File No. PCAOB-2004-04
Consists of 383 Pages

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

Form 19b-4

Proposed Rules

by

Public Company Accounting Oversight Board

In Accordance with Rule 19b-4 under the
Securities Exchange Act of 1934

1. Text of the Proposed Rules

(a) Pursuant to the provisions of Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") is filing with the Securities and Exchange Commission ("SEC" or "Commission") proposed rules to codify the Board's framework relating to the oversight of non-U.S. public accounting firms. The proposed rules and related definitions are attached as Exhibit A to this rule filing.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Board

(a) The Board approved the proposed rules, and authorized them for filing with the SEC, at its Open Meeting on June 9, 2004. No other action by the Board is necessary for the filing of these proposed rules.

(b) Questions regarding this rule filing may be directed to Michael Sullivan, Assistant General Counsel (202-207-9110; sullivanm@pcaobus.org).

3. Board’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

As explained more fully in Exhibit 3, Section 106(a) of the Act provides that non-U.S. public accounting firms are subject to the Act and the rules of the Board and the Commission issued under the Act in the same manner and to the same extent as a U.S. public accounting firm.

The Board developed a framework under which the Board could implement the Act's provisions by relying, to an appropriate degree, on a non-U.S. oversight system.

The proposed rules codify the Board's framework relating to the oversight of non-U.S. public accounting firms.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

4. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rules codify the Board's framework relating to the oversight of non-U.S. public accounting firms.

5. Board's Statement on Comments on the Proposed Rules Received from Members, Participants or Others

The Board released the proposed rules for public comment on December 10, 2003. See Exhibit 2(a)(1). The Board received 22 written comment letters. See Exhibits 2(a)(2) and 2(a)(3).

The Board has carefully considered the written comments. In response to the written comments received, the Board has clarified and modified certain aspects of the proposed rules. The Board's response to the comments it received and the changes made to the rules in response to these comments are summarized in Exhibit 3 to this filing.

6. Extension of Time Period for Commission Action

The Board does not consent to an extension of the time period specified in Section 19(b)(2) of the Exchange Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rules Based on Rules of Another Board or of the Commission

The proposed rules are not based on the rules of another board or of the Commission.

9. Exhibits

Exhibit A –	Text of the Proposed Rules
Exhibit 1 –	Form of Notice of Proposed Rules for Publication in the Federal Register
Exhibit 2(a)(1) –	PCAOB Release No. 2003-024 (December 10, 2003)
Exhibit 2(a)(2) –	Alphabetical List of Comments
Exhibit 2(a)(3) –	Written comments on the rules proposed in PCAOB Release No. 2003-024
Exhibit 3 –	PCAOB Release No. 2004-005 (June 9, 2004)

10. Signature

Pursuant to the requirements of the Act and the Securities Exchange Act of 1934, as amended, the Board has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Public Company Accounting Oversight Board

BY: _____
William J. McDonough, Chairman

Date: June 17, 2004

Exhibit A – Text of Proposed Rules

SECTION 1. GENERAL PROVISIONS

Rule 1001. Definitions of Terms Employed in Rules.

* * *

(f)(ii) Foreign Registered Public Accounting Firm

The term "foreign registered public accounting firm" means a foreign public accounting firm that is a registered public accounting firm.

* * *

(n)(iii) Non-U.S. Inspection

The term "non-U.S. inspection" means an inspection of a foreign registered public accounting firm conducted within a non-U.S. oversight system.

* * *

SECTION 4. INSPECTIONS

* * *

Rule 4011. Statement by Foreign Registered Public Accounting Firms

A foreign registered public accounting firm that seeks to have the Board rely, to the extent deemed appropriate by the Board, on a non-U.S. inspection when the Board conducts an inspection of such firm pursuant to Rule 4000 shall submit a written statement signed by an authorized partner or officer of the firm to the Board certifying that the firm seeks such reliance for all Board inspections.

Rule 4012. Inspections of Foreign Registered Public Accounting Firms

(a) If a foreign registered public accounting firm has submitted a statement pursuant to Rule 4011, the Board will, at an appropriate time before each inspection of such firm, determine the degree, if any, to which the Board may rely on the non-U.S. inspection. To the extent consistent with the Board's responsibilities under the Act, the Board will conduct its inspection under Rule 4000 in a manner that relies to that degree on the non-U.S. inspection. In making that determination, the Board will evaluate –

(1) information concerning the level of the non-U.S. system's independence and rigor, including the adequacy and integrity of the system, the

independence of the system's operation from the auditing profession, the nature of the system's source of funding, the transparency of the system, and the system's historical performance; and

(2) discussions with the appropriate entity or entities within the system concerning an inspection work program.

(b) The Board's evaluation made pursuant to paragraph (a) may include, but not be limited to, consideration of –

(1) the adequacy and integrity of the system, including –

(i) whether the system has the authority to inspect audit and review engagements, evaluate the sufficiency of the quality control system, and perform such other testing as deemed necessary of foreign public accounting firms; and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the system has the authority to conduct investigations and disciplinary proceedings of foreign public accounting firms, any persons of such firms, or both, that may have violated the laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(iii) whether the system has the authority to impose appropriate sanctions for violations of the non-U.S. jurisdiction's laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

(iv) whether the persons within the system have adequate qualifications and expertise;

(2) the independence of the system from the auditing profession, including –

(i) whether the system has the authority to establish and enforce ethics rules and standards of conduct for the individual or group of individuals who govern the system and its staff and has prohibited conflicts of interest, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the person or persons governing the system –

(A) have been appointed, or otherwise selected, by the government of the non-U.S. jurisdiction, without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

(B) may be removed only by the government of the non-U.S. jurisdiction and may not be removed by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(iii) whether a majority of the individuals with whom the system's decision-making authority resides do not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses or certificates for at least the last five years immediately before assuming their position within the system;

(iv) whether a majority of the individuals with whom the system's decision-making authority resides, including the individual who functions as the entity's chief executive or equivalent thereof, are not practicing public accountants; and

(v) whether each entity within the system has the authority to conduct its day-to-day operations without the approval of any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(3) the source of funding for the system, including whether the system has an appropriate source of funding that is not subject to change, approval or influence by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(4) the transparency of the system, including whether the system's rulemaking procedures and periodic reporting to the public are openly visible and accessible; and

(5) the system's historical performance, including whether there is a record of disciplinary proceedings and appropriate sanctions, but only for those systems that have existed for a reasonable period of time.

SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

* * *

Rule 5113. Reliance on the Investigations of Non-U.S. Authorities

Upon the recommendation of the Director of Enforcement and Investigations or upon the Board's own motion, the Board may, in appropriate circumstances, rely upon

the investigation or a sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority.

* * *

SECTION 6. INTERNATIONAL

Rule 6001. Assisting Non-U.S. Authorities in Inspections

The Board may, as it deems appropriate, provide assistance in an inspection of a registered public accounting firm organized and operating under the laws of the United States conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

Rule 6002. Assisting Non-U.S. Authorities in Investigations

The Board may, as it deems appropriate, provide assistance in an investigation of a registered public accounting firm organized and operating under the laws of the United States conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. PCAOB-2004-04)

[Date]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on June 17, 2004, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") the proposed rules described in Items I, II, and III below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rules

On June 9, 2004, the Board adopted PCAOB Rules 4011 and 4012, PCAOB Rule 5113 and PCAOB Rules 6001 and 6002, and two definitions that would appear in PCAOB Rule 1001, to codify the Board's framework relating to the oversight of non-U.S. public accounting firms. The text of the proposed rules and definitions is as follows:

SECTION 1. GENERAL PROVISIONS

Rule 1001. Definitions of Terms Employed in Rules.

When used in the Rules, unless the context otherwise requires:

* * *

(f)(ii) Foreign Registered Public Accounting Firm

The term "foreign registered public accounting firm" means a foreign public accounting firm that is a registered public accounting firm.

* * *

(n)(iii) Non-U.S. Inspection

The term "non-U.S. inspection" means an inspection of a foreign registered public accounting firm conducted within a non-U.S. oversight system.

* * *

SECTION 4. INSPECTIONS

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Rule 4011. Statement by Foreign Registered Public Accounting Firms

A foreign registered public accounting firm that seeks to have the Board rely, to the extent deemed appropriate by the Board, on a non-U.S. inspection when the Board conducts an inspection of such firm pursuant to Rule 4000 shall submit a written statement signed by an authorized partner or officer of the firm to the Board certifying that the firm seeks such reliance for all Board inspections.

Rule 4012. Inspections of Foreign Registered Public Accounting Firms

(a) If a foreign registered public accounting firm has submitted a statement pursuant to Rule 4011, the Board will, at an appropriate time before each inspection of such firm, determine the degree, if any, to which the Board may rely on the non-U.S. inspection. To the extent consistent with the Board's responsibilities under the Act, the Board will conduct its inspection under Rule 4000 in a manner that relies to that degree on the non-U.S. inspection. In making that determination, the Board will evaluate –

(1) information concerning the level of the non-U.S. system's independence and rigor, including the adequacy and integrity of the system, the independence of the system's operation from the auditing profession, the nature of the system's source of funding, the transparency of the system, and the system's historical performance; and

(2) discussions with the appropriate entity or entities within the system concerning an inspection work program.

(b) The Board's evaluation made pursuant to paragraph (a) may include, but not be limited to, consideration of –

(1) the adequacy and integrity of the system, including –

(i) whether the system has the authority to inspect audit and review engagements, evaluate the sufficiency of the quality control system, and perform such other testing as deemed necessary of foreign public accounting firms; and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the system has the authority to conduct investigations and disciplinary proceedings of foreign public accounting firms, any persons of such firms, or both, that may have violated the laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(iii) whether the system has the authority to impose appropriate sanctions for violations of the non-U.S. jurisdiction's laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

(iv) whether the persons within the system have adequate qualifications and expertise;

(2) the independence of the system from the auditing profession, including –

(i) whether the system has the authority to establish and enforce ethics rules and standards of conduct for the individual or group of individuals who govern the system and its staff and has prohibited conflicts of interest, and whether the system can exercise such authority without the

approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the person or persons governing the system –

(A) have been appointed, or otherwise selected, by the government of the non-U.S. jurisdiction, without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

(B) may be removed only by the government of the non-U.S. jurisdiction and may not be removed by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(iii) whether a majority of the individuals with whom the system's decision-making authority resides do not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses or certificates for at least the last five years immediately before assuming their position within the system;

(iv) whether a majority of the individuals with whom the system's decision-making authority resides, including the individual who functions as the entity's chief executive or equivalent thereof, are not practicing public accountants; and

(v) whether each entity within the system has the authority to conduct its day-to-day operations without the approval of any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(3) the source of funding for the system, including whether the system has an appropriate source of funding that is not subject to change, approval or influence by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(4) the transparency of the system, including whether the system's rulemaking procedures and periodic reporting to the public are openly visible and accessible; and

(5) the system's historical performance, including whether there is a record of disciplinary proceedings and appropriate sanctions, but only for those systems that have existed for a reasonable period of time.

* * *

SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

* * *

Rule 5113. Reliance on the Investigations of Non-U.S. Authorities

Upon the recommendation of the Director of Enforcement and Investigations or upon the Board's own motion, the Board may, in appropriate circumstances, rely upon the investigation or a sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority.

* * *

SECTION 6. INTERNATIONAL

Rule 6001. Assisting Non-U.S. Authorities in Inspections

The Board may, as it deems appropriate, provide assistance in an inspection of a registered public accounting firm organized and operating under the laws of the United States conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

Rule 6002. Assisting Non-U.S. Authorities in Investigations

The Board may, as it deems appropriate, provide assistance in an investigation of a registered public accounting firm organized and operating under the laws of the United States conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of and basis for the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared

summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

Section 106(a) of the Act provides that non-U.S. public accounting firms are subject to the Act and the rules of the Board and the Commission issued under the Act in the same manner and to the same extent as a U.S. public accounting firm. The Board developed a framework under which the Board could implement the Act's provisions by relying, to an appropriate degree, on a non-U.S. oversight system. The proposed rules codify the Board's framework relating to the oversight of non-U.S. public accounting firms.

The rules adopted address the Board's oversight of non-U.S. accounting firms that register with the Board and the Board's willingness to assist non-U.S. authorities in their oversight of U.S. firms.

The Board's rules on inspections (PCAOB Rules 4011 and 4012) provide a foreign registered public accounting firm an opportunity to minimize the unnecessarily duplicative administrative burdens of dual oversight by requesting that the Board rely – to an extent deemed appropriate by the Board – on inspections of the registered firm under the home country's oversight system. Under the Board's rules, a firm would first provide the Board with a one-time statement asking the Board to rely on a non-U.S. inspection. At an appropriate time before each inspection of a non-U.S. firm that has submitted such a statement, the Board would determine the appropriate degree of reliance based

on information about the non-U.S. system obtained primarily from the non-U.S. regulator regarding the independence and rigor of the non-U.S. system. The Board would also base its decision on its discussions with the appropriate entity or entities within the oversight system concerning the specific inspection work program for the non-U.S. firm's inspection at hand. The more independent and rigorous a home-country system, the higher the Board's reliance on that system. A higher level of reliance translates into less direct involvement by the Board in the inspection of the non-U.S. registered public accounting firm.

The Board's rule on investigations (PCAOB Rule 5113) provides that the Board may, in appropriate circumstances, rely upon the investigation or sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority. The Board's reliance would depend, in part, on the independence and rigor of the non-U.S. authority. Reliance also may depend on the non-U.S. authority's willingness to update the Board regarding the investigation on a regular basis and its willingness and authority to share the relevant evidence gathered with the Board.

The Board has also adopted two rules reflecting its willingness to assist non-U.S. authorities in their oversight of firms located in the U.S. and registered with the Board. PCAOB Rule 6001 relates to inspections and provides that the Board may, as it deems appropriate, assist a non-U.S. authority in its inspection of a registered U.S. firm. PCAOB Rule 6002 relates to investigations and provides that the Board may, as it deems appropriate and to the extent permitted

by law, assist a non-U.S. authority in the investigation of a registered U.S. accounting firm.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rules codify the Board's framework relating to the oversight of non-U.S. public accounting firms.

C. Board's Statement on Comments on the Proposed Rules Received from Members, Participants and Others

The Board released the proposed rules for public comment in PCAOB Release No. 2003-024 (December 10, 2003). A copy of PCAOB Release No. 2003-024 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's web site at pcaobus.org. The Board received 22 written comments. The Board has clarified and modified certain aspects of the proposed rules in response to comments it received, as discussed below.

Rule 4011 – Statement by Foreign Registered Public Accounting Firm

PCAOB Rule 4011 states that a foreign registered public accounting firm that seeks to have the Board rely on a non-U.S. inspection when the Board conducts an inspection of such firm pursuant to PCAOB Rule 4000 shall submit a written statement signed by an authorized partner or officer of the firm to the Board certifying that the firm seeks such reliance for Board inspections.

The Board's proposed rule would have required that foreign registered public accounting firms submit to the Board a written petition, in English, describing the non-U.S. system's laws, rules and/or other information to assist the Board in evaluating such system's independence and rigor. Many commenters argued that this requirement was neither practical nor effective, that different public accounting firms within the same jurisdiction may translate and describe the system differently, and that non-U.S. regulators, rather than public accounting firms, are in a better position to describe the non-U.S. system, as they may possess information unknown by a foreign registered public accounting firm.

In response to these comments, the Board has decided not to impose the petition requirement. The Board's rule does not require a foreign registered public accounting firm to describe its oversight system, including its legal underpinnings. As explained more fully below, under PCAOB Rule 4012, the Board will, at an appropriate time, obtain information about the non-U.S. system directly from the appropriate non-U.S. regulator.

Instead of requiring a petition, the Board has adopted a rule permitting a foreign registered public accounting firm to submit a one-time statement certifying that it seeks to have the Board rely on a non-U.S. inspection when the Board conducts an inspection pursuant to PCAOB Rule 4000. This statement may be submitted at any time after the foreign public accounting firm's registration application has been approved by the Board. The statement, which must be signed by an authorized partner or officer of the firm, should be

addressed to the attention of the Secretary and may be submitted via post or electronic mail (secretary@pcaobus.org). If the statement is submitted via electronic mail, the words "Rule 4011 Statement" must be included in the subject line.

The Board believes that a foreign registered public accounting firm's one-time statement, which is not associated with any specific Board inspection, should resolve the concern expressed by some commenters that proposed PCAOB Rule 4011 would have left unclear when a foreign registered public accounting firm should submit the earlier proposed petition. Commenters indicated that some non-U.S. jurisdictions are in the process of developing new auditor oversight regimes or otherwise modifying their existing regimes. Those commenters were uncertain whether their petitions would need to be submitted immediately and then updated as changes occurred, or if they should wait until the changes to their local oversight regimes were finalized. Because the one-time statement is not associated with a specific Board assessment for a specific Board inspection under new PCAOB Rule 4012 and no longer includes any description requirements of the non-U.S. system, a foreign registered public accounting firm may submit the statement without waiting for the finalization of any potential changes to its oversight regime. Of course, if the foreign registered public accounting firm is selected for inspection before the finalization of changes to its non-U.S. system, the Board would make a reliance determination under PCAOB Rule 4012 based on the system in place at the time of the determination. As explained more fully below, finalization of changes in a non-U.S. system that

affects a system's independence or rigor would necessitate a review of the Board's previous determination.

In addition, in response to comments, the Board has eliminated the proposed Exhibit 99.3 to Form 1, which would have allowed an applicant an option to provide the name and physical address of the applicant's foreign registrar or any other authority responsible for regulation of the applicant's practice of accounting. The Board believes it is more efficient for the Board to identify the appropriate non-U.S. regulator itself, rather than have a non-U.S. public accounting firm submit an additional exhibit to the Board through the registration system.

It should be noted that PCAOB Rule 4011 (and PCAOB Rule 4012) are not limitations on the Board. Thus, even if a non-U.S. registered public accounting firm does not choose to submit a statement pursuant to Rule 4011, the Board may take steps it determines are necessary to facilitate the inspection of such firm through the cooperative framework.

Rule 4012 – Inspections of Foreign Registered Public Accounting Firms

The Board has reorganized much of the substance, with some modification, of proposed PCAOB Rule 4011 into PCAOB Rule 4012. PCAOB Rule 4012 provides that the Board shall determine the degree, if any, it may rely on a non-U.S. inspection of a foreign registered public accounting firm that has submitted a statement pursuant to PCAOB Rule 4011. The Board will make such determination at an appropriate time before each inspection of such firm. In making that determination, the Board will evaluate (1) information concerning the

level of the non-U.S. system's independence and rigor, including the adequacy and integrity of the system, the independence of the system's operation from the auditing profession, the nature of the system's source of funding, the transparency of the system, and the system's historical performance and (2) discussions with the appropriate entity or entities within the system concerning an inspection work program for the particular firm. The Board will consider certain illustrative criterion, now listed in the rule, in applying the broad principles articulated in PCAOB Rule 4012. PCAOB Rule 4012 also provides that the Board shall conduct its inspection under PCAOB Rule 4000 in a manner that relies on non-U.S. inspections, to the degree determined by the Board and to the extent consistent with the Board's responsibilities under the Act.

The Board received wide-ranging comments on the Board's proposal for determining the appropriate degree of reliance, including concerns about the Board's fundamental approach to oversight of foreign registered public accounting firms to requests for clarification or change to the Board's process for assessing a non-U.S. system.

After careful consideration of the comments, the Board has made certain changes to the proposed rule and offers clarification in other areas, each of which is explained below.

Comments on the Board's Overall Approach

With regard to the Board's overall approach, some commenters argued that the Board should adopt a "mutual recognition" model whereby the Board would accord complete deference to the home-country regulator in the areas of

inspections, investigations and sanctions. Similarly, one commenter suggested that the Board should not issue its own inspection report for a foreign registered public accounting firm, but instead should rely on the report of the non-U.S. regulator.

The Board does not believe that a "mutual recognition" approach would be in the interests of U.S. investors or the public. While the Board is hopeful that it will be able to place a high degree of reliance on certain non-U.S. systems of oversight, the Board believes that it must preserve the ability to participate fully and directly in the inspection, investigation and sanction of foreign registered public accounting firms if warranted by the particular facts and circumstances. Under the Act, the Board's mission is to oversee the auditors of issuers in order to protect the interests of investors and further the public interest in the preparation of informative, fair, and independent audit reports. More specifically, the Board is required by the Act to conduct inspections in order to assess the registered public accounting firm's compliance with U.S. laws, regulations and professional standards. Because non-U.S. regulatory authorities do not have this same mission, deferring to those authorities regardless of the circumstances would not be in the interests of U.S. investors or the public.

Several commenters criticized the principles and related criteria that the Board would consider in evaluating the independence and rigor of a non-U.S. system as disproportionately based on the principles and related criteria that underlie the oversight system in the United States. These commenters

suggested that the Board would place a high level of reliance only on those non-U.S. systems that were identical or substantially similar to the Board.

The Board has previously stated that it believes that the "sliding scale" approach can accommodate a variety of oversight systems. The Board does not intend to require that non-U.S. systems be identical or even substantially similar to the PCAOB in order for the Board to place a high level of reliance on them.

That said, the Act and its creation of an independent public oversight entity for auditors (the PCAOB) reflect the view of the U.S. Congress that the self-regulatory system used to ensure high quality audits for U.S. issuers was not adequate. Thus, in determining the degree to which the Board may rely on a non-U.S. regulator to conduct inspections of firms located abroad that audit companies whose securities trade in U.S. markets, it is appropriate for the Board to evaluate that regulator in light of the principles that underlie the creation of the PCAOB. As explained in the proposing release, however, the listed criteria are not exhaustive, and the presence or absence of any one of the criteria would not necessarily be dispositive. The Board intends to assess the structure and operation of a non-U.S. system as a whole, and not base its decision on whether that system meets a certain number of the criteria.

Comments on Board's Assessment – Application of Principles and Criteria

In response to comments, the illustrative criteria the Board may consider in evaluating a non-U.S. system has been moved from the body of the release into the text of PCAOB Rule 4012.

With regard to the application of the principles and criteria, some commenters urged the Board to evaluate a non-U.S. system's independence and rigor on a country-by-country basis rather than firm-by-firm. Those commenters expressed concern that the Board may draw different conclusions with respect to foreign registered public accounting firms that are subject to the same non-U.S. system.

The Board intends to evaluate a non-U.S. system's independence and rigor on a country-by-country basis so that the conclusion regarding its independence and rigor will be the same for all non-U.S. registered public accounting firms within that system. Of course, each time a firm is selected for inspection, the Board would reconfirm that assessment in light of any changes that may have occurred to the non-U.S. system. In addition to the Board's consideration of the independence and rigor of a non-U.S. system, however, the Board must also consider the discussions with the non-U.S. regulator regarding the inspection work program for the individual non-U.S. registered public accounting firm selected for inspection. Because an inspection work program is specific to an individual non-U.S. registered public accounting firm, the Board's ultimate determination under PCAOB Rule 4012 can be made only on a firm-by-firm basis.

Some commenters urged the Board to describe precisely how the Board would weigh each of the listed criteria. Others urged the Board to avoid weighing certain criteria too heavily, including 1) whether members that govern the oversight system were appointed by the government, and 2) whether a majority of members hold licenses to practice public accounting.

The proposing release stated that the listed criteria are not intended to be exhaustive, and that the presence or absence of any one of the criteria would not necessarily be dispositive. The Board continues to believe that it should not, in the abstract, specify a weight for individual criterion. Assigning a rigid weight to each criterion would create a "check-the-box" process that could result in the form and structure of an oversight system (rather than the substance within the system) having an inappropriate role in the Board's determination. Oversight systems may differ in form, structure and complexity and therefore meet different criteria in different ways, but they nevertheless may achieve the principles in PCAOB Rule 4012 in an equally effective manner. Consequently, the Board does not believe it is appropriate to create a rigid evaluation process that inadvertently penalizes an independent and rigorous system as a result of the Board's use of predetermined weights for the listed criteria. Instead, as explained above, the Board's rule permits the Board to analyze a non-U.S. system as a whole.

Other commenters requested that the Board define the term "any other information," as used in proposed PCAOB Rule 4011(c)(2). The Board's modification of the proposed rule no longer includes those specific words.

However, the Board's rule indicates the Board will evaluate *any* information that comes to its attention concerning the level of the non-U.S. system's independence and rigor. In other words, the Board does not intend to exclude any information due to its source. Of course, the Board will take into account the source of the information in considering the probative value of the information.

Several commenters argued that the proposed rule permits the Board unlimited discretion and therefore creates an unacceptable level of uncertainty with respect to the application of the rule in practice. The Board has decided against modifying the rule in response to these comments. While the Board retains the discretion to design inspection programs under the Act, the Board believes that the stated principles and criteria allow interested parties enough information to estimate reasonably the extent of reliance on a home-country inspection. In addition, the Board expects the level of uncertainty in a specific jurisdiction to subside as the Board begins to implement the rule.

A few commenters expressed concern that the criteria did not include consideration of whether those that govern have appropriate qualifications and expertise. The Board agrees and has included criteria related to the qualifications and expertise of persons within the non-U.S. system.

Another commenter suggested that the Board's criteria do not address financial, business or personal independence risks. As stated in the proposing release, the Board would consider whether an entity within the system has the authority to establish and enforce ethics rules and standards of conduct for an individual or a group of individuals that govern the system and associated staff.

The Board believes this criterion captures the risks related to independence. As part of its assessment process, the Board could consider certain points raised by the specific policies of a code of ethics or a code of conduct and their impact on the independence of the system.

Comments on the Board's Assessment – Process

In addition to the substance of the Board's assessment under the proposed rule, several commenters argued that the Board should make changes to the *process* surrounding the Board's reliance determination.

First, a number of commenters urged the Board to allow an appeal of its reliance determination. The Board has decided against permitting an appeal of the Board's determination. Under the Act, the design and implementation of an inspection work program is within the discretion of the Board. It follows that, because the Board's decision regarding the appropriate degree of reliance, if any, is essentially a decision regarding the design and implementation of inspection work programs for non-U.S. registered public accounting firms, such decision is also properly within the Board's discretion. The Act does not provide for an appeal of the Board's design of such programs. In addition, allowing such an appeal would potentially permit a non-U.S. registered public accounting firm to impede the Board's ability to discharge its obligation under the Act to assess the compliance of that firm with U.S. laws and standards.

Some commenters asserted that the Board should be required to communicate the basis for the Board's determination to the public and representatives of the non-U.S. system. In response to these comments, the

Board intends to provide a general description of its activities with representatives of non-U.S. systems either as part of its annual report to the public or in a separate public report to make the Board's processes under its framework more transparent. As a practical matter, representatives of the non-U.S. system will be informed of the basis for the Board's assessment as a natural part of the dialogue between the Board and those representatives. Under the framework for cooperation created by the Board's rules, a dialogue will take place between the Board and representatives of the non-U.S. system regarding the structure and operation of such system as well as the content of the inspection work programs for the non-U.S. registered public accounting firms within that system.

Another commenter urged that the Board require itself to maintain its initial assessment unless a formal request to change the assessment is made by the non-U.S. registered public accounting firm or alternatively that the Board provides advance notice of its intent to change its assessment determination. PCAOB Rule 4012 provides that the Board will conduct its inspection under PCAOB Rule 4000 in accordance with its reliance determination to the extent consistent with the Board's responsibilities under the Act. The Board intends to maintain its initial assessment unless there is a change in circumstances subsequent to such determination that necessitates a review of that determination. Generally, such circumstances would include changes in the non-U.S. system that affects the system's independence or rigor or changes in the willingness or ability of a non-U.S. regulator to cooperate with the Board in the

inspection of a non-U.S. registered public accounting firm. It would not be in the interest of U.S. investors or the public for the Board to wait, notwithstanding a change in the system, until a non-U.S. registered public accounting firm requested a new assessment. If the Board determines that a change in its prior assessment is warranted, the non-U.S. regulator will be informed, again, as a part of the dialogue between that regulator and the Board.

Another commenter suggested that the Board should be required to provide a non-U.S. registered public accounting firm a copy of any written correspondence between the Board and the non-U.S. regulator. The Board disagrees. Providing the subject of the inspection process (i.e., the registered firm) access to such correspondence could permit the firm subject to inspection an opportunity to be aware of the certain details regarding the inspection work program to be used during the inspection of such firm, as well as inhibit frank and open discussions between the Board and the non-U.S. regulator.

One commenter urged the Board to require that its reliance determination be made within a specified time frame. First, PCAOB Rule 4012 already contains a deadline in that it requires that the Board complete discussions and make a determination at an appropriate time *before* the inspection of a registered non-U.S. firm begins. Second, otherwise permitting flexibility in the amount of time allowed is necessary for the Board to engage in a constructive regulator-to-regulator dialogue about the structure and operation of the non-U.S. system and the requirements of a specific firm's inspection. Thus, the Board has declined to

modify the rule to require the Board to make its determination within a shorter or more specific time frame.

Some commenters stressed that the Board should not weigh unfavorably a non-U.S. regulator's "willingness" to provide access to information when they are prevented from doing so by an asserted conflict of law. As discussed in more detail below, the cooperative framework implemented through these rules may not resolve all potential legal conflicts. Thus, if a non-U.S. regulator is unable to share information, then that factor must be taken into account in the Board's decision on whether it is in the interest of U.S. investors and the public to rely on that regulator. Whether the regulator's inability to share information is weighed "heavily" will depend on the facts and circumstances at hand. Under the Act, the Board must assess each registered public accounting firm's compliance with U.S. laws and standards. A regulator's inability to share information could prevent the Board from making such assessment, which in turn, would prevent the Board from discharging its responsibilities under the Act.

Other commenters noted specifically that potential conflicts of law remain unresolved under the Board's proposed rules and urged the Board to adopt a rule similar to PCAOB Rule 2105 for inspections and investigations of foreign registered public accounting firms. Another commenter requested clarification regarding whether a submission made pursuant to PCAOB Rule 2105 in connection with a registration application applies to potential conflicts of law that may arise subsequent to registration and whether a non-U.S. registered public accounting firm's inability to cooperate due to those subsequent conflicts could

subject such firm to disciplinary action. The commenter also requested clarification regarding whether a submission made pursuant to PCAOB Rule 2105 is also valid for the so-called "deemed consent" under Section 106 of the Act.

First, to clarify, PCAOB Rule 2105 provides the requirements for applicants that wish to withhold information from their applications for registration with the Board. The rule does not apply to potential conflicts of law that may arise subsequent to registration and does not affect the deemed consent under Section 106 of the Act.

Second, the Board recognizes that its rules relating to the oversight of non-U.S. registered public accounting firms do not conclusively resolve potential conflicts of law. Preserving the Board's ability to access audit work papers and other documents or information maintained by registered public accounting firms, including non-U.S. registered public accounting firms, is critical to the Board carrying out its obligations under the Act. Consequently, the Board does not believe that it is in the interests of U.S. investors or the public for the Board to adopt a rule of general application that would limit its ability to access such documents or information regardless of the circumstances or need for those documents or information.

Instead, as explained in the Briefing Paper, the Board envisages that potential conflicts of law that may arise in connection with an inspection or an investigation can be addressed through the cooperative approach. The Board continues to believe that most conflicts of law can be resolved through an

approach in which the Board works in the first instance with the non-U.S. regulator or through the use of special procedures such as voluntary consents and waivers. As previously explained, the Board believes that it is appropriate that a cooperative approach respect the laws of other jurisdictions, to the extent possible. At the same time, every jurisdiction must be able to protect the participants in, and the integrity of, its capital markets as it deems necessary and appropriate. The Board believes that working with non-U.S. regulators in the first instance to overcome asserted conflicts of law reflects the appropriate balance between the interests of different systems and their laws.

The comments urging the Board to adopt a rule similar to PCAOB Rule 2105 for inspections and investigations seem to reflect the view that PCAOB Rule 2105 offers an opportunity for resolution to conflicts of law that are asserted during the registration process. Such interpretation is not correct. If the Board decides to treat a registration application in which information is withheld pursuant to PCAOB Rule 2105 as complete, such action by the Board would not constitute a concession that the non-U.S. law does in fact prohibit the applicant from supplying the information and would not preclude the Board from contesting that assertion in other contexts.

In other words, PCAOB Rule 2105 does not offer an absolute safe-harbor for public accounting firms that assert a conflict of laws. PCAOB Rule 2105 provides an opportunity for the public accounting firm to be heard on an asserted conflict of law in the context of registration. Although not set out in a separate rule, a similar opportunity to be heard regarding asserted conflicts of law that

may arise in the context of inspections and investigations is already provided under the Act and the Board's rules regarding disciplinary hearings.

For those asserted conflicts of law that arise during an inspection or investigation and cannot be resolved by working with the appropriate non-U.S. regulator, by the use of voluntary waivers or consents, or by other means,[1/] the Board's rules provide the registered public accounting firm with an opportunity to present its position to the Board regarding the asserted legal conflict before any action is taken by the Board. If the Board cannot fully conduct an inspection or investigation in a timely manner due to an asserted conflict of law, the Board may consider whether the non-U.S. registered public accounting firm should be sanctioned by the Board for non-cooperation. Under the Act and the Board's rules regarding disciplinary proceedings and hearing procedures, before any sanction may be imposed, a registered public accounting firm will have an opportunity to be heard before an independent hearing officer regarding the asserted conflict of law and whether revocation of its registration is an appropriate sanction. The registered public accounting firm's rights under the Act and the Board's rules include appeal of the hearing officer's decision to the Board, appeal of the Board's decision to the Commission and appeal of the Commission's decision to the court of appeals.

To be clear, the Board is not suggesting that it would in all cases commence a non-cooperation proceeding when a firm asserts a conflict of law

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[1/] The Board hopes to resolve potential conflicts of law as part of its discussions with a non-U.S. regulator under PCAOB Rule 4012 *before* the inspection of a non-U.S. registered public accounting firm.

that cannot be resolved. As previously explained, the Board expects that most conflicts of laws can be resolved by working with the appropriate non-U.S. regulator, through the use of voluntary waivers or consents, or other means. The point is that a rule like PCAOB Rule 2105 is not needed in the context of inspections and investigations because a similar opportunity to be heard is already provided.

Finally, some commenters sought clarification about the participation of "experts" who are designated by the Board in inspections where the Board has determined that a high level of reliance is appropriate. The Board expects that the participation of at least one Board-designated expert in U.S. Generally Accepted Accounting Principles, PCAOB standards and other U.S. professional standards and law will be necessary on all inspections of non-U.S. registered public accounting firms. After the Board has conducted initial inspections through the cooperative framework with the cooperation of the non-U.S. regulator, however, the Board may designate an outside expert who is not a PCAOB employee to participate in the inspection.

Rule 5113 – Reliance on the Investigations of Non-U.S. Authorities

PCAOB Rule 5113 provides that the Board may, in appropriate circumstances, rely upon the investigation or sanction, if any, of a non-U.S. registered public accounting firm by a non-U.S. authority. The Board's reliance would depend, in part, on the independence and rigor of the non-U.S. authority. Reliance also may depend on the non-U.S. authority's willingness to update the

Board regarding the investigation on a regular basis and its willingness and authority to share the relevant evidence gathered with the Board.[2/]

Circumstances may require, however, that the Board conduct an investigation relating to the audit work of a non-U.S. registered public accounting firm, or an associated person of such a firm, in connection with the financial statements of an issuer. PCAOB Rule 5113 does not limit the Board's authority under PCAOB Rule 5200 to commence disciplinary proceedings whenever it appears to the Board that such action is warranted.

Some commenters noted that, because PCAOB Rule 5113 does not definitively limit the Board's authority to initiate an investigation or impose sanctions, it poses the risk that a non-U.S. registered public accounting firm may be subject to an investigation and sanction by both the Board and a non-U.S. authority. One commenter suggested that, because of this risk, the Board should limit its authority and defer to the non-U.S. regulator in matters of investigation and sanction.

The Board has declined to change the rule in response to these comments. As explained earlier, the Board's mission is to oversee the auditors of issuers in order to protect the interests of investors and further the public interest in the preparation of informative, fair, and independent audit reports. Because non-U.S. regulatory authorities do not have the same mission, restricting the Board's authority to conduct investigations or impose sanctions on non-U.S. registered public accounting firms by deferring to non-U.S. authorities –

[2/] Of course, PCAOB Rule 5113 does not apply to investigations or sanctions carried out by the Securities and Exchange Commission.

in every case – would not be consistent with the Board's obligations under Section 105 of the Act.

In any event, the Board does not believe that PCAOB Rule 5113 poses a risk of "double jeopardy" for a registered firm. The Board has the authority to investigate and discipline registered public accounting firms only for potential violations of U.S. laws, regulations and professional standards. To the extent that a foreign registered public accounting firm's conduct violates laws in two separate jurisdictions, the foreign registered public accounting firm has chosen to subject itself to the laws of those jurisdictions by choosing to operate in multiple jurisdictions.

That said, as the Board explained in the Briefing Paper, when a non-U.S. disciplinary regime provides for appropriate sanctions of non-U.S. registered public accounting firms and individuals and that regime adequately serves the public interest and protects investors, the Board intends to rely, as appropriate, on the work of the other disciplinary system. Certain circumstances, however, may require the PCAOB to conduct the investigation of a non-U.S. registered public accounting firm relating to its audit of an issuer or to impose sanctions beyond those imposed by the non-U.S. system. In doing so, the Board may consider the sanctions of the non-U.S. system when determining the appropriate sanction in the United States.

Several commenters requested that the Board clarify the meaning of the phrase "in appropriate circumstances" in PCAOB Rule 5113 or otherwise provide more detail regarding the circumstances under which the Board would choose to

rely on a non-U.S. authority in the context of an investigation. Similarly, one commenter suggested that the Board's approach to inspections and investigations of non-U.S. registered firms should be identical, and therefore that the Board should define the conditions for relying on a non-U.S. authority under PCAOB Rule 5113.

While the request for more detail is understandable, the Board has declined to define the phrase "in appropriate circumstances" as the facts and circumstances of any investigation are not predictable. The Board believes it is necessary to preserve a high level of flexibility to decide whether reliance on a non-U.S. authority in an investigation context is in the interest of U.S. investors and the public and would otherwise permit the Board to satisfy its responsibilities under the Act.

In addition, the Board does not believe that its approach to investigations is "inconsistent" with its approach to inspections of non-U.S. registered public accounting firms. Investigations and inspections are different in nature and are governed under different sections of the Act and, therefore, warrant different approaches. Investigations, which are addressed by Section 105 of the Act, are premised on a possible violation of U.S. law, regulation or professional standard. Inspections, on the other hand, are governed by Section 104 of the Act and do not involve perceived violations of law. Rather, inspections, the timing of which is mandated by the Act, are designed to review periodically and, where necessary, encourage improvements in, a registered public accounting firm's compliance with the relevant U.S. laws, regulations and professional standards.

Finally, some commenters asked that the Board ensure that non-U.S. registered public accounting firms are afforded certain rights whenever the Board relies on a non-U.S. authority in the context of investigations or sanctions. This comment reflects a misunderstanding about the nature of the Board's "reliance" on non-U.S. authorities in the context of investigations and sanctions. With regard to investigations, the Board expects that its participation in an investigation when it "relies" on a non-U.S. authority could take one of two forms: the Board will either 1) *decline* to initiate an investigation of its own and simply rely on the fact that a non-U.S. regulator is conducting the investigation pursuant to its own authority; or 2) initiate an investigation to gather information itself but also accept information gathered by a non-U.S. regulator pursuant to its own authority. In both cases, the non-U.S. regulator is acting pursuant to its own authority, not the authority of the PCAOB or the Act. Therefore, the Board cannot ensure that non-U.S. registered public accounting firms being investigated by a home-country regulator acting under the authority of non-U.S. law are afforded certain rights. The Board can ensure only that registered public accounting firms, including non-U.S. registered public accounting firms, are afforded certain rights with respect to the investigation being conducted by the Board acting pursuant to the authority of the Act and the Board's rules.

In the context of sanctions, the Board's "reliance" (if any) on a sanction imposed by a non-U.S. authority could also take one of two forms: the Board will either 1) *decline* to initiate a disciplinary hearing and impose no sanction of its own, and simply rely on the fact that a non-U.S. authority is sanctioning pursuant

to its own authority; or 2) initiate a disciplinary hearing by relying (at least in part) on an investigative record compiled by a non-U.S. regulator that led to a sanction being imposed by that regulator.

In the first scenario, the Board would be "relying" on a sanction imposed by a non-U.S. regulator by not imposing a sanction itself. Because no sanction is being imposed by the Board, there is no need for a Section 105(c) disciplinary proceeding.

In the second scenario, the Board would be using an investigatory record compiled, at least in part, by a non-U.S. regulator. In that case, however, the Board has initiated a disciplinary proceeding pursuant to Section 105(c) and the Board's rules. As a result, before the Board imposes any sanction, the foreign registered public accounting firm will be afforded the same rights under the Act and the Board's rules as if the Board had compiled the record itself.

Rule 6001 – Assisting Non-U.S. Authorities in Inspections

PCAOB Rule 6001 provides that the Board may, as it deems appropriate, provide assistance in an inspection of a registered public accounting firm conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The rule also provides that the Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

In response to comments suggesting that the Board adopt a rule reflecting its willingness to assist non-U.S. authorities in their inspection of U.S. firms that audit companies whose securities trade outside the United States, the Board has decided to adopt PCAOB Rule 6001. This rule reflects the Board's previous

statements that it is willing to assist in the inspection of U.S. firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions.[3/] Because the interests and needs of non-U.S. regulators will differ across jurisdictions, the Board intends to work out the details of its assistance on the basis of discussions with individual regulators.

Some commenters questioned whether the Act confers authority upon the Board to assist in such inspections. Section 101(c)(5) of the Act grants the Board the authority necessary to assist non-U.S. regulators. Section 101(c)(5) provides that "[t]he Board shall . . . (5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out this Act, in order to protect investors, or to further the public interest."

To satisfy the confidentiality requirements under Section 105 of the Act, the Board intends to establish the necessary and appropriate safeguards so that information gathered through its assistance of non-U.S. regulators is maintained separately from the information gathered during a regular or special inspection under Section 104.

Some commenters requested that the Board require, as a condition of its assistance, that the non-U.S. regulator provide a level of confidentiality for information gathered during inspections comparable to that provided by the Act.

[3/] See PCAOB Release No. 2003-020, Oversight of Non-U.S. Public Accounting Firms (October 28, 2003).

Because an inspection by a non-U.S. regulator may be conducted pursuant to the authority of non-U.S. law, the Board cannot require or ensure that the non-U.S. regulator will provide a level of confidentiality comparable to that provided by the Act. The level of confidentiality provided by the non-U.S. regulator will be determined by the level allowed under the applicable law of the non-U.S. jurisdiction.

Also consistent with the Board's previous statements regarding cooperation, PCAOB Rule 6001 reflects the Board's intention to provide a level of assistance that is consistent with the Board's determination regarding the non-U.S. oversight system's independence and rigor. In other words, the Board intends to be available to assist in the inspection of U.S. public accounting firms where, by virtue of their participation in non-U.S. markets, the U.S. public accounting firm is subject to regulation by a non-U.S. independent public oversight system. However, the Board does not believe it would be appropriate to assist non-U.S. professional associations in their reviews of U.S. public accounting firms.

Because the Board does not believe that local regulators of public accounting firms should impede the efforts of foreign regulators who are taking the necessary steps, as determined by those regulators, to meet their objectives and responsibilities, the Board would not take any steps to hinder a non-U.S. regulator's oversight of a U.S. accounting firm that operates in that regulator's jurisdiction, including obtaining information directly from that firm.

Rule 6002 – Assisting Non-U.S. Authorities in Investigations

PCAOB Rule 6002 provides that the Board may, as it deems appropriate, provide assistance in an investigation of a registered public accounting firm conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The rule also provides that the Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

With respect to investigations, the Board would assist, to the extent permitted by law in investigations by non-U.S. authorities of U.S. public accounting firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions.

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents the Commission will:

(a) by order approve such proposed rules; or

(b) institute proceedings to determine whether the proposed rules should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules are consistent

with the requirements of Title I of the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rules that are filed with the Commission, and all written communications relating to the proposed rules between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All submissions should refer to File No. PCAOB-2004-04 and should be submitted within [ ] days after the date of this publication.

By the Commission.

Secretary

PCAOB
Public Company Accounting Oversight Board

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PROPOSED RULES RELATING TO THE OVERSIGHT OF NON-U.S. PUBLIC ACCOUNTING FIRMS	PCAOB Release No. 2003-024 December 10, 2003 PCAOB Rulemaking Docket Matter No. 013

Summary: The Public Company Accounting Oversight Board (the "Board" or "PCAOB") has proposed rules relating to the oversight of non-U.S. public accounting firms, in the areas of registration, inspections, and investigations and adjudications. The Board is seeking comment on its proposed rules by January 26, 2004. The Board will then consider the comments, modify its proposal as necessary, and submit the proposal to the Securities and Exchange Commission (the "Commission") for its approval pursuant to Section 107 of the Act. The Board's rules relating to the oversight of non-U.S. firms will not take effect unless approved by the Commission.

Public Comment: Interested persons may submit written comments to the Board. Such comments should be sent to the Office of the Secretary, PCAOB, 1666 K Street, N.W., Washington, D.C. 20006-2803. Comments may also be submitted by e-mail to comments@pcaobus.org or through the Board's Web site at www.pcaobus.org. All comments should refer to PCAOB Rulemaking Docket Matter No. 013 in the subject or reference line and should be received by the Board no later than 5:00 p.m. EST on January 26, 2004.

PCAOB
Public Company Accounting Oversight Board

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Board
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The Sarbanes-Oxley Act of 2002 (the "Act") directs the Board to, among other things, establish a registration system and inspection and enforcement programs for accounting firms that audit or play a substantial role in the audit of U.S. public companies.[1/] Specifically, Section 102 of the Act prohibits accounting firms that are not registered with the Board from preparing or issuing audit reports on U.S. public companies or from participating in these activities. Moreover, Section 104(a) of the Act directs the Board to conduct a continuing program of inspections to assess the degree of compliance of each public accounting firm registered with the Board, and that firm's associated persons, with the Act, the rules of the Board, the rules of the Commission, and professional standards in connection with the performance of audits, the issuance of audit reports, and related matters involving U.S. public companies. In addition, Section 105 of the Act grants the Board broad investigative and disciplinary authority over registered public accounting firms and persons associated with such firms. To implement these directives, the Board has adopted rules on registration, inspections, and investigations and adjudications.[2/]

Furthermore, Section 106(a) of the Act provides that any non-U.S. public accounting firm that prepares or furnishes an audit report with respect to any U.S. public company is subject to the Act and the rules of the Board and the Commission issued

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[1/] This release uses the term "U.S. public companies" as shorthand for the companies that are "issuers" under the Act and the Board's rules. This includes domestic public companies, whether listed on an exchange or not, and foreign private issuers that have either registered, or are in the process of registering, a class of securities with the Commission or are otherwise subject to Commission reporting requirements.

[2/] See PCAOB Release No. 20003-007, Registration System for Public Accounting Firms (May 6, 2003); See PCAOB Release No. 20003-015, Rules on Investigations and Adjudications (September 29, 2003); See PCAOB Release No. 20003-019, Inspection of Registered Public Accounting Firms (October 7, 2003).

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under the Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of any state of the United States.

The Board recognizes that certain aspects of the registration, inspection, investigation and adjudication provisions of the Act and the Board's rules raise special concerns for non-U.S. firms. In an effort to address such concerns, the Board has developed a framework under which, with respect to non-U.S. firms, the Board could implement the Act's provisions by relying, to an appropriate degree, on a non-U.S. system. The Board has outlined the broad parameters of this cooperative framework in its Briefing Paper on Oversight of Non-U.S. Public Accounting Firms.[3/]

As recounted in the Briefing Paper, the Board has been engaged in a constructive dialogue with many of its foreign counterparts concerning reforms in the oversight of auditing firms that audit companies whose securities trade in public markets and the possible development of a cooperative arrangement for such oversight. This dialogue has demonstrated that the Board and its foreign counterparts share many of the same objectives. These include protecting investors, improving audit quality, ensuring effective and efficient oversight of audit firms, helping to restore the public trust in the auditing profession and buttressing the efficient functioning of the capital markets.

As also explained in the Briefing Paper, underlying this convergence of views is the global nature of the capital markets. As witnessed in the recent past, the global nature of the capital markets allows the effects of a corporate reporting failure in one country to ripple through the financial markets of another, potentially causing substantial financial damage. In an effort to avert further reporting failures and to help promote the integrity of the capital markets throughout the world, the PCAOB seeks to become partners with its non-U.S. counterparts in the oversight of the audit firms that operate in the global capital markets. To that end, the Board believes that it is in the public interest, and the interest of investors and the Board's non-U.S. counterparts, to develop an efficient and effective cooperative arrangement where reliance may be placed on the home country system to the maximum extent possible.

The Board hopes that its approach to oversight of non-U.S. public accounting firms will encourage improvements in audit quality for firms in jurisdictions that have or

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[3/] PCAOB Release No. 2003-020, Oversight of Non-U.S. Public Accounting Firms (October 28, 2003).

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create independent and rigorous auditor oversight systems. Already significant changes in the regulation of non-U.S. accounting firms have occurred in certain non-U.S. jurisdictions, including a number of proposals for the creation of new bodies to improve audit quality and verify compliance with local auditing and related professional practice standards.

The Board's approach towards the oversight of non-U.S. firms would endeavor to build upon the work of these new bodies – and, where available, existing bodies – in order to minimize administrative burdens and legal conflicts that firms face and to conserve Board resources, without undermining or vitiating the statutory mandates in the Act.

To implement this cooperative approach, the Board is proposing two rules and an amendment to a rule relating to the oversight of non-U.S. firms in the areas of registration, inspections, investigations, and sanctions. In designing these proposed rules, the Board has been guided by the view that it is in the public interest and in the interest of investors to allocate Board resources in a manner that will achieve the requirements of the Act cost-effectively and to minimize unnecessarily duplicative administrative burdens to non-U.S. registered firms.

Specifically, the Board is proposing amending a rule relating to the registration of non-U.S. firms, which is summarized below in Section A of this release. It is also proposing a rule on inspections of non-U.S. registered public accounting firms, which is discussed in Section B of the release. Further, the Board is proposing a rule on investigations and sanctions relating to non-U.S. firms, which is summarized in Section C of this release.

Sections D and E discuss the Board's cooperation with respect to its non-U.S. counterparts' auditor oversight responsibilities and the Board's dialogue with oversight bodies outside of the United States regarding future cooperation, respectively.

The Board seeks the views of interested persons on the proposed rules relating to the oversight of non-U.S. public accounting firms. Section F of this release describes how comments and views may be submitted to the Board.

The proposal on the registration of non-U.S. firms consists of an amendment to one rule (PCAOB Rule 2100) and an amendment to a form (PCAOB Form 1) plus a

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related definition. The proposal on inspections consists of one rule (PCAOB Rule 4011) plus a related definition. The proposal on investigations and sanctions of foreign registered public accounting firms consists of one rule (PCAOB Rule 5113). The text of these proposals and a discussion of each are attached as Appendices 1 and 2, respectively.

A. Board's Proposed Rule on Registration

As stated in previous releases,[4/] the Board's rules regarding the registration, inspection and investigation of non-U.S. firms raise special issues. To address more specifically the nature and scope of the Board's oversight, the Board is issuing the proposed rules and accompanying guidance described in this release related to inspections, investigations and adjudications. In order to permit non-U.S. firms a reasonable period of time to consider and prepare for implementation of these proposals, the Board is also proposing to amend a registration rule to provide a three-month extension of the registration deadline for foreign public accounting firms (i.e., until July 19, 2004).

The Board is also amending the instructions to Form 1 to include Exhibit 99.3, in order to provide non-U.S. accounting firms that expect to petition the Board in accordance with proposed PCAOB Rule 4011[5/] an opportunity to provide the Board with some preliminary information about the applicant's home country oversight system. This exhibit would be optional and would allow an applicant to include the name and address of its foreign registrar[6/] or any other authority or authorities responsible for the regulation of the applicant's practice of accounting, including any authority that inspects the applicant.

Item 1.7 of Form 1 requires the disclosure of the name of any "authority" that has issued a license to the applicant authorizing it to "engage in the business of auditing or

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[4/] See PCAOB Release No. 20003-007, Registration System for Public Accounting Firms (May 6, 2003); See PCAOB Release No. 20003-015, Rules on Investigations and Adjudications (September 29, 2003); See PCAOB Release No. 20003-019, Inspection of Registered Public Accounting Firms (October 7, 2003).

[5/] Proposed PCAOB Rule 4011 is discussed in more detail in Section B.

[6/] See proposed PCAOB Rule 1001(f)(ii).

accounting." Although the Board recognizes that in certain instances the information that may be provided in response to Exhibit 99.3, and that is required by Item 1.7, may be identical, the optional nature of Exhibit 99.3 is not intended to override the disclosure requirement of Item 1.7.

Existing PCAOB Rule 2101 allows for the possibility that a non-U.S. firm could register with the PCAOB by submitting the required application via its home country registration entity, if required by that entity, which then would submit it to the PCAOB.[7/] The rule generally requires such an application, like all applications, be filed electronically with the Board through the Board's web-based registration system. If the applicant has difficulty submitting the application in electronic form, it may request that the Board permit the applicant to file in paper form.

B. Board's Proposed Rule on Inspections for Non-U.S. Registered Firms

1. Statutory Background on the Proposed Rule

Section 104(a) of the Act directs the Board to conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the Board's and the Commission's rules, and professional standards in connection with the performance of audits, the issuance of audit reports, and related matters involving U.S. public companies. In conducting an inspection, Section 104(d) of the Act directs the Board to take the following steps –

- inspect and review selected audit and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and one or more third parties) performed at various offices and by various associated persons of the firm, as selected by the Board;

[7/] Submitting a registration application through a home country regulator does not alter the information required to register with the Board or the legal effect of that registration. Applicants that submit registration applications in this fashion will be treated the same, in all respects, as those that submit registration applications directly to the Board.

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- evaluate the sufficiency of the quality control system of the firm, and the manner of documentation and communication of that system by the firm; and

- perform such other testing of the audit, supervisory and quality control procedures of the firm as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.[8/]

The Board has adopted rules relating to inspections of registered public accounting firms.[9/] Specifically, PCAOB Rule 4000 subjects every registered public accounting firm to all such regular and special inspections as the Board may from time-to-time conduct in order to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the Board's rules, the rules of the Commission, and professional standards, in connection with the performance of audits, issuance of audit reports, and related matters involving U.S. public companies.

Further, consistent with Section 104(d) of the Act, the Board's rules provide that a regular inspection will include, but is not limited to, the steps and procedures specified in Sections 104(d)(1) and (2) and any other tests of the audit, supervisory, and quality control procedures of the firm that the Director of the Division of Registration and Inspections or the Board determines appropriate.[10/] In addition, PCAOB Rule 4002 provides for special inspections that will include all steps and procedures necessary or appropriate to address the issue or issues raised by the Board when it authorized the inspection.[11/]

[8/] See Sections 104(d)(1), (2) and (3) of the Act.

[9/] See PCAOB Release No. 20003-019, Rules on Inspection of Registered Public Accounting Firms (October 7, 2003). These rules are currently pending approval of the Commission.

[10/] Rule 4001.

[11/] Rule 4002.

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Under Section 106(a) of the Act, "[a]ny foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer shall be subject to th[e] Act and the rules of the Board and the Commission issued under th[e] Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State."

2. Overview of the Proposed Rule

The Board recognizes that inspections conducted under PCAOB Rules 4001 and 4002 raise special concerns for non-U.S. registered firms, such as unnecessarily duplicative costs and potential conflicts of law. Accordingly, as explained in PCAOB Release No. 2003-20, the Board believes that it is "necessary or appropriate in the public interest or for the protection of investors" to develop an efficient and effective cooperative arrangement where reliance may be placed, to the maximum extent consistent with the independence and rigor of the home country system, on an inspection of a non-U.S. registered firm conducted by such system.

As noted in PCAOB Release No. 2003-20, such an arrangement would have the positive effects of allowing the Board to allocate its resources in the most cost-effective manner while addressing some practical problems that the Board will face, such as those posed by the use of languages other than English. The Board also believes its arrangements may reduce potential conflicts of laws and minimize unnecessarily duplicative regulatory burdens and costs for accounting firms.

Finally, the Board believes that a cooperative approach to inspections would allow the Board to effectively fulfill its statutory responsibilities to protect the interests of investors and to further the public interest in the preparation of informative, accurate, and independent audit reports for publicly held companies without in any way vitiating any statutory authority granted to the Board. The arrangement would provide a means to meet the statutory requirements to conduct a continuing program of inspections of registered firms by building on the resources of non-U.S. inspection bodies to supplement the work of the Board's staff.

Accordingly, the Board has proposed a rule setting forth an inspection framework for non-U.S. registered public accounting firms. As a general matter, the rule would permit the Board to rely on the work of oversight systems in other jurisdictions, based on a sliding scale: the more independent and more rigorous a local oversight system,

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the greater the Board's reliance on that system. The proposed rule sets forth certain principles, described in more detail below, that the Board would apply when evaluating the independence and rigor of the home country system.

Specifically, proposed PCAOB Rule 4011 would permit a foreign registered public accounting firm to submit a written petition to the Board for an inspection that relies upon an inspection conducted by a home country system.[12/] The petition should describe in detail the non-U.S. system's laws, rules and/or other information to assist the Board in evaluating such system's independence and rigor. The petition should also include documents that support the firm's description of the non-U.S. system. All documents submitted as part of the petition must be in English.

The Board would consider the submission made by the firm, any other information that the Board obtains, and discussions with the appropriate entity or entities within the non-U.S. system concerning an inspection work program. Based on this information, the Board would determine the degree, if any, to which the Board, consistent with the Board's responsibilities under the Act, may rely on the non-U.S. inspection, and the Board would conduct its inspection under PCAOB Rule 4000 in a manner that relies to that degree on the non-U.S. inspection.

A decision by the Board under proposed PCAOB Rule 4011 would apply only to the particular inspection of the particular firm that submitted the petition. However, as a practical matter, the Board's assessment of a non-U.S. system in a specific jurisdiction will most likely be the same for all non-U.S. firms within the authority of that system that submit within the same general time frame. Considering petitions on a firm-by-firm basis allows the Board to take into account differences in the inspection work programs for different firms and also any changes in regulatory regimes that may occur from time to time.

[12/] While not required under proposed PCAOB Rule 4011, the Board encourages interested non-U.S. firms to petition the Board as soon as practicable after approval of their registration application, in order to allow sufficient time for assessment and consultation with the appropriate non-U.S. authority.

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3. Principles for Determining the Independence and Rigor of a Non-U.S. System under the Proposed Rule

The Board would apply certain principles when evaluating the independence and rigor of the home country system. These principles include the adequacy and integrity of the system; the independence of the system's operation from the auditing profession; the nature of the system's source of funding; the transparency of the system; and the system's historical performance.

In assessing the adequacy and integrity of the non-U.S. system, the Board would consider, for example –

- whether an entity within the system has the authority (without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms) to –
  - inspect audit and review engagements of non-U.S. public accounting firms, including engagements that are the subject of ongoing litigation or other controversy;
  - evaluate the sufficiency of the quality control system of the firm, and the manner of the documentation and communication of that system by the firm; and
  - perform such other testing of the audit, supervisory, and quality control procedures of the firm as the entity determines necessary;
- whether an entity within the system has the authority to conduct investigations and disciplinary proceedings of non-U.S. public accounting firms, any persons of such firms, or both, that may have violated the laws and standards relating to the issuance of audit reports, without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;
- whether an entity within the system has the authority to impose appropriate sanctions for violations of the non-U.S. jurisdiction's laws and

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standards relating to the issuance of audit reports, without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

- whether an entity within the system has the authority to establish and enforce ethics rules and standards of conduct for the individual or group of individuals who govern the system and its staff and has prohibited conflicts of interest, including conflicts created by financial obligations to or from a former employer, business partner or client.

In assessing the independence of the non-U.S. system's operation from the auditing profession, the Board would consider, for example –

- whether the individual or individuals with whom the system's decision-making authority resides –
  - have been appointed, or otherwise selected, by the government of the non-U.S. jurisdiction; and
  - may be removed only by the government of the non-U.S. jurisdiction and may not be removed by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;
- whether a majority of the individuals with whom the system's decision-making authority resides does not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses for at least the last five years immediately before assuming their position within the system;
- whether a majority of the individuals with whom the system's decision-making authority resides, including the individual who functions as the entity's chief executive or equivalent thereof, is not practicing public accountants; and
- whether each entity within the system has the authority to conduct its day-to-day operations without the approval of any person affiliated or

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> otherwise connected with a public accounting firm or an association of such persons or firms, including the authority to establish rules that provide for the operation and administration of such entity, the exercise of its authority, and the performance of its responsibilities; and to appoint full-time employees, including accountants, attorneys, and other agents as may be necessary or appropriate, and to determine their qualifications, define their duties, and fix their salaries or other compensation.

In assessing the nature of a non-U.S. system's source of funding, the Board would look to, for example, whether the system has an appropriate source of funding that is not subject to change, approval or influence by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms.

In assessing the transparency of a non-U.S. system, the Board would consider, for example, the transparency of its rulemaking procedures and the periodic reporting to the public by the system.

With regard to a non-U.S. system's historical performance, the Board would consider, for example, whether there is a record of disciplinary proceedings and appropriate sanctions. However, the Board would only consider this principle if the oversight system has been in existence long enough to have established a basis for evaluating past performance.

The criteria described above are intended as illustrative only, not exhaustive. The presence or absence of any one of the criteria would not necessarily be determinative. Moreover, the Board's decision under proposed PCAOB Rule 4011 would be based not only on an assessment of the non-U.S. system's comportment with the listed principles, but also upon the Board's judgment of whether an appropriate degree of reliance on a non-U.S. system would be consistent with the Board's responsibilities under the Act to protect the interests of investors and to further the public interest in the preparation of informative, accurate and independent audit reports for public companies.

4. Agreed-Upon Work Programs under the Proposed Rule

Under the proposed inspection framework, once the independence and rigor of the non-U.S. system has been assessed using the principles described above, the staff

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of the Division of Registration and Inspections would work with the appropriate staff of the non-U.S. entity to agree on an inspection work program. In determining whether to permit any reliance on an inspection conducted by a home country system, the Board would weigh heavily the non-U.S. inspecting entity's willingness to agree to an inspection work program that includes, at a minimum, inspection of the foreign registered public accounting firm's audit and review engagements of U.S. public companies selected by the Board, including those that are the subject of ongoing litigation or other controversy; evaluation of the sufficiency of the quality control system of the foreign registered public accounting firm under the Board's standards on quality control, and the manner of the documentation and communication of that system by the foreign registered public accounting firm; possible performance of other testing of such firm; and participation of experts (who are designated by the Board) in PCAOB auditing and related professional practice standards, accounting principles generally accepted in the United States, the rules and regulations of the Commission, and other applicable standards.

The Board would also give great weight to the non-U.S. inspecting entity's willingness to agree to provide to the Board or its staff, upon their request, the inspecting entity's work papers or work product that document any inspection, evaluation or testing, and to provide to the Board, in a form and with a level of detail agreed upon with the PCAOB, a report relating to any inspection, evaluation or testing.

The allocation of work between the PCAOB staff and the non-U.S. staff would vary depending on the independence and rigor of the non-U.S. system. In jurisdictions with the highest level of independence and rigor, the inspection work program would be executed by the local inspecting body with the participation of experts designated by the Board. Participation by PCAOB staff would be greater in those jurisdictions with less independent and less rigorous systems of oversight. In jurisdictions where auditor oversight is conducted solely by a profession-organized peer review system, the Board would direct the PCAOB staff to execute the inspection work program, but could permit some assistance from the non-U.S. peer review body, which would execute certain agreed-upon modules of that program.

Ultimately, based upon a review of the non-U.S. inspecting entity's inspection work papers and inspection report, and any other work conducted by PCAOB staff, the Board would issue a PCAOB inspection report for a foreign registered public accounting firm. As with Board inspections of U.S. firms, Sections 104(f)-(h) of the Act, Board

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Rules 4007-4009 and any applicable Commission rules would govern the procedures and the firm's rights concerning draft and final versions of the PCAOB inspection report.

C. Board's Proposed Rule on Investigations of Non-U.S. Registered Firms

In PCAOB Release No. 2003-020, the Board indicated that it intended to propose a rule relating to investigations of non-U.S. firms, and the Board is now proposing PCAOB Rule 5113. The proposed rule provides that, in carrying out its investigative responsibilities under Section 105(b) of the Act, the Board may, in appropriate circumstances, rely upon the investigation or sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority.

In addition to the Board's assessment of the circumstances at hand, the application of proposed PCAOB Rule 5113 may depend on the non-U.S. body's willingness and authority to provide the Board or the Director of Enforcement and Investigations with access to the relevant evidence gathered in its investigation. In addition, reliance pursuant to proposed PCAOB Rule 5113 would depend, in part, on the independence and rigor of the non-U.S. investigatory authority. Further, because the Board may not always be in a position to wait until the close of the non-U.S. authority's inquiry before deciding whether to commence its own investigation, the non-U.S. authority's willingness to share information and to update the Board during the course of its investigation may also be relevant to the application of proposed PCAOB Rule 5113.

The Board believes that, in appropriate circumstances, reliance on non-U.S investigatory authorities would serve the public interest and the interest of investors. For example, reliance may promote the efficient allocation of resources in conducting investigations. Moreover, effective and efficient enforcement by the Board may be enhanced by such reliance.

Circumstances may require, however, that the PCAOB conduct an investigation of the audit work of a non-U.S. registered public accounting firm, or an associated person of such a firm, relating to the financial statements of a U.S. public company. Proposed PCAOB Rule 5113 does not limit the Board's authority under PCAOB Rule 5200 to commence disciplinary proceedings whenever it appears to the Board that such action is warranted.

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Finally, in determining an appropriate sanction under PCAOB Rule 5300, the Board, in appropriate circumstances, may consider sanctions imposed by a non-U.S. authority. In those circumstances where the Board considers a non-U.S. sanction, the Board may impose additional sanctions or may determine that no additional sanction is necessary. When a non-U.S. disciplinary regime provides for appropriate sanctions of accounting firms and individuals and that regime adequately serves the public interest and protects investors, the Board intends to rely, as appropriate, on the work of the other disciplinary system. However, the Board's consideration of a non-U.S. sanction does not, in any way, limit the Board's authority to impose a sanction under PCAOB Rule 5300.

D. Cooperation by the Board With Respect to its Non-U.S. Counterparts' Auditor Oversight Responsibilities

The Board is underscoring its willingness to work with its non-U.S. counterparts with regard to such counterpart's oversight responsibilities over a U.S. accounting firm that audits or plays a substantial role in the audits of public companies in such counterpart's home country.[13/] Specifically, with respect to an inspection of a U.S. firm conducted by a non-U.S. counterpart, the Board has previously announced that it would assist in the inspection of U.S. firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions.[14/] In order not to compromise the Board's independence, however, the Board intends to provide a level of assistance that is consistent with the Board's determination regarding the non-U.S. oversight system's independence and rigor.

With respect to investigations, the Board would assist, to the extent permitted by applicable law and consistent with its reasonably available resources, in investigations by non-U.S. authorities of U.S. accounting firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions. In addition, in lieu of imposing its own sanctions, other non-U.S. jurisdictions may wish to rely upon sanctions imposed by the Board on a U.S. registered public accounting firm.

[13/] Additional rule making is not necessary to carry out the Board's authority in this area.

[14/] See PCAOB Release No. 20003-020, Oversight of Non-U.S. Public Accounting Firms (October 28, 2003)

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E. Continuance of the Dialogue and Other Board Programs

The Board anticipates continuing its dialogue with oversight bodies outside of the United States in order to achieve its objectives generally, as well as to try to find ways to coordinate in areas where there is a common programmatic interest. Moreover, at the appropriate time, the Board intends to begin a dialogue with its non-U.S. counterparts on the details of the inspection work programs for individual firms in non-U.S. jurisdictions.

F. Opportunity for Public Comment

Interested persons are encouraged to submit their views to the Board. Written comments should be sent to the Office of the Secretary, PCAOB, 1666 K Street, N.W., Washington, D.C. 20006-2803. Comments may also be submitted by e-mail to comments@pcaobus.org or through the Board's Web site at www.pcaobus.org. All comments should refer to PCAOB Rulemaking Docket Matter No. 013 in the subject or reference line and should be received by the Board no later than 5:00 p.m. EST on, January 26, 2004.

* * *

On the 10th day of December, in the year 2003, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ISSUED BY THE BOARD.

/s/ J. Gordon Seymour
Acting Secretary

December 10, 2003

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APPENDICES –

1. Proposed Amendments to Board Rules

2. Section-by-Section Analysis of Proposed Amendments to Board Rules

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Appendix 1 – Proposed Amendments to Board Rules

The Board proposes to amend Section 1 of its rules by adding new subparagraphs to PCAOB Rule 1001, to amend Section 2 of its rules by striking "April 19, 2004" and substituting "July 19, 2004" in PCAOB Rule 2100, to amend Section 4 of its rules by adding PCAOB Rule 4011, to amend Section 5 of its rules by adding PCAOB Rule 5113, and to amend the Instructions to Form 1. The relevant portions of the Rules and Instructions, as proposed to be amended, are set out below.

RULES OF THE BOARD

SECTION 1. GENERAL PROVISIONS

* * *

Rule 1001. Definitions of Terms Employed in Rules.

When used in the Rules, unless the context otherwise requires:

* * *

(f)(ii) Foreign Registered Public Accounting Firm

The term "foreign registered public accounting firm" means a foreign public accounting firm that is a registered public accounting firm.

(f)(iii) Foreign Registrar

The term "foreign registrar" means an entity, other than an entity existing under the laws of the United States or any state, with which a foreign public accounting firm is required to register.

* * *

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SECTION 2. REGISTRATION AND REPORTING

Part 1 – Registration of Public Accounting Firms

Rule 2100. Registration Requirements for Public Accounting Firms

Effective October 22, 2003 (or, for foreign public accounting firms, July 19, 2004), each public accounting firm that –

(a) prepares or issues any audit report with respect to any issuer; or

(b) plays a substantial role in the preparation or furnishing of an audit report with respect to any issuer

must be registered with the Board.

* * *

SECTION 4. INSPECTIONS

* * *

Rule 4011. Inspections of Foreign Registered Public Accounting Firms

(a) A foreign registered public accounting firm that is subject to an inspection under the laws, rules, or professional oversight system in the jurisdiction in which it is organized and operates may request that the Board rely on that inspection in conducting an inspection of the firm pursuant to Rule 4000.

(b) A request pursuant to paragraph (a) shall be made by submitting to the Board a written petition, in English, that describes the non-U.S. system's laws, rules and/or other information to assist the Board in evaluating such system's independence and rigor.

(c) The Board shall determine the degree, if any, to which the Board, consistent with the Board's responsibilities under the Act, may rely on the non-U.S. inspection, and the Board shall conduct its inspection under Rule 4000 in a manner that

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relies to that degree on the non-U.S. inspection. In making that determination, the Board will evaluate –

(1) the submission made under paragraph (b);

(2) any other information the Board may obtain concerning the level of the non-U.S. system's independence and rigor, including the adequacy and integrity of the system, the independence of the system's operation from the auditing profession, the nature of the system's source of funding, the transparency of the system, and the system's historical performance; and

(3) discussions with the appropriate entity or entities within the system concerning an inspection work program.

SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

* * *

Part 1 – Inquiries and Investigations

* * *

Rule 5113. Reliance on the Investigations of Non-U.S. Authorities

Upon the recommendation of the Director of Enforcement and Investigations or upon the Board's own motion, the Board may, in appropriate circumstances, rely upon the investigation or a sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority.

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FORM 1 – APPLICATION FOR REGISTRATION

GENERAL INSTRUCTIONS

* * *

11. An applicant may list the name and physical address (and, if different, mailing address) of the applicant's *foreign registrar* or any other authority or authorities responsible for the regulation of the applicant's practice of accounting, including any authority that inspects the applicant. If applicable, the applicant may provide such information as Exhibit 99.3.

* * *

PART X – EXHIBITS

To the extent applicable under the foregoing instructions, each application must be accompanied by the following exhibits:

* * *

Exhibit 99.3 Non-U.S. Oversight System Information

* * *

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Appendix 2 – Section-by-Section Analysis of Proposed Amendments to Board Rules

The Board proposes to amend Section 1 of its rules by adding new subparagraphs to PCAOB Rule 1001, to amend Section 2 of its rules by striking "April 19, 2004" and substituting "July 19, 2004" in PCAOB Rule 2100, to amend Section 4 of its rules by adding PCAOB Rule 4011, to amend Section 5 of its rules by adding PCAOB Rule 5113, and to amend the Instructions to Form 1. Each of the amendments to the rules is discussed below.

Proposed Amendments to Board Rules

Rule 1001 – Definitions of Terms Employed in Rules

Foreign Registered Public Accounting Firm

The definition of non-U.S. jurisdiction in Rule1001(f)(ii) means a foreign public accounting firm that is a registered public accounting firm.

Foreign Registrar

The definition of foreign registrar in proposed Rule1001(f)(iii) means an entity in a non-U.S. jurisdiction with which a public accounting firm that is organized and operating under the laws of that non-U.S. jurisdiction is required to register.

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Rule 2100 – Registration Requirements for Public Accounting Firms

The Board has also decided to allow non-U.S. public accounting firms an additional three months to register. Accordingly, the proposed amendment provides that the mandatory registration date for these firms is July 19, 2004.

Rule 4011 – Inspections of Foreign Registered Public Accounting Firms

Proposed PCAOB Rule 4011 states that a foreign registered public accounting firm that is subject to an inspection under the laws, rules, or professional oversight system within the non-U.S. jurisdiction in which it is organized and operates may request that the Board rely on that inspection in conducting an inspection of the firm pursuant to PCAOB Rule 4000.

The rule also states that requests should be made by submitting to the Board a written petition in English describing the non-U.S. system's laws, rules and/or other information to assist the Board in evaluating the independence and rigor of the system.

In evaluating the independence and rigor, the Board would apply certain principles including the adequacy and integrity of the system; the nature of the system's source of funding; the independence of the system's operation from the auditing profession; the transparency of the system; and the system's historical performance.

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Although not stated in the Rule, upon receiving such petition, the Board would consider criteria, for example, as described below, that indicate a non-U.S. system's comportment with the principles set forth in the Rule.

In assessing the adequacy and integrity of the non-U.S. system, the Board would consider, for example –

- the authority of the system to inspect, evaluate and perform certain testing;
- the authority of the system to conduct investigations and disciplinary proceedings;
- the authority of the system to impose sanctions for violations of the non-U.S. jurisdiction's laws and standards; and
- the authority of the system to establish and enforce ethics rules and standards of conduct;

In assessing the independence of the non-U.S. system's operation from the auditing profession, the Board would consider, for example --

- whether the individual or individuals with whom the system's decision-making authority resides –
    - have been appointed, or otherwise selected, by the government of the non-U.S. jurisdiction; and

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- may be removed only by the government of the non-U.S. jurisdiction and may not be removed by any person associated with a public accounting firm or an association of such persons or firms;

- whether a majority of the individuals with whom the system's decision-making authority resides does not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses for at least the last five years immediately before assuming their position within the system;
- whether a majority of the individuals with whom the system's decision-making authority resides, including the individual who functions as the entity's chief executive or equivalent thereof, is not practicing public accountants; and
- the authority of the entities within the system to conduct their day-to-day operations.

In assessing the nature of a non-U.S. system's source of funding, the Board would look to, for example, whether the system has an appropriate source of funding that is not subject to change, approval or influence by any person associated with a public accounting firm or an association of such persons or firms.

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In assessing the transparency of a non-U.S. system, the Board would consider, for example, the transparency of its rulemaking procedures and the periodic reporting to the public by the system.

With regard to a non-U.S. system's historical performance, the Board would consider, for example, whether there is a record of disciplinary proceedings and appropriate sanctions. However, the Board would only consider this principle if the oversight system has been in existence long enough to have established a basis for evaluating past performance.

The criteria described above are intended as illustrative only, not exhaustive. The presence or absence of any one of the criteria would not necessarily be determinative. Moreover, the Board's decision under proposed PCAOB Rule 4011 would be based not only on an assessment of the non-U.S. system's comportment with the listed principles, but also upon the Board's judgment of whether an appropriate degree of reliance on a non-U.S. system would be consistent with the Board's responsibilities under the Act to protect the interests of investors and to further the public interest in the preparation of informative accurate and independent audit reports for public companies. Generally, in jurisdictions with the highest level of independence and rigor, the inspection work program would be executed by the local inspecting body with the participation of experts designated by the Board. Participation by PCAOB staff

would be greater in those jurisdictions with less independent and less rigorous systems of oversight.

Finally, proposed PCAOB Rule 4011 states that after considering the submission made in accordance with the Rule, any other information that the Board has obtained, and discussions with the appropriate entity or entities concerning an inspection work program, the Board shall determine the degree, if any, to which the Board, consistent with the Board's responsibilities under the Act, may rely on the non-U.S. inspection. The Board will then conduct its inspection under PCAOB Rule 4000 in a manner that relies to that degree on the non-U.S. inspection.

Rule 5113 – Reliance on the Investigations of Non-U.S. Authorities

Proposed PCAOB Rule 5113 provides that the Board may, in appropriate circumstances, rely upon the investigation or sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority. The Board's reliance would depend, in part, on the independence and rigor of the non-U.S. authority. Reliance also may depend on the non-U.S. authority's willingness to update the Board regarding the investigation on a regular basis and its willingness and authority to share the relevant evidence gathered with the Board.

Circumstances may require, however, that the Board conduct an investigation relating of the audit work of a non-U.S. registered public accounting firm, or an

RELEASE

associated person of such a firm, relating to the financial statements of a U.S. public company. Proposed PCAOB Rule 5113 does not limit the Board's authority under Rule 5200 to commence disciplinary proceedings whenever it appears to the Board that such action is warranted.

Form 1

General Instructions

The amendment to the general instructions to the Form permits an applicant to list the name and physical address (and, if different, mailing address) of the applicant's foreign registrar or any other authority or authorities responsible for the regulation of the applicant's practice of accounting, including any authority that inspects the applicant. If applicable, the applicant may provide such information as Exhibit 99.3.

Part X – Exhibits

The amendment to Part X of Form 1 lists Exhibit 99.3.

PCAOB
Public Company Accounting Oversight Board

19b-4

Exhibit 2(a)(2)

Tab Number	Comment Source
1	Australian Government, The Treasury, *Author: Michael Rawstron, General Manager, Corporations and Financial Services Division*, January 22, 2004
2	Australian Securities & Investments Commission, *Author: Jeffrey Lucy AM, Acting Chairman*, January 20, 2004
3	BDO Global Coordination B.V., *Author: Frans Samyn, Chief Executive Officer*, January 26, 2004
4	The Center for Public Company Audit Firms, of the American Institute of Certified Public Accountants, *Author: Robert J. Kueppers, Chair, Executive Committee*, January 26, 2004
5	Compagnie Nationale des Commissaires aux Comptes, *Author: Michel Tudel*, January 26, 2004
6	Deloitte Touche Tohmatsu, January 26, 2004
7	Ernst & Young LLP, January 26, 2004
8	European Commission, *Author: Alexander Schaub, Director-General*, January 26, 2004
9	Fédération des Experts Comptables Européens – European Federation of Accountants, *Author: David Devlin, President*,
10	Financial Services Agency of Japan, *Author: Naohiko MATSUO, Director for International Financial Markets*, January 26, 2004
11	Grant Thornton LLP, *Author: Karin A. French, Partner in Charge of SEC Regulations*, January 27, 2004
12	Institut der Wirtschaftsprüfer, *Author: Wolfgang Schaum, Executive Director*, January 26, 2004
13	Institute of Certified Public Accountants of Singapore, *Author: Janet Tan, Executive Director*, January 26, 2004
14	The Institute of Chartered Accountants in England & Wales; *Author: Eric E Anstee*, January 23, 2004
15	The Japanese Institute of Certified Public Accountants, *Author: Akio Okuyama, Chairman & President*, January 23, 2004
16	KPMG LLP, January 26, 2004
17	National Association of State Boards of Accountancy; *Author: David A. Vaudt, CPA, Chair; and David A. Costello, CPA, President & CEO*, January 23, 2004
18	PricewaterhouseCoopers, January 26, 2004

PCAOB
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19b-4

19	RSM International, *Author: William D. Travis Chairman, Transnational Assurance Services Executive Committee*, January 27, 2004
20	Swiss State Secretariat for Economic Affairs, *Author: Hanspeter Tschäni, Head of Division, International and European Economic Law*, January 26, 2004
21	United States General Accounting Office, *Author: David M. Walker, Comptroller General of the United States*, January 28, 2004
22	Wirtschaftsprüferkammer, *Author: Hubert Graf von Treuberg, President*, January 26, 2004

23 January, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803
USA

Dear Mr Secretary

RULEMAKING DOCKET MATTER NO. 013

We appreciate the opportunity to provide a submission in response to the Public Company Accounting Oversight Board's *Proposed Rules Relating to the Oversight of Non-US Public Accounting Firms* (Proposed Rules) released on 10 December 2003.

We support the efforts of the Public Company Accounting Oversight Board (PCAOB) in pursuing the objectives of improving audit quality, ensuring effective oversight of audit firms and helping to restore the public trust in the auditing profession. Australia shares the United States' regulatory objectives in this area.

We understand that, in the interest of minimising administrative burdens and legal conflicts as well as conserving resources, the PCAOB will be actively seeking to rely on the home country's system in situations where it has confidence in that system's integrity. Given Australia's strong regulatory system and the fact that Australia has only a limited number of companies which are SEC registrants (and their debt and equity raisings in the US result in comparatively minor exposure for US investors), we are in favour of an oversight approach by the PCAOB which avoids regulatory overlap with Australia and minimises compliance costs for Australian audit firms that audit SEC registrants. We also agree with the PCAOB's proposal to extend its registration deadline for non-US firms to 19 July 2004.

It should be noted that Australia has been implementing a continuous corporate law economic reform program (the CLERP initiative) since 1997. The aim of this initiative is to ensure that Australia has an effective corporate disclosure framework that incorporates the world's best practice and provides the structures and incentives for a fully informed market.

The following submission outlines how Australian bodies could collaborate with the PCAOB in carrying out its functions under the proposed rules. The submission also provides information about the systems in place in Australia to regulate and oversee accounting and auditing practices, including anticipated changes under the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (CLERP 9), which was introduced into Parliament on 4 December 2003, and the role of the Financial Reporting Council (FRC) and the Australian Securities and Investments Commission (ASIC) in the oversight and regulation of the industry.

Australia's regulatory and oversight system

Australia has a robust, independent and transparent corporate reporting and governance framework. Audits are generally conducted professionally and competently in accordance

with recognised auditing standards, giving full regard to the interests of shareholders, the need for independence, and professional ethical rules. Australia's regulatory system is based on the belief that restoring investor confidence in auditing requires transparent standard setting, effective monitoring and oversight of the financial reporting framework and effective enforcement by the regulators. Each of these aspects will be further strengthened by the CLERP 9 reforms.

CLERP 9 reforms

The CLERP 9 reforms will significantly strengthen the regulatory requirements applying to company auditors and include measures that:

- move the Australian Auditing and Assurance Standards Board (AuASB) under the authority and oversight of the FRC;
- enhance the financial reporting framework by expanding the powers of the FRC to include monitoring of professional bodies, audit firms and independence policies and procedures;
- improve auditor registration requirements;
- strengthen existing auditor independence requirements through:
  - the introduction of a general standard of auditor independence (based on the corresponding standard in the SEC rules on auditor independence);
  - increased restrictions on employment and financial relationships between auditors and their clients;
  - increased requirements for disclosure of fees for non-audit services;
  - a requirement for audit partner rotation every 5 years;
  - making breaches of the above requirements offences for which ASIC will be able to take appropriate enforcement action; and
- give auditing standards legislative backing.

Generally, CLERP 9 will place liability for contraventions of the law on:

- individual auditors;
- in the case of firms - on each individual partner; and
- in the case of authorised audit companies - on the directors and the company.

Australian Securities and Investment Commission

ASIC is responsible for surveillance, investigation and enforcement of the Corporations Act, including the statutory responsibilities of auditors and others in relation to financial reporting. ASIC may take action where audits are not undertaken in accordance with the auditing standards.

Financial Reporting Council

Under CLERP 9, the FRC will oversee the AuASB and have a role in promoting, overseeing and monitoring auditor independence in Australian firms. Ensuring the quality of, and compliance with,

auditor independence standards facilitates both the production of quality audits and the restoration of public trust in the auditing profession. The FRC will not have an enforcement role, as this will remain a matter for ASIC as the securities regulator. However, it is envisaged that the FRC would refer matters of concern to ASIC for investigation, and have a key role in understanding and reporting to the Government on audit firm processes and auditor independence issues more generally.

PCAOB's Proposed Rules relating to the Oversight of Non-US Public Accounting Firms

Registration and information requirement

While Australian law does not require the registration of audit firms, there is a system of individual auditor registration and provision for deregistration or the imposition of other sanctions where an auditor breaches the law.

We understand that the proposed rules will require individual audit firms to provide the PCAOB with information about the regulatory system in the jurisdiction in which they reside. To this end, the Australian Treasury is willing to provide the PCAOB with relevant material concerning the Australian regulatory system. We suggest that this may be a more efficient means by which to satisfy the PCAOB's information requirement.

Inspection requirement

As well as responding to the financial reporting issues that are brought to its attention, ASIC conducts extensive reviews of listed entities' financial reports on a routine, not-for-cause basis. ASIC aims to complete about 440 of these reviews in the current year.

ASIC's examination of an entity’s financial reports often raises questions about the adequacy of the audit, and in some cases more general issues about the overall level of compliance by an audit firm with its obligations under the current regulatory regime. ASIC pursues these concerns by audit paper review and, where necessary, on-site visits. ASIC investigations of this kind most commonly result in ASIC taking the matter to an independent disciplinary tribunal - the Companies Auditors and Liquidators Disciplinary Board (CALDB). The CALDB was established under the ASIC Act and has a chairman who is a legal practitioner appointed by the Minister. The CALDB has the power to cancel or suspend the registration of an auditor, limit future audit practice, or require other remedial steps. In its last reporting year, ASIC action resulted in disciplinary action against six auditors.

As part of its planning for the new regulatory regime established by the CLERP 9 legislation, ASIC has established a special audit response team. This team is responsible for examining complaints about auditor conduct and investigating individual instances where defects in financial reporting by listed entities are, at least in part, attributable to defects in the audit process.

More significantly, the special purpose team will conduct routine surveillances of auditors to monitor compliance with the enhanced obligations of auditors under CLERP 9. Techniques will include the review of audit papers and regular on-site inspections. ASIC envisages that inspections of larger audit firms (the "Big Four" plus second tier firms) will take place over a two year cycle, with inspections of representative samples of smaller firms done on a risk-scoring basis.

ASIC will examine all material relevant to auditors' compliance with their obligations under Australian law. The initial focus for larger firms is likely to be on compliance with independence requirements, but will extend to all aspects of compliance with legislative obligations. Compliance

with audit standards will be legislatively mandated under the new regime, and this work will therefore encompass all aspects of the audit process.

ASIC's new programs and activities are scheduled to begin on commencement of the new CLERP 9 regime, which is anticipated to commence on 1 July 2004. Some aspects of ASIC's planning for this work are as yet incomplete. However, ASIC is willing to provide further details in order to assist the PCAOB.

Sanctions

As noted above, while Australian law does not require the registration of audit firms, there is a system of individual auditor registration and provision for deregistration or the imposition of other sanctions where an auditor breaches the law. These sanctions could include:

- the cancellation or suspension of the person's registration as an auditor;
- admonishing or reprimanding the person; and/or
- requiring the person to give an undertaking to engage in, or refrain from engaging in, specified conduct.

Information sharing and scope for cooperative arrangements

Regarding the issue of sharing confidential information and documents with the PCAOB, we are currently exploring whether any legal or practical problems exist which might impede this process. Information concerning this issue and additional details regarding Australia's regulatory regime could be provided to the PCAOB following the enactment of the CLERP 9 Bill.

We understand that the PCAOB intends to provide a level of assistance that is consistent with the Board's determination regarding the non-US oversight system's level of independence and rigor. In keeping with this, we anticipate that any additional resources or technical expertise required by ASIC to meet the PCAOB's requirements would be provided by the PCAOB.

In summary, we agree that - as generally expressed in the PCAOB's 10 December 2003 release - it is in the interests of the PCAOB and its Australian counterparts, as well as in the public interest, that an efficient and effective cooperative arrangement is developed where reliance is placed on the home country's regulatory system to the maximum extent possible. In this regard, Australia will be taking a close interest in the application of the PCAOB's rules across other jurisdictions, particularly those with similar regulatory regimes to Australia.

We look forward to developing a successful working relationship between the PCAOB and the relevant Australian bodies regarding the oversight of Australian audit firms.

Yours sincerely

Michael Rawstron
General Manager
Corporations and Financial Services Division

ASIC
Australian Securities & Investments Commission

JEFFREY LUCY AM
Acting Chairman

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Our Reference: LetterPCAOB

13 January 2004

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

Dear Sir

Re: Proposed Rules Relating to the Oversight of Non-US Public Accounting Firms

We have read with interest PCAOB Release No 2003-024 and the proposed rules relating to the oversight of non-US public accounting firms in the areas of registration, inspections, and investigations and adjudications.

As a jurisdiction which includes accounting firms that audit US public companies (as defined in the Release) it is our expectation that the Australian regulatory system will be one that the proposed PCAOB rules and cooperative model will be applied.

The Australian Securities and Investments Commission (ASIC) is Australia's equivalent to your Securities Exchange Commission although there are some differences in overall jurisdictions. We are interested in engaging in a specific dialogue with the PCAOB in these matters.

As you may be aware, the Australian Government is in the process of implementing the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 which includes proposed provisions to further strengthen the regulation of auditing in Australia and ASIC's role in that process. We are currently in the process of addressing these proposals and our policy and operational initiatives relevant to their implementation.

It is my intention to make arrangements to meet with representatives of the PCAOB and the SEC in the near future to discuss these issues and to establishing a close working relationship into the future.

Yours sincerely

Jeffrey Lucy AM
Acting Chairman

cc. M. Rawstron – Treasury

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MEMORANDUM

To

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 260006-2803
Email: comments@pcaob.org

Date

26 January, 2004

From

Frans Samyn
CEO
BDO Global Coordination B.V.

Dear Mr. Secretary,

PCAOB Rulemaking Docket Matter No. 013
Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms

We welcome the opportunity to comment on the Public Company Accounting Oversight Board's ("PCAOB" or "Board") proposed rules relating to the oversight of non-U.S. public accounting firms. BDO Global Coordination B.V. is the coordinating entity of BDO International, a world wide network of independent public accounting firms ("BDO Member Firms") serving international clients, including U.S. public companies.

We appreciate the Board's efforts to date to address the concerns of non-U.S. firms and to work with non-U.S. regulatory bodies in developing a cooperative arrangement with respect to the oversight of non-U.S. firms. We should like to make a broad comment on this cooperative framework, before commenting on some of the specifics of the proposed rules.

The Cooperative Framework

While we appreciate the Board's efforts towards developing a cooperative approach, we believe that more time is needed still, to achieve a framework that will work in a multinational environment. The recent spate of global accounting scandals has highlighted the need, not only for improvements in regulatory structures around the world, but also for an internationally harmonised approach to standards and oversight. Many countries have already embarked on ambitious reforms with respect to auditor oversight. There now appears to be an excellent opportunity to be proactive in reaching multilateral agreement on the principles and minimum requirements of an effective and robust oversight regime.

While the proposed rules allow for cooperation, it appears, nevertheless, that the PCAOB is still claiming global jurisdiction. This poses numerous problems for audit firms in many jurisdictions with conflicting legislation. These legal conflicts have been well documented by the international law firm, Linklaters, in its submissions to the PCAOB[1]. Given that regulators in many countries are working towards the same objectives, to ensure that investors have access to reliable information, an effective system of mutual recognition should be achievable. Such a system would allow for different approaches, while insisting that rules are in place to achieve the common goal of investor protection. We would urge the PCAOB to consider these non-U.S. oversight systems to

[1] Comment on Docket Matter No. 012, dated 20 January 2004
Comment on Docket Matter No. 001, dated 31 March 2003

the fullest extent possible and, in that regard, recognize the practical and legal impediments that the PCAOB proposal may present in certain countries.

We hope that every effort will be made to avoid duplicate registration and oversight requirements. Such duplication increases the costs of compliance for audit firms (and consequently for issuers) and does little to enhance audit quality or serve the public interest.

The Proposed Rules

The Proposed Extension Period

We agree with the Board's proposal to provide an extension of the registration deadline for non-U.S. firms. Indeed, we believe consideration should be given for an extension period greater than three months. The proposed extension would require non-U.S. public accounting firms that audit, or play a substantial role in the audit, of U.S. public companies to be registered with the Board by 19 July 2004. Given the application review timeline, firms need to be preparing their applications now, for submission before the end of April, to ensure that they are registered by the due date.

In effect, then, firms are having to submit to an oversight regime which has not yet been determined. It is not possible for firms to properly assess the impact of registration, or to make informed decisions about the feasibility of registration, until the final rules are known. There are many firms who currently have only one or two audit clients requiring them to register. These clients are usually subsidiaries of U.S. public companies and the engagements may not comprise a significant number of audit hours and fees. Such firms have a choice: they can either register or discontinue these audit engagements.

It is highly preferable that the final rules are issued before firms are required to make a decision about whether or not they wish to expose themselves to the consequences of PCAOB registration. The extension period should therefore be lengthened, to provide a timeline that will allow firms to properly consider, and prepare for, the registration process. This extension would provide more time to develop the cooperative framework and resolve legal conflicts.

Firm-by-Firm Requests and Decisions

The proposed Rule 4011 allows each non-U.S. registered firm to request that the Board rely on the inspection regime of its home jurisdiction. Each such request must include a written petition describing the laws and rules of the oversight system. We believe that this information should be provided directly by the respective regulatory bodies within each jurisdiction, rather than by individual firms. This would seem to be a more efficient, effective and equitable approach, given that laws and rules of each jurisdiction should apply uniformly to all firms within that jurisdiction.

Equally, the determination of the degree to which the Board may rely on an inspection system should be applied nation-wide, rather than to individual firms. The Release states: "*Considering petitions on a firm-by-firm basis allows the Board to take into account differences in the inspection work programs for different firms and also any changes in regulatory regimes that may occur from time to time.*" It would seem relatively easy for the Board to be updated by the foreign regulator on a periodic basis as to any changes in its regulatory environment. Therefore, we do not see the need for the Board to rely on individual firms for this information. In addition, if a non-U.S. oversight system applies its rules to individual firms differently, this should be taken into account in the Board's assessment of that system. Similarly, if changes occur in a regulatory regime, the Board's assessment of that regime may also change. The Board should not apply a differential system of oversight within jurisdictions.

Determining the Independence and Rigor of non-U.S. Oversight Systems

We believe the measurement criteria for determining the independence and rigor of a home country system needs to be more clearly defined. For example, what is an appropriate source of funding of an oversight body? We would expect that funding by the accounting profession would not be considered appropriate, but how would funding by the issuers or securities bodies be evaluated?

What weight is to be given to each criterion? The regulatory systems in many jurisdictions are newly established or evolving. To what degree will this lack of an historical performance inhibit a positive evaluation?

The proposed rules are silent as to the transparency of the evaluation process. It is important that firms and non-U.S. regulatory bodies understand the reasoning behind the Board's determinations in order to have the opportunity to make amendments or develop procedures to address its concerns, if possible. There also needs to be a process whereby firms and/or regulatory bodies can appeal the Board's judgements.

Agreed-Upon Work Programmes

In determining whether to permit any reliance on a home country inspection system, "*the Board would weigh heavily the non-U.S. inspecting entity's willingness to agree to an inspection work program that includes, at a minimum, inspection of the foreign registered public accounting firm's audit and review engagements of U.S. public companies selected by the Board…*". It should be acknowledged that, for many non-U.S. accounting firms, these engagements are likely to be subsidiaries of U.S. public companies, and may themselves be neither listed nor of public interest. As such, they may not ordinarily fall within a home country's inspection remit.

The Board would "*give great weight to the non-U.S. inspecting entity's willingness to agree to provide to the Board or its staff, upon their request, the inspecting entity's work papers or work product…*". The oversight bodies in some jurisdictions may be willing, but completely unable, to comply with such requests, due to the aforementioned, well-documented legal conflicts regarding confidentiality and data protection. These same jurisdictions are also likely to be ones whose laws will prevent PCAOB staff from directly executing the inspection work programme. It would seem that these conflicts need to be resolved prior to implementing these provisions of the proposal.

Cooperation with Respect to the Board's non-U.S. Counterpart's Auditor Oversight Responsibilities

We are pleased to note that the Board is willing to cooperate with its counterparts with respect to their inspections of U.S. firms, as part of discharging their own oversight responsibilities. However, we note that this willingness is conditional upon, or "consistent with", the Board's assessment of the non-U.S. oversight system's independence and rigor. With respect to investigations, the Board would assist only "to the extent permitted by applicable law" and "consistent with its reasonably available resources".

We trust that the Board will respect similar qualifications offered by non-U.S. authorities with regard to the Board's inspections and investigations of non-U.S. firms.

We understand that the scope of the Board's authority to conduct inspections and investigations of U.S. firms is limited to reviewing and enforcing their compliance with U.S. laws and professional standards. Further, both the Sarbanes-Oxley Act of 2002 ("the Act") and the Board's own rules may limit the ability of the Board to share with its non-U.S. counterparts information gathered in the course of such an inspection or investigation.

Section 104 of the Act and Rule 4000 of the Board both provide for an inspection programme, but neither authority allows for an inspection of a registered accounting firm with the intention of

determining that firm's compliance with non-U.S. legal requirements or professional standards. Similarly, while Section 105 of the Act authorises the Board to conduct investigations of registered accounting firms and their associated persons, such investigations do not relate to acts or practices by firms that may violate non-U.S. laws or professional standards.

In regard to the information gathered from the Board's inspections and investigations, there does not appear to be any provision within the Act or the Board's existing rules that allows the Board to transmit to, or share with, its non-U.S. counterparts any information that it is not either authorised or required to make publicly available.

We believe that significant work needs to be undertaken within the U.S. legislative framework before reciprocal rights can effectively be extended to non-U.S. regulators.

Conclusion

The Board has stated that it "*anticipates continuing its dialogue with oversight bodies outside of the United States in order to achieve its objectives generally, as well as to try to find ways to coordinate in areas where there is a common programmatic interest*". We applaud this initiative, but consider that more time is needed to establish a workable structure that involves a system of mutual recognition and a degree of home country control. If a global approach is pursued, gaining multilateral agreement on the principles of an effective oversight regime, it is likely that many of the legal barriers will be overcome. Oversight in all jurisdictions can be simultaneously strengthened, while allowing for different approaches and legislative and cultural frameworks, without sacrificing investor protection, and avoiding duplicity and excessive compliance costs.

Please feel free to contact us, should you have any queries about us, our network, or our comments.

Yours sincerely,
BDO Global Coordination B.V.

Frans Samyn
Chief Executive Officer

January 26, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, DC 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 013 – Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms

The Center for Public Company Audit Firms ("Center") of the American Institute of Certified Public Accountants ("AICPA") respectfully submits the following comments on the Public Company Accounting Oversight Board's ("PCAOB" or the "Board") proposed rules relating to the oversight of non-U.S. public accounting firms. The Center was established by the AICPA to, among other things, provide a focal point of commitment to the quality of public company audits and provide the Board, when appropriate, with comments on its proposals on behalf of Center member firms. The AICPA is the largest professional association of certified public accountants in the United States, with more than 350,000 members in business, industry, public practice, government and education.

The Center recognizes the enormous effort put forth by the PCAOB members and staff to develop a policy and rules related to its oversight of non-U.S. public accounting firms and the significant challenges associated with this effort. We realize and agree that a significant responsibility of the PCAOB is to help restore public confidence in audited financial statements of issuers, both U.S. and non-U.S. registrants.

We commend the Board for and support its work to establish cooperative arrangements with its non-U.S. counterparts, particularly to develop an efficient and effective system of regulation of public accounting firms where reliance may be placed on the home country system to the maximum extent possible. We acknowledge the difficulties associated with doing this – but believe it is important and in the public interest to do so. Accordingly, we encourage the Board to continue to pursue this effort to the extent allowable under the Sarbanes-Oxley Act of 2002 ("Act").

While non-U.S. firms are ineligible for membership in the Center, many of our member firms not only utilize but rely on the work of non-U.S. firms in performing audits of multinational corporations. Accordingly, we believe it is critical to our members that the Board develop clear and concise policies that create the most effective and efficient system for the registration of non-U.S. firms. Central to such

a system will be the development of cooperative arrangements with non-U.S. regulators. By doing so, the Board will be in a better position to create the most effective post-registration programs (i.e., inspection and discipline), which we support and is in the public interest.

The Center is firmly committed to working with and supporting the PCAOB to develop policies for registered firms that allow the Board to effectively implement the Act, and stand ready to assist in any way possible to achieve the Board's objectives in this area.

Sincerely,

Robert J. Kueppers, Chair
Executive Committee
Center for Public Company Audit Firms

cc: Mr. William J. McDonough, Chairman, PCAOB
Ms. Kayla J. Gillan, Member, PCAOB
Mr. Daniel L. Goelzer, Member, PCAOB
Mr. Bill Gradison, Member, PCAOB
Mr. Charles D. Niemeier, Member, PCAOB

CNCC
COMPAGNIE NATIONALE DES COMMISSAIRES AUX COMPTES

LE PRÉSIDENT

Office of the Secretary
Public Accounting Oversight Board
1666 K Street, N.W.
Washington D.C. 20006-2803
United States of America

January 26, 2004

Subject : Rulemaking Dockett Matter n°013 – Proposed rules relating to the oversight of non-US public accounting firms

Dear Mr Secretary,

The CNCC ("Compagnie Nationale des Commissaires aux Comptes", the French Body of statutory auditors) has already provided its comments on the releases of the Public Company Accounting Oversight Board (the "PCAOB" hereafter). In particular, our views and comments related to release n°2003-23 on proposed standard on audit documentation and proposed amendment to interim standards were expressed in our letter dated January 20, 2004.

We would like to take the opportunity of the present letter to remind you the terms of the above-mentioned letter regarding the creation of the "Haut Conseil du Commissariat aux Comptes" recently established by the "Loi de Sécurité Financière" of August 1, 2003 :

"The "Haut Conseil" was established to oversee the professional standards, practices and independence of French "commissaires aux comptes", with the assistance of the "Compagnie nationale des commissaires aux comptes". Decree n° 2003-1121, dated November 25, 2003, with respect to the organization of the "Haut Conseil", specifically provides that the "Haut Conseil" is to maintain regular relationships with its foreign homologues, both within the European Union and internationally. Although the "Haut Conseil" is just beginning its functions, the "Haut Conseil" should have the power to enter into arrangements with foreign regulators that would permit, if it so decides, the sharing of information and documents.

The "Haut Conseil" has jurisdiction for quality control over all French "commissaires aux comptes" including those responsible for the audit of French foreign registrants and French affiliates of other SEC Registrants."

Therefore, the "Haut Conseil" has authority to make comments. In this respect, we have provided our views on release 2003-024 to the "Haut Conseil" who will respond accordingly in the context of its role as defined by law.

Furthermore, we would expect that many of the issues raised by releases 2003-023 and 2003-024 will be addressed in the context of upcoming discussions between the PCAOB and the "Haut Conseil".

Best regards,

Michel Tudel

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January 26, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 013

Proposed Rules Relating To The Oversight Of Non-U.S. Public Accounting Firms

The member firms of Deloitte Touche Tohmatsu ("DTT") are pleased to respond to the request for comments from the Public Company Accounting Oversight Board (the "PCAOB" or the "Board") on its *Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms*, PCAOB Rulemaking Docket Matter No. 013 (Dec. 10, 2003) (the "Release" or the "Proposed Rules").

INTRODUCTION

We support the goals of the Sarbanes-Oxley Act of 2002 (the "Act") in restoring investor confidence as well as the Board's efforts to implement the Act faithfully, and we recognize and support the efforts of the Board to improve audit quality. The Act contemplates that the Board will have some regulatory authority over those non-U.S. public accounting firms that issue audit reports, or play a substantial role in the preparation of audit reports, for issuers of U.S. securities. Congress recognized, however, that the direct regulation of non-U.S. public accounting firms by a U.S. body could raise delicate legal and practical issues and may be redundant of the public accounting regulatory systems of other countries.[1] Congress thus intended that the Board proceed with caution before it imposed its regulatory regime over that provided by the home countries of non-U.S. public accounting firms.

We, therefore, support the Board's efforts, throughout its rulemaking and otherwise, to forge cooperation between the non-U.S. regulators of the public accounting profession and the Board. We also support other aspects of the Board's proposal. Specifically, we applaud the Board's proposal to grant a three-month extension for the registration deadline of non.-U.S.

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[1] *See* Act § 106(c) (granting the Securities and Exchange Commission and the Board authority to exempt non-U.S. public accounting firms from any provision of the Act or the rules of the Board or the Commission issued under the Act).

firms, which, among other things, will allow the Board and non-U.S. regulators additional time to engage in a cooperative dialogue regarding oversight of non-U.S. firms.

Fundamentally, however, we believe that the Board has erred by placing the onus on non-U.S. public accounting firms to demonstrate the adequacy of their home regulator's oversight system. Instead, we believe that such matters are more appropriately the subject of international conventions among the Board and non-U.S. regulators. Through such a process, the Board may establish or strengthen its cooperative ties with non-U.S. regulators, while ensuring that the non-U.S. regulators meet reasonable standards of rigor in the enforcement of their oversight systems.

If the Board were to retain its current proposal for evaluating the qualifications of home country regulators, the Board should make critical modifications to the proposal. In particular, the Board should: (1) specify the procedures under which the Board will consider a request for reliance by a non-U.S. public accounting firm; (2) modify some of its criteria for determining whether a non-U.S. regulatory system is sufficiently rigorous and independent to merit reliance; (3) establish procedures for changing a reliance determination; and (4) strengthen the effect of its reliance determination on the Board's decisions to institute an inspection or investigation.[2]

I. THE BOARD SHOULD NOT REQUIRE SUBMISSIONS BY INDIVIDUAL FIRMS UNDER PROPOSED RULE 4011 AND SHOULD INSTEAD REACH RELIANCE AGREEMENTS WITH NON-U.S. REGULATORS THROUGH INTERNATIONAL CONVENTIONS.

We agree with the Board that its oversight of non-U.S. public accounting firms raises "special concerns" and that the best way to address these concerns is through a "cooperative arrangement" with non-U.S. regulators of the accounting profession.[3] Specifically, we concur with the Board that it should "seek[] to become partners" with non-U.S. regulators in their common enterprise to enhance audit quality and to protect the global capital markets from potential corporate reporting failures.[4]

The Release proposes that the Board determine the extent to which it will rely on each country's regulator through requests *by individual non-U.S. public accounting firms*. In doing so, the Release proposes an indirect, rather than a direct, way to accomplish these goals of cooperation between the Board and non-U.S. regulators. We believe that cooperation would be advanced in a more timely, efficient, and effective manner if the Board and non-U.S. regulators were to determine the extent of mutual recognition through direct negotiations and discussions. These negotiations and discussions could be facilitated through the involvement of an existing international organization, such as the International Organization of Securities Commissions

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[2] As we note below, many of our suggestions in these four areas would also be important in any system of agreements with non-U.S. regulators that the Board might develop.

[3] Release at 3.

[4] *Id. See also Briefing Paper: Oversight of Non-U.S. Public Accounting Firms*, PCAOB Release No. 2003-020, at 1 (Oct. 28, 2003) ("Briefing Paper").

("IOSCO"), or an international body established for the specific purpose of determining the extent of mutual recognition among regulators.

Under the auspices of such an organization, the Board and its non-U.S. counterparts may discuss and agree upon the fundamental features of an independent and rigorous system for regulating the public accounting profession that will guide the extent to which regulators may be mutually recognized.[5] If these principles for independent and rigorous regulation were developed through consensus, as opposed to being asserted by the Board alone, the Board would be significantly more likely to succeed in encouraging other countries to make legislative modifications that improve the oversight of the public accounting profession. Because the criteria for mutual recognition, if reached through international conventions, would be perceived to be more objective, non-U.S. regulators also would be more likely to participate in the system of cooperation and information-sharing that lies at the heart of the Board's proposal to rely on the oversight of non-U.S. regulators when consistent with the requirements of the Act. Concerns about sovereignty and extra-territorial imposition of U.S. law would also be alleviated if these reliance determinations were made through regulator-to-regulator negotiations.

Such a process would yield especially significant benefits given that significant revisions of several non-U.S. regulatory systems are in their nascent stages. For example, the European Union ("EU") is currently developing a revised Eighth Directive, which would establish minimum auditing standards for the public accounting oversight bodies of EU member countries, and would require the registration of audit firms. It is of particular importance for developing cooperative arrangements that the proposed Eighth Directive would establish procedures for cooperation among EU member state regulators on investigations of public accounting firms.[6] If the Board were to seek a mutual recognition agreement with the EU directly, as opposed to making reliance determinations through firm-by-firm submissions, the Board may be able to participate in the development of these cooperation procedures. Indeed, the EU has contemplated developing precisely such a "cooperative working model with the U.S. Public Company Accounting Oversight Board" during the course of revising the Eighth Directive.[7]

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[5] For example, the Board and non-U.S. regulators could determine the extent to which mutual recognition is appropriate in light of the familiarity of one regulator with another country's set of accounting and auditing standards.

[6] European Union Press Release, *Preparation of Eurogroup and Council of Economics and Finance Ministers, Brussels, 19th 20th January 2004*, at 3 (Jan. 19, 2004) (stating that the Revised Eighth Directive will "tighten the oversight of auditors, will establish rules on quality assurance, will specify the rules on independence and on ethics, and will impose the use of high quality auditing standards for all statutory audits," in addition to "enhanc[ing] cooperation over oversight bodies at [the] European level").

[7] *Id.* *See also* European Union Press Release, *Results of Council of Economics and Finance Ministers, Brussels, 20th January 2004, Financial Services and Taxation*, at 1 (Jan. 21, 2004) (stating that the revision of the Eighth Directive would "enhance cooperation of oversight bodies at European level and with third country regulators").

Similarly, there is pending legislation in Australia that proposes to establish a new Audit Independence Supervisory Board, in addition to the Australia Securities and Investment Corporation, which would have a majority of non-accountant members.[8] If the Board were to develop consensus agreements on mutual recognition, the Board could significantly shape the early rulemaking of these evolving non-U.S. regulatory bodies in a manner that could assist the Board in fulfilling its statutory obligations.

A direct negotiation process through an international organization would also ease current difficulties in the implementation of the Board's rules. As the Board recognizes in the Release, the imposition of its oversight system on non-U.S. public accounting firms will inevitably raise conflicts with non-U.S. law.[9] Data privacy laws, professional obligations under non-U.S. laws and professional standards, and laws specific to a particular client's business in non-U.S. jurisdictions may hinder or prevent inspections or investigations of non-U.S. firms that are registered with the Board.[10] For example, the review and processing of personal data in member countries of the European Union is often governed by national laws implementing European Directive 95/46/EC of October 24, 1995. These national laws impose certain prohibitions on the entity processing personal data, including the extent to which the entity is permitted to disclose the personal data to third parties. Processing may include the collection, retrieval, distribution and transfer to other countries of personal data.

Similarly, duties of confidentiality under both non-U.S. laws and professional standards in many countries may well restrict the ability of non-U.S. firms to provide the Board access during inspections and investigations. While client waivers can in some countries address these impediments, in other countries the restrictions are absolute and client waivers would not serve to eliminate the impediment. Moreover, the ability of audit firms in certain countries to provide access to audit workpapers is further restricted by impediments that arise from the nature of the client's business. For example, where an audit firm serves a client involved in the banking industry or the government contracting industry, the firm's ability to provide access to workpapers may be more severely restricted by banking secrecy laws and national security laws.

Making mutual recognition determinations through negotiations with non-U.S. regulators could resolve some of these conflicts as the regulators agree to relax the rules that are creating the conflict or to determine other means for resolving the conflict. In addition, our proposal

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[8] *CLERP 9, 2002* (Cth) s. 2.5.1 (Austl.). Other countries also have rigorous public accounting regulatory systems in place, including, for example, Denmark, France, Japan, Spain, Sweden, and the United Kingdom.

[9] Release at 4.

[10] We have previously highlighted these legal impediment issues by contributing to Deloitte & Touche LLP's March 31, 2003 comment letter to the Board regarding the Board's proposed registration system and Deloitte & Touche LLP's January 20, 2004 comment letter regarding the Board's audit documentation rules.

would alleviate difficulties with compound or duplicate sanctions in multiple enforcement proceedings.[11]

The burdens on the Board would also be greatly reduced. The Release's proposed firm-by-firm request system promises to present the Board with a significant amount of data to process and with highly particularized determinations to make. Moreover, the Board contemplates that its reliance determinations would be revised, and additional requests received, on the basis of any of a number of changes in the regulatory regimes of foreign countries. By resolving such issues through agreements with the regulators themselves, the Board may achieve certain assurances of oversight activities and not be charged with such an extensive monitoring process. Moreover, the Board would not be deluged with reliance requests from each individual non-U.S. public accounting firm. Instead, direct negotiation with a single non-U.S. regulator would at once resolve reliance issues pertaining to many non-U.S. public accounting firms.

Finally, determining the proper extent of reliance on the oversight for non-U.S. regulators through international conventions could lead to *mutual* recognition. Through mutual recognition, non-U.S. regulators may agree to rely on the Board for the oversight of U.S. public accounting firms.[12] The Board's proposed system of unilaterally determining the degree of reliance would not be likely to yield this significant benefit. Mutual recognition would not just be an advantage for U.S. public accounting firms. As the Board itself has recognized, "allowing oversight regimes to allocate their resources in the most cost effective manner" is an important objective.[13] By eliminating redundancies in the global oversight of public accounting firms and by allowing non-U.S. regulators to focus on their own domestic public accounting firms, with which they have a special expertise, mutual recognition would advance the Board's goal of eliminating corporate reporting failures from the global capital markets.

By reaching mutual recognition determinations through direct consultation with non-U.S. regulators, the Board would enhance the cooperation with non-U.S. regulators, would be better able to influence legislative change abroad, would facilitate the elimination of conflicts with non-

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[11] Briefing Paper at 4.

[12] Mutual recognition also could lead to a system where registration with a home country regulator is effectively the equivalent of registration with the Board. Rather than embracing such a system, the Release suggests that the Board's rules allow for the possibility that a non-U.S. firm could register with the Board by submitting the registration application to the home country regulator. *See* Release at 6. But, given that the Release then states the home country regulator must transmit the application to the Board, it is unclear what practical benefit, if any, this proposal would engender. In addition, as discussed in Section II.B. below, the Board should consider whether it has the statutory authority to assist non-U.S. regulators in either their inspections or investigations of U.S. firms and, to the extent the Board does have such authority, the terms under which the Board may share its own information with non-U.S. regulators.

[13] Briefing Paper at 1.

U.S. law that arise in the implementation of the Board's rules, and would be more likely to obtain the reciprocal benefit of the non-U.S. regulator's reliance on the Board for U.S. public accounting firms.

II. If The Board Were To Undertake Reliance Determinations On Its Own Initiative, The Board Should Make Several Modifications To Its Proposal

A. The Process For Reliance Requests Is Cumbersome And Needs Clarification.

As discussed above, we believe that the Board should replace its firm-by-firm submission system and, instead, make its reliance determinations through international conventions with non-U.S. regulators. If the Board were to choose to make reliance determinations outside of an agreed-upon international framework, the Board must modify its proposal to provide an orderly, reliable, and transparent process for those determinations. It is important to bear in mind when considering the proposed modifications below that they could also apply within a system of mutual recognition agreements with non-U.S. regulators that, we argue, the Board should adopt in place of its current proposal.

First, home country regulators—at the prompting of a non-U.S. firm—should be the parties responsible for providing the information necessary for a reliance request to the Board. If non-U.S. firms are required to characterize their domestic oversight systems, they risk embarrassment, rebuke, and delay from home country regulators for statements with which the regulator may not agree—for any of a number of certainly legitimate reasons. In addition, the Board is likely to receive more complete and accurate information if the submitted information constitutes the authoritative representations of the non-U.S. regulator itself, as opposed to the potentially disparate descriptions of the non-U.S. regulator submitted by two or more individual firms in a particular country.

Second, the Board should provide some timeframe within which it must make a reliance determination. In the Release, the Board encourages non-U.S. public accounting firms to petition the Board for a reliance determination "as soon as practicable after the approval of their registration application."[14] Nevertheless, the Release contains no indication of the time within which the Board will make a reliance determination or of the scope of its inspections while a request for reliance is pending. Without specification, the Board may embark on inspecting a non-U.S. registered firm as if it were a U.S. registered firm, even though a request for reliance may be indefinitely pending. Accordingly, we recommend that the Board make clear that reliance determinations will ordinarily be made within ninety days of a reliance request. In addition, the Board should state that full reliance will be the default presumption until the Board makes an affirmative decision to accord a foreign regulator less than full reliance.

Third, the Board should make its decisionmaking process in response to a reliance request more transparent. The current proposal does not require that the Board issue a written

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[14] Release at 9 n.12.

reliance decision and provides no hearing for the petitioning entity in the event of an adverse decision. Both a written decision explaining the reasons for a particular reliance action and a hearing are necessary to ensure that the Board is engaging in a reasoned and fair decisionmaking process. The proposal also states that the Board will conduct "discussions" with non-U.S. regulators regarding a reliance request.[15] The proposal, however, does not expressly contemplate that affected non-U.S. firms will be able to participate in those discussions. At a minimum, the Board should make available to affected non-U.S. firms any written correspondence on a reliance issue between the Board and non-U.S. regulators so that such firms may respond to issues raised in the Board's discussions.[16]

B. THE CRITERIA FOR MAKING RELIANCE DETERMINATIONS SHOULD BE MODIFIED

The Board has set forth "principles" for evaluating whether reliance on a non-U.S. regulator is appropriate. While the Board's principles reflect a possible method for structuring an independent and rigorous oversight system for a country's accountants, we are concerned that the Board's "principles" ignore other adequate methods of regulation. Specifically, the Board should be careful not to demand that foreign governments adopt exactly the Board's model in order to qualify for reliance. As the Board itself has stated, its rules should seek to "accommodate the variety of inspection systems found around the world."[17] In recognition that there are other legitimate methods for ensuring robust oversight of a country's accounting firms, we believe that the Board should modify its "principles" for making reliance determinations.

First, the Board should not place unduly heavy weight on whether a majority of a non-U.S. regulator's members are not licensed accountants. The Release states that the Board will inquire as to whether "a majority of the individuals with whom the system's decisionmaking authority resides does not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses for at least the last five years immediately before assuming their position within the system."[18] Before the Act, however, the U.S. system of accounting regulation through state regulatory bodies, in many instances, lacked any such disqualification of licensed accountants. Non-U.S. regulators cannot be faulted for having in place what, until 2002, was the U.S. model for regulating the accounting industry.

Although Congress decided that only two out of the five PCAOB members must be licensed accountants,[19] there are other valid methods for ensuring independence. For example,

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[15] Release at 9.

[16] In the course of this process, the firms could also provide the non-U.S. regulator with suggestions for improvement in light of the Board's oversight responsibilities.

[17] Briefing Paper at 2.

[18] Release at 11.

[19] Act § 101(e)(2).

foreign governments may have focused on ensuring that their oversight bodies had extensive expertise through permitting greater proportions of licensed accountants to sit on those oversight bodies, while still ensuring independence through strong conflict of interest rules. The mere fact that Congress chose a particular system to ensure the independence of the Board does not suggest that alternatives are illegitimate or inadequate or would somehow subject non-U.S. regulators to improper influence.

Second, the Board should not hold against a non-U.S. regulator an inability to provide all of its investigatory and regulatory information to the Board. The Release states that, in determining the degree of reliance on the non-U.S. regulator, the "Board would give great weight to the non-U.S. inspecting entity's willingness to agree to provide the Board or its staff, upon their request, the inspecting entity's workpapers or work product that document any inspection, evaluation or testing, and to provide the Board, in a form and with a level of detail agreed upon with the PCAOB, a report relating to any inspection, evaluation or testing."[20] As discussed previously, the legal regimes in many countries may make it impossible for the non-U.S. regulator to disclose some regulatory, investigatory, or inspection information to the Board. Indeed, the Board itself appears to lack the authority to disclose information gathered during an inspection and underlying an inspection report or other types of investigatory information to foreign regulators. Section 105(b)(5)(A) strictly prohibits the disclosure of inspection and investigatory information by the Board, renders that information privileged against legal discovery, and insulates that information from the operation of various freedom of information and public records acts. Notwithstanding this strong confidentiality provision, the Board is permitted to disclose such information to a carefully limited set of domestic law enforcement entities—the Attorney General of the United States, the "appropriate Federal functional regulator," state attorneys general, and "appropriate State regulatory authorit[ies]."[21] Regulators in non-U.S. jurisdictions are not, however, among the exceptions to the Act's confidentiality requirement. The Board should not penalize a non-U.S. regulator for an inability to do that which the Board is statutorily prohibited to do.[22]

Third, the Board should adopt more detailed principles for use in determining whether reliance can be placed on a non-U.S. regulator in the context of an investigation. The Release suggests that the Board's reliance determination for an investigation will be based on the "circumstances at hand," "the independence and rigor of the non-U.S. regulatory authority," and

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[20] Release at 13.

[21] Act § 105(b)(5)(B).

[22] On a related matter, the Board should specifically state that any information that it does receive through an arrangement with a non-U.S. regulator will be held confidentially by the Board. The same justifications for the statutory guarantee of confidentiality with regard to the Board's own investigatory information—including the protection of investigated public accounting firms and associated persons—would apply to similar investigatory information gathered by non-U.S. regulators. *See* Briefing Paper at 3.

the "non-U.S. authority's willingness to share information."[23] These broad statements provide insufficient guidance on the type of materials that should be submitted to the Board in support of a reliance request. We therefore urge that the final rule or accompanying release include additional detail regarding the principles that will be used in making reliance determinations for investigations. In addition, to bring some transparency to the process, we recommend that, as is the case with the reliance determinations for inspections, the extent to which the Board may place reliance on a non-U.S. regulator should be determined on a periodic basis for each non-U.S. jurisdiction that has made a reliance request, rather than on an *ad hoc* basis for each investigated non-U.S. firm.

C. THE STANDARD FOR CHANGING A RELIANCE DETERMINATION SHOULD BE CLARIFIED

The Board should also establish procedures and standards for any potential changes in a reliance determination that has already been made. The Release would require that non-U.S. firms renew their applications for reliance on non-U.S. regulators annually. This approach is unduly burdensome, inefficient, and should be unnecessary if the Board, in fact, establishes a cooperative relationship with the relevant non-U.S. regulator.

Instead, the Board should make clear that a reliance determination will remain in effect until a formal request is made to change the determination or the Board has notified the non-U.S. regulator and the affected firms of its intent to change the determination and all affected firms have an opportunity to submit comments on the proposed change. Such a modification will permit the Board to make fully informed reliance determinations without upsetting the legitimate expectations of regulated firms.

D. THE EFFECT OF THE RELIANCE DETERMINATION SHOULD BE STRENGTHENED

Although the Board's proposal embodies a system for making reliance determinations, the Release states that the Board may depart from an established reliance determination and perform its own inspection or investigation at any time.[24] We believe that the Board's reservation of this unfettered discretion is inconsistent with its commitment to cooperate with non-U.S. regulators. Indeed, the Board's statement that it may depart from a reliance determination at any time provides little incentive for non-U.S. firms and their home country regulators to undertake the extensive burdens necessary to seek a reliance determination from the Board.

At the same time, we recognize that circumstances may arise in which the Board may need to conduct its own investigation or inspection notwithstanding its prior reliance determination. Even if providing for such a possibility is necessary, the Board should at least establish standards and procedures that foster cooperation between the Board and non-U.S.

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[23] Release at 14.

[24] Release at 14.

regulators. The final rules, at a minimum, should specifically state that, once an appropriate level of reliance has been determined for a non-U.S. regulator, the Board will abide by that determination until the non-U.S. regulator demonstrably fails effectively to regulate its home country public accounting firms. To implement this standard, the Board's rules should establish a procedure under which a non-U.S. regulator is formally notified of the Board's concern and is guaranteed a minimum period of time in which to respond to the Board. Only after that period has passed, and the non-U.S. regulator has failed to offer an adequate response to the Board's concerns, should the Board be able to initiate its own inspection or investigation. Placing such procedures in the Board's rule would somewhat assure non-U.S. regulators that the Board is serious about cooperation and that it will not immediately trample on any cooperative arrangement in the event of a high profile issue in need of regulatory attention.

Moreover, the proposal contemplates that, for even those non-U.S. regulators accorded the highest levels of reliance by the Board, inspections of a registered non-U.S. firm would occur with the participation of Board-designated experts or other agents of the Board.[25] We are concerned that the Board does not appreciate the magnitude of the undertaking that such participation by Board experts or other agents would require. Just considering the affiliate non-U.S. firms of large U.S. public accounting firms, the Board's experts and other agents would be charged with attending hundreds of inspections under the proposed system. Because of various non-U.S. confidentiality laws discussed above, Board experts or other agents may not even have full access to the audit workpapers that are the subject of the audit. The Board's staff would then be required to execute its own, duplicate inspection report concerning the work of the non-U.S. regulator and accompanying Board experts or other agents.[26] We believe that global oversight resources would be much better allocated if the Board eliminated the requirement for Board agent participation in inspection by non-U.S. regulators, at least for those regulators afforded higher levels of reliance.

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[25] Release at 13.

[26] Release at 13-14.

CONCLUSION

We applaud the Board's efforts, in this Release and elsewhere, to establish a cooperative relationship with non-U.S. regulators and to eliminate redundancies in the Board and non-U.S. regulators' common oversight of non-U.S. public accounting firms that issue audit reports, or play a substantial role in the audit reports, of U.S. issuers. We believe, however, that there are more effective and efficient methods for the Board to accomplish those objectives while ensuring that its mandate to oversee public accounting firms is fulfilled. Accordingly, we ask that the Board adopt the suggestions outlined above. If you have any questions or would like to discuss these issues further, please contact P. Nicholas Fraser at (212) 492-4118.

Very truly yours,

/s/ Deloitte Touche Tohmatsu

cc: William J. McDonough, Chairman of the Board
Kayla J. Gillan, Board Member
Daniel L. Goelzer, Board Member
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January 26, 2004

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**PCAOB Rulemaking Docket Matter No. 013,
Proposed Rules Relating to the Oversight of
Non-U.S. Public Accounting Firms**

Dear Mr. Seymour:

Ernst & Young LLP ("Ernst & Young"), a U.S. registered public accounting firm, is pleased to submit comments on the proposal of the Public Company Accounting Oversight Board ("PCAOB" or "the Board") relating to the oversight of non-U.S. public accounting firms. Ernst & Young's affiliated firms located in foreign countries have provided assistance in the preparation of this letter.

We believe that the proposal reflects the Board's strong commitment to work cooperatively with non-U.S. regulators in order to achieve important objectives, such as improving audit quality and helping to restore public trust in the auditing profession. Ernst & Young shares those objectives, and we believe that international cooperation is the best means of achieving those goals. Moreover, we believe that these goals can best be achieved when the regulatory requirements are as clear as possible, and we are therefore seeking guidance with respect to certain international issues.

We have the following specific comments on the proposal:

1. The Release states at page 6: "Existing PCAOB Rule 2101 allows for the possibility that a non-U.S. firm could register with the PCAOB by submitting the required application via its home country registration entity, if required by that entity, which then would submit it to the PCAOB." We fully support the concept that foreign firms would be allowed to register with the PCAOB by submitting an application through the relevant foreign regulator. There is, however, some uncertainty about how the PCAOB intends to implement this option. This is because, contrary to the statement on page 6 of the Release, existing Rule 2101 does not provide for the possibility of home country registration, so this statement appears to be incorrect.[1] We strongly urge the Board to

[1] Existing PCAOB Rule 2101 states in its entirety: "Any public accounting firm applying to the Board for registration pursuant to Rule 2100 must complete and file an application for registration on Form 1 by following the

amend Rule 2101 so that it is consistent with the Release's description of that rule quoted above.

Allowing the filing of a registration form with local regulators rather than with the PCAOB would help accomplish the important objectives outlined in the PCAOB's Release and in its recent Briefing Paper on Oversight of Non-U.S. Public Accounting Firms (PCAOB Release No. 2003-020, October 28, 2003) ("Briefing Paper"). In those documents, the PCAOB states that it "seeks to become partners with its non-U.S. counterparts in the oversight of the audit firms that operate in the global capital markets." Release at 3; Briefing Paper at 1. Further, the Board has emphasized the establishment of "an efficient and effective cooperative arrangement" with foreign regulators. *Id.*

This goal of "partnership" and "cooperation" with foreign regulators could be significantly advanced if non-U.S. accounting firms were permitted to file their PCAOB registration applications with their local regulators. Such a procedure could provide the building block for other aspects of cooperative relationships, including those with respect to inspections and investigations.

With these goals in mind, if the PCAOB were to amend Rule 2101 to be consistent with the description in this Release, the Board might appropriately state that a non-U.S. firm could register with its home country if home country registration is "permitted" by the local regulator, rather than "required" by the local regulator as stated in the Release at page 6. Such a change would provide greater flexibility and would further advance the goals of international regulatory cooperation. We also suggest that, if the Board were to permit home country registration, it should provide foreign regulators with some substantive and meaningful role in the registration process. For example, the foreign regulator should be encouraged to advise the Board on the impact of foreign confidentiality and other laws on certain registration form disclosure requirements and to work with relevant accounting firms in addressing these issues. Furthermore, the Board could determine the extent to which compliance by a non-U.S. firm with the local registration requirements, both in terms of content and form, might be deemed to satisfy all or part of the Board's own registration requirements.

2. The Board proposes a "sliding scale" with respect to reliance on the work of oversight systems in non-U.S. jurisdictions. Release at 8. Under this approach, the Board would more readily defer to regulatory regimes that provide oversight of accounting firms in a manner similar to that provided by the Board than to those that do not exercise such oversight. As to the latter, the Board itself would perform inspections and investigations of registered accounting firms in the relevant jurisdictions.

This proposal does not seem to take into consideration international law conflicts. There are jurisdictions outside of the United States that, absent some agreement with or

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instructions to that form. Unless directed otherwise by the Board, the applicant must file such application and exhibits thereto electronically with the Board through the Board's web-based registration system. An applicant may withdraw its application for registration by written notice to the Board at any time before the approval or disapproval of the application."

cooperation from local authorities, would prohibit or restrict U.S. regulators from entering the local jurisdiction in order to inspect or investigate local entities or persons. Accordingly, no matter how a particular jurisdiction fares on the sliding scale, the PCAOB should take the approach of working cooperatively with local regulators with respect to any inspection or investigation of a registered accounting firm in a non-U.S. jurisdiction.

In this regard, the "sliding scale" approach is not altogether consistent with the PCAOB's stated goals of cooperation and partnership with foreign regulators. There may be foreign regulators that would fare poorly on the factors that comprise the proposed sliding scale but that would nonetheless be willing and able to work with the PCAOB and assist it in the performance of inspections and investigations. That willingness to cooperate in the global regulation of accounting firms seems far more important as a factor in guiding the PCAOB's handling of foreign inspections and investigations than do the elements of the proposed sliding scale (such as whether the foreign regulators are appointed by the relevant government, whether the foreign regulators hold accounting licenses, and so on).

3. Proposed Rule 4011 would permit a foreign registered accounting firm to submit a written petition requesting that the Board rely upon inspections conducted by a home country system. The petition would describe in detail the non-U.S. system's laws, rules, and other information to assist the Board in evaluating the system's independence and rigor.

   We support this element of the proposal. We expect that many of our non-U.S. affiliates will work with other accounting firms in the relevant jurisdiction, and with local regulators, in developing such a petition. That process will, by itself, likely lead to a healthy examination of the local regulatory regime and could result in its strengthening.

   We do suggest, however, that foreign firms and regulators be permitted an alternative approach, whereby the regulator – rather than, or in addition to, the accounting firms – be permitted to submit a petition. This is because the proposed rule essentially requires a foreign accounting firm to evaluate and to describe the effectiveness of its own regulator. In some jurisdictions, this may be an awkward process, and allowing a regulator-filed petition as an alternative seems advisable.

4. We agree with certain elements of the sliding scale. For instance, it seems important that the foreign regulator be independent of the accounting profession and have an independent source of funding. We do not, however, agree with other elements of the sliding scale. In particular, the scale places emphasis on whether the regulators are non-accountants – *see, e.g.*, page 11 of the Release: "whether a majority of the individuals with whom the system's decision-making authority resides does not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses for at least the last five years immediately before assuming their position within the system." We acknowledge that Congress, in Section 101(e) of the Sarbanes-Oxley Act, required that the PCAOB consist of a majority of non-accountants, but we submit that this decision largely reflects the unusual time and

circumstances that gave rise to the Act's passage. In any event, we do not think that a U.S. value judgment on this issue should be extended to foreign regulators.

5. The Board states (Release at 15) that it will assist foreign regulators by inspecting or investigating U.S. firms that audit or play a substantial role in the audits of "public companies in non-U.S. jurisdictions." This commitment is apparently meant to encompass a situation where the company as to which the U.S. firm "audits or plays a substantial role" is not itself an SEC registrant. *Id*. The Release further states that additional rulemaking is "not necessary to carry out the Board's authority in this area." Release at 15 n.13. Although we believe that such assistance to foreign regulators would be consistent with the international cooperation goals outlined in the release, we query whether the Board does have the statutory authority to conduct such inspections or investigations. The Board's statutory authority relates to issuers, which would not include non-U.S. public companies that do not meet the definition of "issuers" under the Act.

   In this regard, if the Board believes it has the authority to assist foreign regulators in its inspection or investigation of registered accounting firms with respect to non-issuers, then it follows that the Board also has the authority to inspect or investigate registered firms generally as to their audit work on non-issuers. Such an assumption of authority would significantly expand the Board's powers beyond its statutory authorization.

   In addition, to the extent the Board intends to assist foreign regulators in their investigations, we note the importance of the strict provisions of the Sarbanes-Oxley Act (see Section 105(b)(5)) relating to confidentiality, discoverability, and use of information that the PCAOB receives from registered accounting firms. These protections would not automatically apply if the PCAOB were to share materials with foreign regulators. As the PCAOB develops cooperative relationships with foreign regulators, which we strongly support, we urge the Board to ensure that the confidentiality of information that is shared with the PCAOB's foreign counterparts be protected to the same extent as set forth in the Act.

6. Proposed Rule 5113 states that the Board may, in appropriate circumstances, "rely upon" the investigation of a registered accounting firm and sanctions imposed upon that firm by a foreign regulator. Release at 14. It is not clear from the Release, however, what the Board means by the phrase "rely upon" in this context. If the Board is suggesting that it will use the results of a foreign regulator's investigation, including a finding of violation, as the basis for the Board's own disciplinary proceeding against the relevant foreign firm, we respectfully disagree.

   Under Section 105(c)(4) of the Sarbanes-Oxley Act, the PCAOB may only impose sanctions based on a violation of "this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards." The PCAOB does not have authority to impose sanctions on registered accounting firm based on violation of non-U.S. laws. (By contrast, the SEC sought and obtained explicit statutory authority to

impose sanctions on foreign securities professionals, such as broker-dealers, based on a foreign court or foreign regulator's finding of violation of certain foreign laws. *See* International Securities Enforcement Cooperation Act of 1990, Pub. L. No. 101-550, § 203(a), 104 Stat. 2714 (1990) (codified as amended at Section 15(b) of the Exchange Act)). Accordingly, the proposed rule might properly be amended so that it states merely that the PCAOB might rely upon "the assistance" of a foreign regulator in performing its own investigations.

7. The Board has proposed a three-month extension of time for the registration of non-U.S. accounting firms. We support this proposed extension. In this regard, we are taking the opportunity of this comment letter to bring the Board up-to-date on some of the non-U.S. registration-related issues that the U.S. firms have been dealing with thus far. We are doing so in part with the expectation that the Board might provide greater transparency and guidance with respect to certain matters.

U.S. accounting firms were required to be registered with the Board no later than October 22, 2003. One of the requirements was that registering firms were required to obtain consents to cooperate from "associated persons" of the registering firm.

Although not stated in the rulemaking releases or public meeting on this matter, the Board's staff informally advised accounting firm representatives that such consents were required from non-U.S. accounting firms that have any involvement in the U.S. firm's audit of a public company and that, if such a consent could not be provided because of limitations under local law, the U.S. firm could submit a legal opinion describing foreign legal impediments as set forth in the Board's Rule 2105. These firms then engaged in an intensive worldwide effort to determine the need for and, where appropriate, to obtain legal opinions describing foreign law constraints in dozens of countries throughout the world, and these were submitted to the Board as part of the U.S. firms' registrations.

The Board then allowed the firms to register, but in its letters approving firms' registration applications the Board's staff stated an additional legal requirement. In the letter received by Ernst & Young, the Board's staff stated that the firm's "statutory obligation to cooperate" includes a requirement of "obtaining from audit clients and, to the maximum extent practicable, from other third parties any waivers or consents that would overcome any legal obstacle to the associated person's cooperation." No such requirement is set forth either in the Act or in the Board's rules, and this was the first time that the Board or its staff stated that such a requirement exists.

As a result of this PCAOB staff statement, and because of additional and overlapping workpaper-production requirements imposed by Section 106(b) of the Sarbanes-Oxley Act (pursuant to which a foreign accounting firm providing material services on the audit of a U.S. registrant is "deemed to have consented" to production of its audit workpapers), the U.S. firms have informed their U.S. SEC audit clients that they must seek waivers from their majority-owned foreign subsidiaries so that the registered accounting firms can produce workpapers to the PCAOB or SEC without regard to client claims of confidentiality or other rights. The U.S. firms have also required their affiliated non-U.S.

firms to consent to production of their workpapers and related information to the extent they can do so without violating their local law.

We have briefly reviewed the history of this matter because it strikes us as important that an undertaking of this magnitude, with broad international law implications, should be as transparent and open as possible. In addition, there are several related issues that we believe the PCAOB should address, either in the context of this rulemaking or elsewhere.

First, although our firm, and other major accounting firms, have instructed their foreign affiliated firms that they must provide consents, we have made clear that those consents must only be to the extent permitted under the relevant local law. Thus, we have not requested that any foreign firm provide a consent that would require it to violate a relevant local law, such as applicable bank secrecy or other laws. Likewise, we have instructed our clients that they must provide us with waivers of relevant legal impediments, but we have informed them that we are not asking them to waive legal impediments that are not, as a matter of their local law, subject to waiver (for example, bank secrecy or national defense laws in certain jurisdictions might preclude a client from waiving the impediments under these laws, or blocking statutes in some jurisdictions might prevent an effective waiver). Although both of these approaches seem obvious as a matter of international comity and practicality, the approaches have not explicitly been acknowledged, either by the PCAOB in its administration of Section 102 (the registration requirements) or by the PCAOB and SEC in their administration of Section 106 (the auditor workpaper production requirements). We urge the PCAOB (and the SEC) to do so.

Second, we do not know what the Board expects us to do in response to the Board staff's letter relating to waivers from "third parties." The range of possible "third parties" is vast, and the rights they may have under foreign laws are uncertain. Efforts to obtain such waivers would appear to entail a level of complexity and difficulty many times greater even than the complex and difficult efforts currently underway with respect to U.S. SEC audit clients. Guidance on this matter is essential.

Third, although we have instructed our clients that they must provide us with waivers of relevant legal impediments (to the extent such waivers are legally permissible), we cannot inform our clients of the consequences of failing to provide such a waiver, such as whether we might be barred from signing an audit opinion on such a client. This is because we do not know what those consequences might be. We believe that the consequences on an issue of this importance should be known.

Fourth, the U.S. accounting firms, after discussions with counsel for certain audit clients and with others, believed it would be feasible to request their U.S. SEC audit clients to obtain confidentiality waivers from the clients' non-U.S. subsidiaries. However, we have been informed by certain of our non-U.S. accounting firm affiliates that it might not be possible for those firms – when they register with the PCAOB later this year – to instruct their foreign private issuer clients to provide similar waivers from their non-U.S. subsidiaries. We have been told that some of these foreign private issuer clients might conclude that they cannot cooperate in a meaningful way. We believe that further

guidance from, and discussions with, the PCAOB – together with the SEC – on this matter is essential. Non-U.S. companies that avail themselves of the U.S. capital markets have never been required under SEC regulations to waive applicable confidentiality or other protections. Such companies should be advised whether the PCAOB (and the SEC, pursuant to Section 106) interprets the Sarbanes-Oxley Act as erecting such a waiver requirement as a condition of access to the U.S. markets – something that the SEC has never chosen to do. This is a significant regulatory change, and the new regulatory policy should be as clear as possible.

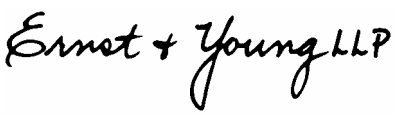
Fifth, despite the enormous efforts being expended obtaining thousands of waivers and consents from entities throughout the world, there is no guarantee that, in the context of an actual financial fraud or audit failure, this new regulatory apparatus will work as intended. The PCAOB and SEC might well need to rely upon traditional enforcement mechanisms, which in an international context must include the involvement and support of foreign governments and regulators. We believe it would be most productive for the PCAOB to continue its efforts in developing cooperative relationships with foreign regulators. In this regard, we are committed to doing what we can to facilitate such arrangements and to strengthen the development of non-U.S. regulatory bodies.

In sum, the extraterritorial reach of the Sarbanes-Oxley Act with respect to non-U.S. accounting firms has created a wide range of complex international law problems. We are fully aware of the challenges confronted by the PCAOB in dealing with its statutorily-mandated responsibilities, and we recognize how determinedly the PCAOB and its staff have been approaching these problems. On our part, the unprecedented new requirements have caused us and the other major accounting firms to commit enormous resources to obtain relevant waivers and consents from thousands of non-U.S. accounting firms and public audit clients. These efforts will be worthwhile if they help achieve an important objective, namely, effective PCAOB and SEC oversight of compliance with SEC and Board regulations. Such oversight is essential to the improvement of audit quality and to the increase of public trust in our profession and the integrity of the financial reporting process. But, to a large extent, we are caught between two oftentimes conflicting sets of requirements: the document production/cooperation requirements of Sections 102 and 106 of the Act, and the professional secrecy, client confidentiality, data protection and other legal impediments of relevant foreign jurisdictions. Accordingly, we have described the worldwide initiatives in this area to emphasize the importance of a consistent acknowledgement by the PCAOB, as well as the SEC, of the limitations imposed by foreign laws and of the need for a clearer and more transparent statement of the goals and requirements in this area.

* * *

We appreciate the opportunity to provide these comments, and we would welcome discussion of any points that require further explanation.

Respectfully submitted,



Ernst & Young LLP

EUROPEAN COMMISSION
Internal Market

Director General

Brussels,
Internal Market DG/GL D(2004) 1091

Office of the Secretary
PCAOB
1666 K Street, N.W.
Washington DC 20006-2803
United States of America

Dear Sirs,

Subject : PCAOB Release No. 2003-024; PCAOB Rulemaking Docket Matter No. 13 Proposed rules relating to the oversight of non-U.S. public accounting firms

We are grateful for the opportunity to comment on the proposed rules relating to the oversight of non-U.S. public accounting firms. These rules proposed by the PCAOB have important effects on US-listed EU companies and EU audit firms. We make the following comments in the context of the importance that the European Commission attaches to a constructive and open regulatory dialogue between the United States and the European Union. Such a positive dialogue is crucial to ensure consistent worldwide regulation of public accounting firms based to the largest extent possible on home country oversight and control. Cooperation between international regulators is essential – but it must be based on mutual respect of each partner's laws and jurisdiction.

We have closely examined the Release and in particular Rules 4011 and 5113. It contains several positive elements for building an EU-US co-operative approach relating the oversight of non-U.S. public accounting firms.

However, we believe that a number of issues in the Release can be improved so that the rules better reflect a "true partnership" in the regulation of public accounting firms in cross-border cases. This will ensure the necessary predictability to European audit regulators and oversight systems on the conditions and practical application of the cooperative approach. In particular, we are concerned about the following issues:

Inspections

i. Rule 4011 "inspections of foreign registered accounting firms" clarifies the principles for the PCAOB's assessment of foreign systems but the section-by-section analysis also emphasises that its principles and criteria are illustrative and not exhaustive. This could mean that other criteria could be used in addition giving the PCAOB rather an open-ended discretion to assess foreign systems. The result would be considerable uncertainty for the PCAOB's foreign counterparts whose systems will be judged. This uncertainty is amplified by the notion of the sliding scale of involvement of the PCAOB in the oversight of foreign audit firms. The clear impression is that the only benchmark is the PCAOB's own

structure and competences whereas it is clear that there are different ways to achieve the equivalent ends.

ii. Under a true EU-US cooperative approach on auditor oversight based on effective equivalence of regulation and oversight, we do not consider the direct participation of PCAOB inspection personnel in EU quality assurance reviews to be necessary in every case. Although we believe that systematic participation might be of interest as a measure of mutual confidence building at the beginning, we doubt whether this needs to be done on a permanent basis. We also question whether both sides need to allocate resources to such foreign participation, in particular, once initial experiences have been positive. We understand that the PCAOB is mandated to carry out inspections, especially the application of US-GAAP and PCAOB auditing standards. However, direct participation by PCAOB inspectors is problematic for a number of legal reasons and could even cause constitutional difficulties in some Member States. Therefore, such participation must be in accordance and agreement of the authority of the Member State where the audit firm is located. As in the PCAOB's briefing paper, we would also like more emphasis in the Rule placed on the importance of the PCAOB and foreign oversight bodies drawing up joint work plans as the basis for joint cooperation. Furthermore, for those of the oversight systems considered to be in the top scale, participation of PCAOB personnel should be limited to cases where knowledge of US standards cannot be secured by any other means. In this context it would be helpful if the PCAOB clarified in its rules whether the designated expert could also be a home country expert in US accounting and auditing standards. In any case, once the SEC will recognise IAS/IFRS for US listing purposes the need for such expertise would seem unnecessary for EU issuers in the US.

iii. Rule 4011b requires each foreign audit firm to submit a written petition describing the non-US system of oversight to assist the PCAOB in assessing this non-US system. We doubt whether such a procedure is efficient and would be in line with a true cooperative approach with foreign oversight bodies. To minimise bureaucracy we suggest the PCAOB obtains such information once directly from the foreign oversight bodies.

Investigations

Rule 5113 "reliance on investigations of non-U.S. authorities" indicates the PCAOB's willingness to cooperate with foreign investigative authorities. We also welcome that the PCAOB is prepared to rely on sanctions of foreign jurisdictions imposed on these audit firms. However, here again the conditions for such co-operation are not specified clearly enough and so there will be an unacceptable high degree of uncertainty on how cooperation on investigations will work. We also believe that foreign interference in judicial proceedings in another country is not appropriate and we suggest that this (mutual) principle should be introduced into rule 5113.

PCAOB assistance to EU oversight bodies

We would welcome a clear and unequivocal statement in the rules of its willingness to assist non-U.S. oversight bodies in the oversight of US audit firms in the same way as it demands foreign counterparts be willing to provide assistance to the PCAOB for audit firms established in their territory. The Release reduces the notion of reciprocal co-operation to a small section worded in an ambiguous way. In this regard, we would

welcome the inclusion of cooperative procedures with foreign oversight systems in the PCAOB rules, based on the principle of reciprocity.

Legal conflicts

The present drafting of the rules does not take account of the fact that there are potential conflicts of law between the concept of US oversight on foreign audit firms laid down in the proposed rules and domestic Member State laws. Unlike the PCAOB briefing paper (PCAOB Release No. 2003-020, 28 October 2003), the proposed rules on inspection and investigation of foreign accounting firms do not recognise that conflicts of law may occur (e.g. secrecy rules; confidentiality; employment laws …). For example, in the PCAOB briefing paper there was a recognition that the PCAOB would work with the home country system "… to attempt to resolve potential conflicts of laws … including the use of special procedures such as voluntary consents or waivers …". There is no such language in the rules. This is an issue which is of crucial importance for the EU and therefore we urge their inclusion.

* * *

To summarise, we would urge revision of the Release to take account of the points mentioned above with a view to making much clearer the reciprocal benefits of a real co-operative approach with the PCAOB. Our comments have in particular underlined that on the basis of the current draft our Member States and the audit firms established in their territory are uncertain as to what the co-operative approach would mean in practice.

We trust that our comments will help the definition of the PCAOB rules that form the basis for a full EU-US co-operative approach regarding auditor oversight. We are open to discuss these matters with you further in the near future.

Yours sincerely,

Alexander SCHAUB
Director-General

Date

26 January 2004

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Dear Sirs,

Re: PCAOB Rulemaking Docket Matter No. 013 – "Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms"

FEE (Fédération des Experts Comptables Européens – European Federation of Accountants) is pleased, as the representative organisation of the European accountancy profession, to comment on the exposure draft released by the PCAOB on 10 December 2003 on "Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms" (referred to as "the proposed rules").

FEE shares the objectives of the PCAOB to enhance the efficient functioning of the capital markets, to protect investors and to help restore public trust in the auditing profession by improving audit quality and by ensuring effective and efficient oversight of audit firms. FEE is generally supportive of the overall intention of the PCAOB to develop co-operative arrangements with its foreign counterparts to enable it to place reliance on the home country systems for registration, inspections, investigations and adjudications.

We are in favour of high level principle-based standards which we believe will also form the basis for the soon to be proposed revised European Commission Eighth Company Law Directive. A principle-based framework, with sufficient credible detail, allows for the use of judgement concerning the different ways in which oversight and quality assurance arrangements can apply principles effectively and recognizes the need for a proper transparent process and robust discussion.

However, we regret that the proposed rules do not support "mutual co-operation with other high quality regulatory systems that respects the cultural and legal differences of the regulatory regimes that exist around the world" announced in the PCAOB Briefing Paper on "Oversight of non-U.S. Public Accounting Firms."

We consider this to be the crucial point. FEE is firmly of the view that robust oversight is most effectively provided in the public interest at national level, provided that within the EU there is also a body charged with co-ordination and that there is effective global co-operation. Our discussion paper on oversight, issued in September 2003, clearly stated the European profession's commitment to oversight at the highest level of rigour and, as to co-ordination, went further than the proposals of the European Commission set out in its Communication in May 2003.

The stance taken by the PCAOB on oversight will be a crucial element in a successful outcome in terms of public and investor confidence in the audit function in the EU. If it in effect largely ignores the established or developing systems for quality assurance in the EU, or rates certain systems as weak because of the way in which they achieve shared objectives, this is unlikely to contribute to the most effective oversight possible and its rapid further development where necessary.

Limited co-operation, based only on the PCAOB model, offers a difficult prospect. Audits of listed companies in the EU may take on a different value in terms of quality (thus itself perhaps undermining the public perception of all audits). There is a risk of unseemly litigation between European firms or oversight bodies and the PCAOB, driven by the imperatives of some future scandal and conflicts

between PCAOB rules and national law. There might also, in a particular case, be the risk of inconsistent findings between a national oversight system and the PCAOB. Overall, limited co-operation offers ineffective solutions. In such a scenario, the benefits of continuous development of existing systems could well be lost.

By contrast, FEE supports a co-operative approach that builds on what has already been achieved in the European Union and, if judged necessary, identifies how regimes in individual EU countries could meet the highest level of PCAOB's specific assessment within a short period of say three years. The PCAOB has many good ideas to bring to this process and European systems of quality assurance and oversight also have much valuable knowledge to share. The higher the level of co-operation the more likely it is that audit regulation will be effective and efficient and the less likely it is that issues will be missed. FEE therefore encourages the PCAOB to be actively engaged with European Union initiatives to improve European quality assurance.

Because of the importance of the issues raised by the proposed rules we are sending a copy of our response to the International Federation of Accountants (IFAC) and the European Commission.

In addition to our overall comments on matters of principle, this letter includes comments on specific paragraphs.

Overall comments

Status of explanatory material in the release

The status of the explanatory material in the release on Pages 2 to 16 of the proposed rules, as well as the information given in the Section-by-Section-analysis in Appendix 2, is unclear. We would appreciate further clarification as to whether the additional guidance included in these pages and Appendix 2 will be included and binding upon the PCAOB in the final rule.

Generally, we would welcome more transparency in the standard setting process that is adhered to by the PCAOB. Specifically, a statement providing clarity on the authority of the PCAOB rules and other pronouncements would be most helpful.

Lack of overall transparency

We have serious concerns about the surprising general lack of transparency in the evaluation process that the PCAOB will apply to determine the independence and rigour of a non-U.S. oversight systems under the proposed rules. The reasons for this concern are twofold:

(1) The description of the five criteria for determining the independence and rigour of a non-U.S. system is not included in the rules themselves but only in the "Section-by-Section Analysis" and it is indicated that these criteria are intended as illustrative only and are not exhaustive; and

(2) No reference is made to, and no information is included on, the benchmarks that will be used to evaluate an oversight system against these criteria.

We believe that the PCAOB's far-reaching discretion, enhanced by the frequent use of "*may*" in the context of placing reliance on a non-U.S. oversight system, will result in unintended uncertainty with respect to the evaluation by the PCAOB of any particular oversight system and therefore may be detrimental to the desired co-operative approach.

Proposed rule 4011 (c) (2) indicates that it is the PCAOB's intention to take into account "*any other information* that the Board may obtain concerning the level of the non-U.S. system's independence and rigor" to determine the degree of reliance on the non-U.S. inspection. It is understood, perhaps incorrectly, that this would be the case without any corresponding feedback and discussion with the jurisdictions' appropriate entity or entities regarding this other information, as such a procedure is not clearly described in the proposed rules. We suggest that the PCAOB should further clarify what is to be understood by "any other information". We also suggest that the PCAOB should be required to discuss such other information and its influence on the evaluation of and subsequent reliance on the non-U.S. system with the appropriate entity or entities, thus allowing the opportunity to identify potential improvements and to avoid potential misunderstandings.

The Section-by-Section Analysis included in Appendix 2 states in the first paragraph on page A2-3 that "Although not stated in the Rule (4011), …, the Board would consider criteria, for example, as described below, that indicate a non-U.S. system's comportment with the principles set forth in the Rule." We urge the PCAOB to include the criteria or principles as described in Appendix 2 in proposed Rule 4011 and to include information on the benchmarks which will be used to evaluate not only a petition for an oversight system but also "any other information" as further specified in our previous paragraph against these criteria or principles. Such transparency is desirable for instance to avoid the appearance of treating one jurisdiction's oversight system inconsistently from any another jurisdiction's system.

Exclusively regulator-to-firm approach is inadequate for evaluation of oversight systems

The proposed Rule 4011 (a) indicates that "*a foreign registered public accounting firm* that is subject to an inspection under the laws, rules, or professional oversight system in the jurisdiction in which it is organised and operates may request that the Board rely on that inspection in conducting an inspection of the firm…". In the written petition the foreign registered public accounting firm "describes the *non-U.S. system's* laws, rules and/or other information to assist the Board in evaluating *such system's* independence and rigor."

This is a reasonable starting point for the evaluation process but the consequential need for interaction between the PCAOB and the home country oversight system is not clearly and explicitly addressed in the proposed rules. For example, proposed rule 4011 (c) (2) simply indicates that the PCAOB will evaluate "any other information the Board may obtain concerning the *level of the non-U.S. system's* independence and rigor…" whereas proposed Rule 4011 (c) (3) more appropriately refers to "discussions with the appropriate *entity or entities within the system* concerning an inspection work program."

We can support the option for a firm to request the PCAOB to rely on its home country oversight system and to submit a high level description of that system. However, the requirement for each individual foreign registered public accounting firm to submit detailed descriptions of the non-U.S. system's laws, rules and so on is neither practical nor fully cost-effective. We also fail to see any corresponding benefit to the public interest. In our opinion this requirement for individual firms is also in contrast with the PCAOB's stated intention on Page 8 of the Release "… to develop an efficient and effective co-operative arrangement …" and to allow the Board to allocate its resources in the most cost-effective manner. It is surely inappropriate and insufficient that the detailed information requirement is for each of the individual audit firms to fulfil instead of the PCAOB obtaining all the details that are required from the oversight bodies in each jurisdiction.

We believe that such a co-operative arrangement should consistently be applied on a regulator to regulator basis and is a matter for the PCAOB and the oversight authorities in any given jurisdiction and not for the individual audit firms.

We believe that the PCAOB would itself be faced with the risk of duplicated and even somewhat inconsistent information if several individual firms were to submit their own private descriptions and

translations in respect of one and the same system. Moreover this requirement would lead to excessive cost and efforts on the part of each public accounting firm as well as for the PCAOB.

Confidentiality and data protection issues

Certain requirements in respect of inspections and investigations and adjudications which are not proposed to be amended for non-U.S. public accounting firms in the proposed rules are likely to conflict directly with confidentiality requirements and data protection legislation. The practical impossibility of obtaining all of the relevant consents to share information casts serious doubt on the ability of *any* audit firm in many EU jurisdictions to comply with all the proposed rules. This could have a severe impact on investor confidence, the credibility of audited financial statements and even perhaps the standing of the PCAOB.

The general "duty to co-operate with inspectors" and "… comply with any request … to provide access to, and the ability to copy, any record in the possession, custody, or control of such a firm …" (Rule 4006) will inevitably result in legal conflicts concerning confidentiality obligations and data protection issues. Similar issues will arise in cases where the PCAOB requires "Testimony of registered public accounting firms and associated persons" (Rule 5102) and "Production of audit work papers and other documents" in investigations (Rule 5103).

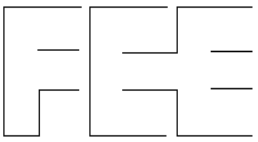
As the proposed rules include no provision for exemption, a registered public accounting firm will apparently not be permitted to object to, or not comply with, any requests which the PCAOB subsequently may make based on the reason that the request infringes its jurisdiction's law. With respect to inspections, investigations and adjudications there does not appear to be an exemption rule similar to Rule 2105 "Conflicting non-U.S. laws" that permits an applicant to withhold information from its application for registration when submission of such information would cause the applicant to violate a non U.S. law. Therefore, it seems necessary expressly to include such an exemption in amendments to the proposed rules for inspections, investigations and adjudications for foreign registered public accounting firms.

Similarly, confidentiality requirements and data protection legislation will result in the difficulty for many of the public accounting firms in the Member States of the European Union to provide all the information which the PCAOB may request in future. Although we appreciate the PCAOB's proposal to amend the Registration Rule 2100 to provide a three-month extension of the registration deadline for foreign public accounting firms, this does not resolve the basic issue of confidentiality and data protection described above. Registration with the PCAOB would subject not only European Union public accounting firms, but perhaps also the oversight authorities in their jurisdiction, to PCAOB rules in circumstances where they were unable to comply with them in significant respects due to local legislative restrictions.

It is particularly in respect to these potential conflicts of law that we regret that the constructive determinations as included in "Potential Conflicts of Law" in the PCAOB Briefing Paper on "Oversight of Non-U.S. Public Accounting Firms" seem not to have been retained.

Lack of consideration for quality aspects of non-U.S. oversight systems

The PCAOB has included in the release paper and proposed rules certain criteria intended to be used in its evaluation of the independence and rigour of a particular home country oversight system. We are concerned that the examples of such criteria to assess the adequacy and integrity of the home country system are based primarily, if not indeed exclusively, on the U.S. system for inspections and investigations and adjudications of U.S. public accounting firms. Perhaps it is thought that an oversight system of any other kind cannot readily be considered consistent with the PCAOB's mandate under the Sarbanes Oxley Act, although this is not mentioned in the proposed rules. Such an appreciation would



appear inconsistent with the tone of the Briefing Paper and the wide discretions afforded the PCAOB under the Act.

Although we appreciate that the PCAOB evaluation criteria will necessarily include comparison with the U.S. system, the PCAOB should be prepared to acknowledge that established non-U.S. systems, whilst different in form and details from the U.S. system, may, with perhaps some improvements, be equally effective and efficient in operation as the U.S. system may itself prove to be. Therefore we suggest that the PCAOB amends the rules and guidance thereon to allow a constructive evaluation of any given oversight system in its entirety and not merely consider whether it has the same features as the U.S. system. The proposed approach as currently drafted does not seem to us adequately to take into account provision for the various forms of regulatory systems resultant from different legal traditions in jurisdictions outside the U.S., nor does it appear to provide a means of building on established systems.

It is also in this respect that we regret that the PCAOB has not retained its recognition as included in the PCAOB Briefing Paper on "Oversight of Non-U.S. Public Accounting Firms" "that not all jurisdictions have inspection programs that are independent of the auditing profession" and "that the co-operative approach it envisages would accommodate the variety of inspection systems fund around the world".

We advocate that the main criteria for an efficient and effective oversight system should be professional competence and independence, criteria which are applied in European oversight systems in order to adhere to the minimum requirements of the Recommendation on Quality Assurance for Statutory Audits in the European Union, which the European Commission released in November 2000. These requirements are intended to become part of the modernised Eighth European Union Company Law Directive, which is currently under revision. The last paragraph starting on Page A2-3 in the Section-by-Section Analysis included in Appendix 2 focuses on ensuring that the auditing and accounting profession will not be in the majority amongst the individuals with whom the system's decision-making authority resides. We are supportive of this requirement but equally urge the PCAOB to focus also on the professional competence and knowledge of such individuals. We believe that it is essential that an adequate number, but not a majority, of such individuals has current technical and practical professional experience in the areas of accounting, auditing, ethics and quality assurance standards.

Inconsistent reliance upon non-U.S. inspection versus non-U.S. investigation

The PCAOB Briefing Paper on "Oversight of Non-U.S. Public Accounting Firms" indicated that under the co-operative approach the PCAOB would be able to place full reliance on non-U.S. oversight systems in appropriate circumstances both for inspections and for investigations and sanctions.

We regret that in the Section-by-Section Analysis included in Appendix 2 on Pages A2-2 to A2-6 and in the explanatory material included in the Release on Pages 6 to 14 of the proposed rules the possibility of full reliance on non-U.S. oversight systems for inspections has not been retained, as they provide that the PCAOB will always play an active role in the process, both related to the selection of the individual audit files to be inspected and the effective execution of the quality assurance engagement itself. This seems to be in contrast with the Section-by-Section Analysis included in Appendix 2 on Pages A2-6 and A2-7 and in the explanatory material included in the Release on Pages 14 and 15 of the proposed rules which allow for reliance in appropriate circumstances upon the investigation or a sanction of a foreign registered accounting firm by a non-U.S. authority.

This apparent inconsistency in reliance upon non-U.S. oversight authorities in respect of inspection versus investigation and sanctions merits reconsideration in favour of restoring the possibility for full reliance on inspections performed by non-U.S. authorities or at least further clarification.

Involvement of government and the accounting profession

The last paragraph starting on Page A2-3 in the Section-by-Section Analysis included in Appendix 2 indicates that "In assessing the independence of the non-U.S. system's operations from the auditing profession, the Board would consider, for example, whether the individual or individuals with whom the system's decision-making authority resides have been appointed, or otherwise selected, by the *government* of the non-U.S. jurisdiction."

It should be noted that in certain Member States of the European Union independence of such individuals might be assured otherwise. They might for instance have been appointed by an oversight body independent from both the profession and the government under arrangements established or approved by the government. We repeat that we believe that the main criteria for an efficient and effective oversight system are professional competence and independence, as described in more detail under the general comment on "Lack of consideration for qualities of non-U.S. oversight system", and we urge the PCAOB to take these alternatives fully into consideration in its deliberations.

Need for due process

As indicated in the general comment on "Lack of overall transparency", the PCAOB's discretion in evaluating and determining the level of reliance on a non-U.S. oversight system is far-reaching with no apparent opportunity for discussion with, or a hearing of, the appropriate entities. This will inevitably result in uncertainty about the fairness of the evaluation process and the consistent treatment of different jurisdictions' oversight systems.

It is therefore essential that a due process be described in the rule providing for co-operative discussion with the entities under consideration, feedback on the PCAOB's decisions and even a hearing between the PCAOB and such entities, or a right of appeal. Currently the only recourse possible seems to be an appeal in a U.S. court. Such a process would be more likely to foster the sharing of knowledge and good practice between oversight authorities and so promote regulatory convergence at the highest level.

The body charged with hearing any appeal would be expected objectively to review, assess and conclude on the initial decision to which exception is taken, together with the supporting conclusions, reasons and findings.

We therefore urge the PCAOB to include the rights of discussion, hearing, feedback and appeal in amendments to the proposed rules for registration, inspections, investigations and adjudications for foreign registered public accounting firms.

Lack of definitions

The term "inspection" has not been defined in the PCAOB Rules 4000 "Inspections" or in the amendments to such rules for non-U.S. public accounting firms currently proposed. As the term "inspections" is not widely used in Europe, a definition or further clarification would be helpful. We commonly use the term "quality assurance" to refer to a continuous process of monitoring the quality of the work performed by audit firms, using a wide range of instruments including visits to firms. We do not know whether this is the meaning of "inspections".

Comments on Specific Paragraphs

Appendix 2 – Section-by-Section Analysis of Proposed Amendments to Board Rules, Page A2-3, last paragraph and Page A2-4, paragraphs 2 & 3.

The wording "whether a majority of the individuals with whom the *system's decision-making authority* resides, …" is used a number of times. We suggest to include further clarification of the subject of the "system's decision-making" which might be various issues such as appointments and inspections.

This is especially relevant in the context of our general comments on "Involvement of government and accountancy profession" as a system with a single decision-making body (as is the PCAOB) is not common in a number of Member States of the European Union, where decision-making is quite appropriately dispersed over different bodies subject to public oversight.

Appendix 2 – Section-by-Section Analysis of Proposed Amendments to Board Rules, Page A2-5, paragraph 2.

It should be noted that, as is the case in the U.S., oversight and quality assurance systems have been strengthened or introduced recently or will be introduced shortly in a number of Member States of the European Union with the aim of helping to restore the public trust in the auditing profession.

Therefore, not all such systems will have been in existence long enough to have established a basis for evaluating past performance. We would appreciate it if the PCAOB acknowledged this. We would appreciate if the PCAOB could also acknowledge that an initial lack of a historical record of performance will not be detrimental to the general evaluation of the reliance to be placed on such oversight system. This would seem only fair, especially given that the PCAOB is itself recently established.

Appendix 2 – Section-by-Section Analysis of Proposed Amendments to Board Rules, Page A2-7, paragraph 1.

It is stated that, in addition to the investigation and sanctions by a non-U.S. authority, "Proposed PCAOB Rule 5113 does not limit the Board's authority under Rule 5200 to commence disciplinary proceedings whenever it appears to the Board that such action is warranted". It should be noted that double sanctioning is a clear case of double jeopardy, which may be criticised from a human rights perspective.

We regret that the recognition of foreign sanctions appears minimal, since the PCAOB considers that non-U.S. sanctions do not in any way limit its authority, whereas it also suggests that non-U.S. jurisdictions may wish to rely upon sanctions imposed by the PCAOB on a U.S. registered public accounting firm.

D. Co-operation by the Board With Respect to its Non-U.S. Counterparts' Auditor Oversight Responsibilities, Page 15 of the Release Paper, paragraph 1.

The PCAOB indicates that "it would assist in the inspection of U.S. firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions. In order not to compromise the Board's independence, however, the Board intends to provide a level of assistance that is consistent with the Board's determination regarding the non-U.S. oversight system's independence and rigor."

Further clarification of the PCAOB's intention would be helpful as the statement above could be understood to overlook completely the common objective of the PCAOB and non-U.S. oversight systems to protect investors, improve audit quality, ensure effective and efficient oversight of audit firms, help restore public confidence in the auditing profession and buttress the efficient functioning of the capital markets. Indeed, where the rigour and independence of the non-U.S. oversight system is considered by the PCAOB to be minimal, we would expect the PCAOB to supplement the non-U.S. oversight systems by assuming a major role in the inspection of the U.S. audit firm rather than the opposite.

E. Continuance of the Dialogue and Other Board Programs, Page 16 of the Release Paper.

It is indicated that "the Board anticipates continuing its dialogue with oversight bodies outside of the United States … to try to find ways to coordinate in areas where there is a common programmatic interest". We would welcome further clarification as to what is meant by "common programmatic interest" and how such a dialogue can be made transparent to all the stakeholders involved.

✷ ✷ ✷

If you have any further questions about our views on these matters, do not hesitate to contact us.

Yours sincerely,

David Devlin
President

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January 26, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms (PCAOB Rulemaking Docket Matter No. 013)

Dear Secretary:

As the Director for International Financial Markets of the Financial Services Agency of Japan (“FSA”), I am pleased to submit this letter on behalf of the FSA in response to the request of the Public Company Accounting Oversight Board ("PCAOB") for comments on the Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms ("Proposed Rules") as contained in PCAOB Release No. 2003-024 December 10, 2003).

(Three important principles

We would like to emphasize again that there are ***three very important principles*** in dealing with and resolving the issues raised by the Proposed Rules in a mutually satisfactory way. The first principle is ***mutual respect for each jurisdiction's sovereignty and auditor oversight system***. The second principle is the ***importance of recognizing substantially equivalent auditor oversight system*** of foreign jurisdictions. The third principle is the ***necessity of practical cooperation between the auditor oversight bodies*** of the United States and Japan.

(Fully independent and rigorous Japanese auditor oversight system)

In view of these principles, we appreciate that the Proposed Rules in principle takes a cooperative approach which may rely on the home country system to the maximum extent possible. We are also grateful that the PCAOB has been engaged in constructive dialogues with the FSA. Under the principles proposed by the Proposed Rules for determining the independence and rigor of a non-U.S. system, ***we are confident the Japanese auditor oversight system will provide full independence and rigor through the implementation of the revised CPAs Law in April this year***. The CPAs and Auditing Oversight Board ("CPAAOB") will be the main independent auditor oversight body in Japan from this April, and will play the role of a counterpart of the PCAOB. ***We respectfully request the PCAOB to rely on the CPAAOB to the maximum extent, and not to conduct on-site inspections and on-site investigations of the Japanese audit firms.*** It should be noted that the Japanese Government is not able to give consent to the exercise of public authority by the PCAOB, including inspection and investigation, in Japanese

territory. In any case, we sincerely hope that potential legal difficulties which may arise between the Proposed Rules and Japanese sovereignty shall be resolved coordinately in accordance with relevant international rules. In addition, the CPAAOB will conduct inspections of the Japanese audit firms when necessary and appropriate for the public interest or protections of investors in Japan under the CPAs Law. ***We sincerely hope that the PCAOB and the CPAAOB will establish a constructive and practical cooperative relationship within such a framework***..

Request for further extension of deadline of registration)

We welcome the fact that the Proposed Rules would provide a three-month extension of the registration deadline for foreign public accounting firms (i.e., until July 19, 2004). Since the fiscal year 2004 (from April 1, 2004 to March 31, 2005) will be the important first year under the new auditor oversight structure in Japan, it will take up substantial resources and efforts for the CPAAOB and the Japanese audit firms to become familiar with new regulations. Therefore, ***we respectfully request the PCAOB to further extend the deadline of registration to Japanese audit firms by at least additional nine months, namely to April 2005.***

(Conclusion)

We respectfully request that the PCAOB will take full account of our comments in promulgating the final rules.

Yours Sincerely,

Naohiko MATSUO
Director for International Financial Markets
Financial Services Agency, Japan

Grant Thornton

January 26, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, DC 20006-2803

Via e-mail: comments@pcaobus.org

Re: PCAOB Rulemaking Docket Matter No. 013, *Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms*

Dear Board Members and Staff,

Grant Thornton LLP appreciates the opportunity to comment on the Public Company Accounting Oversight Board's ("Board" or "PCAOB") *Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms* ("proposed rules") and commends the Board on their work in this area.

We support the Board's efforts to develop a cooperative arrangement with its foreign counterparts for the inspection, investigation and discipline of non-U.S. registered public accounting firms. We believe that establishing a framework to rely, to the maximum extent possible, on the accounting firm's home country inspection system, will allow the Board to implement the provisions of the Sarbanes-Oxley Act of 2002 ("Act") and also address some practical problems, such as the use of languages other than English. We are very much in favor of a cooperative arrangement that can reduce potential conflicts with other countries' laws and minimize duplicative regulatory costs and burdens for issuers and non-U.S. accounting firms. However, we have significant concerns with certain aspects of the approach the Board has recommended in the proposed rules.

Our concerns and our recommendations to improve the framework under which the PCAOB can place reliance on a non-U.S. system are as follows.

Board's Proposed Rule on Registration

We agree with the Board's proposal to delay the registration deadline for foreign public accounting firms. However, given the many issues of law that the foreign firms must address with regard to confidentiality, data protection, legal enforcement, employment liability and banking secrecy in preparing their registration applications, we believe that the delay of ninety days will not be sufficient to allow meaningful progress to be made on these issues.

However, it is vital that the PCAOB proceed with at least the July 19, 2004 deadline as compliance by firms with the original April 2004 deadline, in light of the legal issues, is not feasible.

Also, given the proposed registration deadline of July 19, 2004, many foreign firms may plan to file their registration application sometime during late spring 2004, to allow time for the PCAOB staff to review and provide comments. Given the time frame needed for these proposed rules to be finalized by the PCAOB, then approved by the U.S. Securities and Exchange Commission (SEC), it appears questionable whether the rules would be in place to allow a foreign firm to submit an Exhibit 99.3 petition describing their home country system with the filing of their application. [Further, as discussed in more detail below, we have concerns that few home country systems would qualify for reliance under the evaluation principles included in the proposed rules. Ninety days would not be a reasonable amount of time for countries to establish a regulatory system that would meet the Board's guidelines. We request that the Board consider a lengthier delay in the registration deadline to allow foreign firms and their home country regulators more time to fully address all of these issues.]

Board's Proposal on Inspections for Non-U.S. Registered Firms

Overview

We believe it is in the best interest of the public and for the protection of investors that an efficient and effective cooperative arrangement be established between the PCAOB and non-U.S. regulatory bodies. We believe it will also serve as one more step in restoring public confidence in audited financial statements of issuers, both U.S. and non-U.S. registrants. However, we believe that this cooperative arrangement must recognize that legal conflicts exist in almost every country around the globe. In some countries, the foreign law issues that may arise as a result of a PCAOB inspection may be overcome and in some countries there is no practical way to overcome the legal restrictions. For these reasons, we suggest that the Board continue to work with non-U.S. rule-makers such as the European Commission and other regulatory bodies, to establish a framework to harmonize the approach to home country inspections and investigations. This framework would include common principles, or objectives, that should be included in all regulatory systems. The framework could incorporate those principles noted by the Board in Paragraph B.3. of the proposed rules, but individual countries would be allowed to determine how best to achieve these objectives, taking into consideration their own legal restrictions and requirements. We believe this harmonization approach is the only reasonable way to overcome some of the practical problems that may arise as a result of an inspection or investigation by a third party such as the PCAOB. This approach would also eliminate unnecessary duplicative inspection costs and burdens for issuers and non-U.S. accounting firms.

Evaluating petitions on a firm-by-firm basis

If the final rule continues with the proposed approach, we suggest that the PCAOB work directly with the non-U.S. regulatory bodies to obtain information about their regulatory structures, funding arrangements etc. Each foreign accounting firm should not be required to file an individual petition with the SEC describing their home country system because this process may result in the submission of inconsistent or incomplete descriptions of the home system. We believe that the PCAOB should be seeking the information directly from the non-U.S. regulators. This will help to avoid potential misunderstandings or disagreements or a conclusion by the PCAOB that it cannot rely on a foreign system when, if fact, it could.

Further, decisions regarding the non-U.S. home country systems should be made on a country- by-country basis. The Board should not consider petitions on a firm-by-firm basis taking into account differences in the inspection work programs for different firms. How the home country inspections

are applied to different firms should be taken into consideration by the PCAOB in determining reliance upon a non-U.S. system. Approving petitions on an individual firm basis will result in some firms being subject to their home country inspection process and some firms being subject to both the home country and the PCAOB inspection processes. This approach will result in an unfair application of the rules, and may disadvantage the smaller firms within a country.

Assessing the level of reliance on a country-by-country basis would also allow the Board to be transparent in its own assessment process. This approach would allow the Board flexibility in disclosing the reasons behind their decision not to place reliance, or to place a low level of reliance, with regard to a certain county's home system. Understanding how reliance on a non-U.S. home country system is determined, will be important to both U.S. and non-U.S. firms for many reasons. These decisions should be made available to the public.

Principle for Determining the Independence and Rigor of a Non-U.S. System under the Proposed Rule

Establishing a framework for harmonization as described above would address some of our concerns on the proposed principles for determining the independence and rigor of a non-U.S. system. Paragraph B.3. of the release to the proposed rules lists certain principles that the Board would apply in evaluating the independence and rigor of a non-U.S. home country system. It seems appropriate that in order for a system to be considered adequate, it should demonstrate certain principles such as integrity, some independence from the auditing profession, transparency in the inspection process, and a successful history of disciplinary sanctions. Paragraph B.3. further describes the underlying characteristics and criteria that the Board will consider in evaluating the rigor and independence of a non-U.S. home country system. These characteristics and criteria parallel the oversight requirements established in the U.S. by the Act, including the establishment of the PCAOB. Suggesting that the characteristics of the newly established U.S. system is the only acceptable system under which a foreign country may provide adequate oversight of their own auditing profession is not appropriate. Further, we believe, based on discussions with other member firms of Grant Thornton located around the world, that there is only a remote possibility that the type of regulatory system described in Paragraph B.3. is in existence today outside of the U.S. For example, Canada, a country long recognized by the SEC for having accounting, auditing and regulatory oversight requirements similar to the U.S. (as evidenced by the multijurisdictional disclosure system available only to Canadian issuers), may not meet these described characteristics. Canada has recently established a new regulatory board and oversight requirements paralleling many of those introduced in the Act. However, there is concern that the new Canadian Public Accountability Board may not meet the independent funding requirements included in Paragraph B.3. and it will not have a "history of disciplinary sanctions" for some years to come.

While the concept of the Board placing reliance upon a non-U.S. oversight system, based on a sliding scale, is sound, it is impractical of the Board to believe that such systems are in existence today. Some countries may be willing to establish a home country system that would meet at least some of the characteristics noted in Paragraph B.3. but those efforts will take a considerable amount of time and certainly would not be established by the time the foreign firms must submit their registration applications in the spring of this year. Such systems may not be in place for quite some time, perhaps a year or longer.

Agreed-Upon Work Programs under the Proposed Rule

Under the proposed inspection framework, once the independence and rigor of the non-U.S. system has been assessed using the principles discussed in paragraph B.3., the PCAOB staff would work

with the appropriate staff of the non-U.S. entity to agree on an inspection work program. Paragraph B.4. of the release indicates that the

> "Board would also give great weight to the non-U.S. inspecting entity's willingness to agree to provide to the Board or its staff, upon their request, the inspecting entity's work papers or work product that document any inspection, evaluation or testing, and to provide to the Board, in a form and with a level of detail agreed upon with the PCAOB, a report relating to any inspection, evaluation or testing."

The sharing of confidential information on inspections performed by a non-U.S. home country system with the PCAOB may be problematic due to the numerous foreign law issues. Please see the Linklaters comment letter provided on the *Proposed Auditing Standard on Audit Documentation and Proposed Amendment to Interim Auditing Standards, Release No. 2003-023*, submitted to the PCAOB on January 20, 2004. This letter summarizes some of the basic legal impediments, data privacy considerations and practical disclosure problems that may exist when data may need to be disclosed to a party from or located outside of the home country. Therefore, even if the PCAOB deems a home country system adequate for full reliance upon the system, the foreign law issues may still present a significant hurdle to implementing a cooperative work program approach.

Consistency of Proposed Rules with Proposed Audit Documentation Rules

We note in the proposed rules that the "Board recognizes that certain aspects of the registration, inspection, investigation and adjudication provisions of the Act and the Board's rules raise special concerns for non-U.S. firms", and that to address these concerns a cooperative framework with non-U.S. firms will be established. However, we note an inconsistency between this acknowledgement and the requirements of the Board's *Proposed Auditing Standard on Audit Documentation and Proposed Amendment to Interim Auditing Standards, Release No. 2003-23*. The proposed rule on audit documentation does not address the implication of foreign law issues. We respectfully refer you to the comment letter on the proposed audit documentation rules submitted by Grant Thornton International on January 20, 2004.

Cooperation by the Board With Respect to its Non-U.S. Counterparts' Auditor Oversight Responsibilities

We note that the Board intends to assist in the inspection and investigation of U.S. firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions. We understand the Board's willingness to cooperate with non-U.S. regulators; however, we are concerned whether this level of involvement with a non-issuer would be allowable under the Board's authority as granted by the Sarbanes-Oxley Act of 2002.

In conclusion, we again commend the Board in its efforts to establish a cooperative arrangement with its non-U.S. counterparts. We would suggest that the Board adopt a framework to harmonize the approach to home country inspections and investigations. This framework would allow countries to determine how best to achieve common principles within their own legal restrictions and requirements. This approach will minimize some of the practical problems confronting the Board with regard to non-U.S. firms and at the same time allow the Board to fulfill their oversight requirements under the Act. However, this framework will need time to become established.

In the meantime, we would strongly encourage the Board to proceed with the formal approval of the July 19 deadline as a matter of urgency in order that non-US registering firms may finalise their processes for the gathering of data and submission of Form 1.

* * * *

We would be pleased to discuss our comments with you. If you have any questions, please contact Ms. Karin A. French, Partner in Charge of SEC Regulations, at (703) 847-7533.

Very truly yours,

GRANT THORNTON LLP

Karin A. French
Partner in Charge of SEC Regulations

INSTITUT
DER
WIRTSCHAFTSPRÜFER
IDW

January 26, 2004

Public Company Accounting Oversight Board
(PCAOB)
Office of the Secretary
1666 K Street, N.W.,
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USA

By E-Mail: comments@pcaobus.org

Dear Sir(s):

Re: PCAOB Rulemaking Docket Matter No. 013
IDW Comments on the PCAOB Proposed Rule Relating to the Oversight of Non-U.S. Public Accounting Firms

We would like to thank you for the opportunity to comment on the PCAOB Proposed Rule Relating to the Oversight of Non-U.S. Public Accounting Firms. The Institut der Wirtschaftsprüfer represents approximately 85 % of the German Wirtschaftsprüfer (German Public Auditor) profession. The German profession seeks to comment on the proposals by the PCAOB noted above because this Proposed Rule will directly affect the oversight of significant number of German Wirtschaftsprüfer in the areas of registration, inspections, investigations and adjudications.

We support and share the PCAOB's objective of protecting investors, improving audit quality, ensuring effective and efficient oversight of audit firms to help restore the public trust in the auditing profession and buttress the efficient functioning of the capital markets.

General comments

We understand that the PCAOB has undertaken to address the concerns of non-U.S. public accounting firms in relation to registration, inspection, investigation and adjudication provisions of the Sarbanes-Oxley Act by developing a framework under which the PCAOB can implement the Act's provisions by relying, to an appropriate degree,

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on a non-U.S. oversight system. In this respect, we consider the PCAOB's concept of a cooperative framework as a step in the right direction in principle, but based on our reading of the Proposed Rules relating to the oversight of Non-U.S. public accounting firms, we believe that the proposed approach is not cooperative in substance. With respect to inspections, we are unable to determine from the Proposed Rule whether the PCAOB is willing to assess any oversight system in any jurisdiction and determine that it can place full reliance on that system. The Board foresees no circumstances in which it will not play an active role, be it in the selection of audit and review engagements, participation of U.S. experts on quality assurance engagements or the specific evaluation of quality control standards in accordance with PCAOB standards. This is in direct contrast to Proposed Rule 5113 regarding investigations and sanctions, according to which, in certain cases, the Board may rely upon investigations or sanctions executed by a non-U.S. authority.

As we have previously noted in our Comment letter on the Proposed Auditing Standard "Audit Documentation", it is inconsistent for the PCAOB to insist, on the one hand, that its rules, regulations and standards must be applied to SEC registrants and those involved with them throughout the world, but on the other hand to take a narrow US-based view of the environment within which SEC registrants and the auditors of their financial statements operate. In this sense, we believe that the PCAOB's principles for the evaluation of the independence and rigor of a particular home country system appears to be a kind of description of the US oversight system rather than a set of basic principles that take the different forms of oversight systems throughout the world into account. Furthermore, the Proposed Rule leaves so much to the discretion of the PCAOB that there appears to be little certainty as to how the rules will be applied in practice, nor how consistently the rules will be applied between different foreign jurisdictions or even within a particular foreign jurisdiction.

The Proposed Rule also does not clarify how cooperation with national authorities would function in practice – in particular, how the PCAOB would handle potential conflicts in the conduct of inspections and general oversight of foreign accounting firms. The Proposed Rule does not appear to contribute to increasing the transparency and public accountability of the PCAOB's determinations at an international level. We would also like to point out that the current proposal will lead to a considerable burden on accounting firms by making them subject to two systems of oversight. In this case, the assertion that the Proposed Rule will reduce such burdens does not appear to be borne out by its actual content.

Conflicts with Non-U.S. Law

Severe legal conflicts for Non-U.S. public accounting firms will arise from a number of existing rules issued by PCAOB recently – especially from PCAOB Rulemaking Docket Matter No. 006, Inspection of Registered Public Accounting Firms, and

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PCAOB Rulemaking Docket Matter No. 005, Rules on Investigations and Adjudications.

A general duty to cooperate and comply with any request of the Board and to provide access to any record in the possession or control of the non-U.S. public accounting firm (Rule 4006) will inevitably lead to legal conflicts concerning confidentiality, data protection, employment, secrecy and national security obligations of accounting firms and their clients under German law. Simply obtaining a waiver from the client will neither release the client nor the auditor from most of these obligations. The same problems will arise if the board may require testimony with respect to any matter or to demand any other document or information in the possession of a registered public accounting firm that the Board considers relevant (Rule 5102 (a), Rule 5103 (a)).

As the Proposed Rules make no provision for exemption, a registered public accounting firm will not be permitted to object to, or not comply with any requests which the PCAOB subsequently may make based on the reason that the request infringes national law. An exemption rule similar to Rule 2105 “Conflicting Non-U.S. Laws” with regard to registration, that allows an applicant to withhold information from its application for registration when submission of such information would cause the applicant to violate a non U.S. law if that information were submitted to the Board is not included with respect to inspections and investigations. As discussed below, until the legal conflicts between U.S. law and German law have been resolved, there needs to be a temporary exemption for German firms with respect to the PCAOB’s access to documents and other records of German SEC registrants and their subsidiaries and to the PCAOB’s right to testimony and documents from the German auditors of these registrants and subsidiaries.

In our letter dated August 18, 2003 we provided a detailed explanation of such legal impediments currently established within the German Law.

Pursuant to the first paragraph of section B. 4: “Agreed-Upon Work Programs under the Proposed Rule” the PCAOB intends to “weigh heavily the non-U.S. inspecting entity’s willingness to agree to an inspection work program”. Likewise, according to the second paragraph of section C.: “Board’s Proposed Rule on Investigations of Non-U.S. Registered Firms” the PCAOB sets forth that “In addition to the Board’s assessment of the circumstances at hand, the application of proposed Rule 5113 may depend on the non-U.S. body’s willingness and authority to provide the Board or the Director of Enforcement and Investigations with access to the relevant evidence gathered in its investigations.” We would like to point out, that the potential for a non-U.S. public accounting firm or a non-U.S. authority to provide the PCAOB with access to relevant documents or information is not merely a question of ‘willingness’ of the respective entities to cooperate with the PCAOB but rather governed by legal ob-

ligations, such as data protection laws, legal secrecy, national security, employment or confidentiality obligations, which necessarily makes 'willingness' irrelevant.

Given these legal constraints, which are in part based in the provisions of the German constitution together with court decisions in a constitutional context, we believe that the only feasible solution will be real cooperation with the German government and German regulators. In particular, because it appears that the PCAOB will not be in a legal position to perform inspections on German soil and the limitations on accounting firms' and regulators' ability to transfer audit documentation to either the PCAOB directly or to US accounting firms means that the PCAOB will be left with little choice but to recognize or accredit the oversight and inspection regime as established by government and regulators in Germany. Furthermore, it should be noted that the EU Commission is currently in the process of revising the 8th Directive. The coming revisions are expected to require member states of the EU to establish an oversight structure and system closer both in form and substance to that established in the U.S. On this basis, we suggest that the PCAOB seek further dialogue, both with the EU Commission and with the German government and German regulators.

Specific Comments on Board's Proposed Rules by Section as in the Release

Section A. Board's Proposed Rule on Registration

We appreciate the Board's proposal to amend the Registration Rule 2100 to provide a three-month extension of the registration deadline for foreign public accounting firms. However, the amendment does not resolve the basic problem that certain fundamental issues identified above, e.g. legal conflicts regarding data protection, etc., have not been fully resolved. Each German firm registering with the PCAOB would subject itself to PCAOB rules, while at the same time being unable to comply with them due to national legal restrictions in significant areas.

The PCAOB's Proposal to insert an Exhibit 99.3 to Form 1 which comprises only very basic information about the registrant's home country oversight system is in our opinion of very little help, because this information does not go far beyond the information already required by Item 1.7 of Form 1, and therefore it could easily be left out.

Furthermore, it remains unclear in which circumstances non-U.S. firms are permitted to register via the home country registration entity and what the detailed procedures and prerequisites for this kind of registration process may be – especially with regard to the procedures concerning the cooperation between the home country registration entity and the PCAOB. We assume that further clarification on this point would be helpful.

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Section B. Board's Proposed Rule on Inspections for Non-U.S. Registered Firms

Subsection 2. Overview of the Proposed Rule

The Proposed PCAOB Rule 4011 (b) would permit a foreign registered public accounting firm to submit a written petition to the Board requesting an inspection that relies upon an inspection conducted by a home country system. In that petition the non-U.S. public accounting firm should describe in detail the non-U.S. system's laws, rules or other information to assist the Board in evaluating such system's independence and rigor.

The requirement for each individual foreign registered public accounting firm to submit detailed description of the Non-U.S. system's laws rules etc. is neither practicable nor cost-effective; we fail to see any corresponding benefit to the public interest. In our view this requirement for individual firms is in contrast to the PCAOB's intention prescribed on page 8 of the Release, to develop an efficient and effective cooperative arrangement and to allow the Board to allocate it's resources in the most cost-effective manner. Such a cooperative arrangement should be a matter for the PCAOB and the national oversight authorities in any given foreign jurisdiction and not for the individual firms. We consider that the PCAOB would itself be faced with an information overload problem if several individual firms were to submit different descriptions or translations of one and the same system.

We would also like to point out, that it would be difficult for the PCAOB to monitor consistency and quality of the information given by each individual firm. Moreover, this requirement would lead to excessive duplication and cost-intensive efforts on the part of each public accounting firm as well as for the PCAOB. If the PCAOB intends to achieve the requirements of the Act cost-effectively and to minimize unnecessarily duplicative administrative burdens to non-U.S. registered firms, then this specific information requirement should be handled on a jurisdictional basis rather than firm-by-firm. We accept that the description for the individual work-program is best provided by individual firms, but a general description of the inspection- or quality assurance system should be provided on a jurisdictional basis by the relevant oversight authority in those jurisdictions.

We also have serious concerns about Proposed Rule 4011(c) (2) in respect of the PCAOB's intention to take into account "any other information that the Board obtains" without prescribing any corresponding feedback and discussion with the countries appropriate entity or entities regarding this other information. In our opinion, this will lead to unintended uncertainty with regard to the PCAOB's evaluation of any particular system and therefore may be detrimental to the desired cooperative approach. We suggest therefore that the PCAOB should clearly define what is to be understood by "any other information". We also suggest that the PCAOB should be required to

discuss such other information and its influence on the evaluation of and resultant reliance on the non-U.S. system with the appropriate entity or entities thus allowing the opportunity to counter any misunderstandings that may otherwise arise.

Subsection 3. Principles for Determining the Independence and Rigor of a Non-U.S. System under the Proposed Rule

The PCAOB has indicated certain principles to be used in its evaluation of the independence and rigor of a particular home country system. We are concerned, that the examples given of criteria the PCAOB intends to use to assess the adequacy and integrity of the home country system are primarily oriented on the US system for inspections and investigations of U.S. public accounting firms. As the Release paper and Proposed Rules therein are concerned exclusively with the oversight of non-U.S. firms we question whether the application of U.S. system-based criteria is appropriate. In stipulating, for instance, that in its evaluation of the independence of the non-U.S. system's operation from the auditing profession the Board would consider "*whether the individual or individuals with whom the system's decision-making authority resides have been appointed, or otherwise selected, by the government of the non-U.S. jurisdiction* " the PCAOB is very precise, but does not anticipate any adjustments for a non-U.S. system that may differ in certain aspects from these specific requirements. This may not be practicable in certain non-U.S. systems, in which the independence requirement of the individuals responsible for oversight are guaranteed by other means.

We note that the PCAOB's evaluation criteria is largely based on the U.S. System, and suggest that this could undermine the sought after cooperation of all parties. The PCAOB should be prepared to concede, that non-U.S. systems, while different in form and detail from the US-System, could be equally effective and efficient in operation as the US-System. Therefore, we urge the PCAOB to amend the rules and guidance thereon to allow a constructive evaluation of any given oversight system in its entirety and not merely consider whether it complies with the U.S. systems requirements. The proposed approach as currently drafted does not adequately take into account provision for the various forms of regulatory systems resultant from different legal traditions in other countries.

Other criteria the Board will consider in assessing the adequacy and integrity of the non-U.S. system included in the examples are overly vague and non-specific, leaving the PCAOB with considerable scope for discretion, whilst promoting an environment of uncertainty that could impede progress towards the PCAOB's intended goals.

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Furthermore the PCAOB deliberations on pages 11 and 12 of the Release focus on ensuring that the auditing and accounting profession will not be over-represented amongst those individuals with whom the system's decision-making authority resides. We support this principle, but we foresee a danger that the PCAOB is focusing solely on the aspect of independence, whilst not addressing the qualification aspect of the responsible persons with decision-making authority within the oversight function. We consider it to be equally important to the effectiveness of any oversight system, that there be an adequate (not necessarily a majority) representation of individuals with current professional experience in the fields of auditing, accounting, ethics and quality control standards. In particular, in consideration of the level of authority and impact of decisions made by these individuals or bodies we stress that sufficient input from individuals possessing technical and practical knowledge in this areas is essential.

Furthermore, we question why the independence criteria listed do not address for example financial, business or personal independence risks.

Subsection 4. Agreed-Upon Programs under the Proposed Rule

Degree of reliance of non-U.S.-systems in accordance with Rule 4011 (c) (2)

From the third paragraph on Page 13, we surmise that the PCAOB generally regards inspection systems that involve the profession as less independent and rigorous than other oversight systems. We do not agree with this assertion because inspection systems administrated by independent bodies or by government, in which (active) members of the profession carry out the field work, can be organized and administered such that the inspection is equal in independence and rigor to those in systems where staff is employed directly by regulators to carry out the inspections.

Accordingly, we encourage the PCAOB to apply its proposed criteria in the assessment of non-U.S. oversight systems individually and in the same way to foreign systems, which include elements of involvement of the profession instead of directly discounting the adequacy and rigor of such systems. The merits of each individual non-U.S-system must be considered as a whole for the PCAOB to determine the extent to which it can reasonably rely upon that system.

We would like to reemphasize that it is important that the PCAOB resolve the conflict of laws that we have identified before subjecting German accounting firms to the provisions of the proposed Rule.

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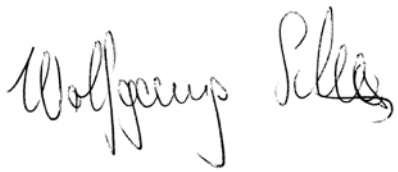
If you have any questions about our comment letter, we would be pleased to be of assistance to you or to meet with you.

Yours very truly,



Wolfgang Schaum
Executive Director

494/513/541

From: ICPAS [cpasingapore@pacific.net.sg]
Sent: Monday, January 26, 2004 5:26 AM
To: Comments
Subject: PCAOB RULEMAKING DOCKET MATTER NO. 013 -

26 January 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street
N.W. Washington D.C. 20006-2803
USA

Dear Sir,

PCAOB RULEMAKING DOCKET MATTER NO. 013 –
PROPOSED RULES RELATING TO THE OVERSIGHT OF NON-U.S. PUBLIC ACCOUNTING FIRMS

The Institute of Certified Public Accountants of Singapore (ICPAS) appreciates the opportunity to provide feedback and comments on the PCAOB's proposed rules and amendments relating to the oversight of non-US public accounting firms in PCAOB Release No. 2003-024, dated 10 December 2003.

ICPAS is the national organisation of the accountancy profession in Singapore. It was established in June 1963 as the Singapore Society of Accountants (SSA) under the Singapore Society of Accountants Ordinance, then reconstituted and renamed the ICPAS on 11 February 1989, under the Accountants Act 1987. Currently, approved company auditors are required to be members of the ICPAS and registered with the Public Accountants Board (PAB). Further information in relation to the PAB is provided in the response to question 2 below.

The ICPAS is committed to retaining investor and public confidence in the auditing process. We agree with the need for increased authority and responsibility for the oversight system of the auditing functions. Our comments relate to your proposals as follows and are also based on responses received from ICPAS members, who are public accountants, in relation to a questionnaire circulated by ICPAS:

1. PCAOB to extend the registration for non-US accounting firms by 90 days to 19 July 2004.
2. PCAOB to rely on the work of oversight systems in other jurisdiction.
3. Foreign registered public accounting firms to submit a written petition to PCAOB for an inspection that relies upon an inspection conducted by a home country system. PCAOB to evaluate its discussion with the non-US inspecting body concerning an inspection work program for the registering firm.

1. PCAOB to extend the registration for non-US accounting firms by 90 days to 19 July 2004

Our members appreciate the extension of the registration date but a minority of members has indicated preference for a longer extension period to facilitate the collation of large quantity of information in fulfilling the registration requirements, which can be burdensome both administratively and financially.

2. PCAOB to rely on the work of oversight systems in other jurisdiction

The Institute agrees with and appreciates the PCAOB's proposal to rely on the work of oversight systems in other jurisdiction, which promotes the efficiency and effectiveness of the overall oversight operations of the PCAOB and the oversight systems in other jurisdiction. The Institute wishes to assure the PCAOB that the auditing, ethical and accounting standards in Singapore are already in line with international best practice as determined by the International Federation of Accountants and the International Accounting Standards Board.

The Public Accountants Board (PAB), a statutory body under the purview of the Singapore Ministry of Finance, currently performs the oversight function of auditors in Singapore. With effect from 1 April 2004, this function will be taken over by the Accounting and Corporate Regulatory Authority, a new statutory board formed from the merger of the PAB and the Registry of Companies and Businesses (RCB). Evidently, there are considerable efforts to continuously update our system in keeping with the reforms and initiatives at the international level.

3. Foreign registered public accounting firms to submit a written petition to PCAOB for an inspection that relies upon an inspection conducted by a home country system. PCAOB to evaluate its discussion with the non-US inspecting body concerning an inspection work program for the registering firm.

The Institute agrees with the PCAOB's proposal (i) for foreign registered public accounting firms to submit a written petition for an inspection that relies upon an inspection conducted by a home country system; and (ii) to evaluate its discussion with the non-US inspecting body concerning an inspection work program for the registering firm. The Institute is of the view that this is a marked improvement in the effectiveness of the first proposed oversight system to be performed by the PCAOB. This form of quality control measures exercised by the PCAOB over the reviews performed by the non-US oversight body is consistent with the auditing principles related to reliance on the work of other professionals or auditors.

Pursuant to the PCAOB Proposed Rule 4011, non-US public accounting firms are required to submit a written petition describing the non-US system's laws, rules and/or other information to assist the Board in evaluating the independence and rigor of the system.

The Institute further proposes a unified petition approach for the public accounting firms in Singapore. This proposal is based on the fact that the accounting firms in Singapore are subject to the oversight system performed by one oversight body and the requirements of the oversight system in Singapore are applicable to all accounting firms in Singapore. In promoting efficiency and effectiveness of the submission and review process, the non-US oversight body should be empowered to submit the required information, on behalf of the non-US public accounting firms, to the PCAOB for assessment of the non-US oversight system on a periodical basis.

In ironing out the details of the above proposal, the Institute agrees with the PCAOB's proposal to evaluate its discussion with the non-US inspecting body concerning an inspection work program for the

registering firm as part of the petition and review process.

The Institute emphasizes the adequacy, integrity and independence of the oversight system in Singapore and proposes a high level of reliance on the Singapore inspection system to the PCAOB. The Institute is also happy to share with the PCAOB the relevant reforms and initiatives currently being undertaken in Singapore.

In summary, the Institute agrees with the proposals of the PCAOB but recommends a unified petition approach, which the Institute urges the PCAOB to take into careful consideration. The Institute strongly believes that the co-operation between the Singapore and US authorities would be in line with advancing the spirit of the US-Singapore Free Trade Agreement.

Yours sincerely,
Janet Tan
Executive Director
Institute of Certified Public Accountants of Singapore

23 January 2004

Office of the Secretary,
Public Company Accounting Oversight Board,
1666 K Street NW,
Washington, D.C.
20006-2803
USA

From the Office
of the Chief Executive

By e-mail: comments@pcaobus.org

Dear Sir or Madam,

Rulemaking Docket Matter No. 013:
Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms

We set out below our comments on the above consultation paper, issued on 10 December 2003.

We welcome the proposal to issue rules allowing the Board to rely on home country control in appropriate circumstances, in so far as it goes. We understand the need to assess on a case by case basis, as regimes around the world vary considerably in structure and effect. However, we regret the lack of any consideration of whether there can be reliance on home country control for registration purposes. The prospective use of the home registering authority as a 'post-box' achieves little and does not solve the disclosure problems that arise as a result of data protection legislation. For example, we understand that there is a legal view that UK firms cannot complete Item 8.1 of the registration form (agreeing to provide any information at any time in the future) because the UK Information Commissioner has indicated that consent from employees to disclosure of "any information at any time in future" would not be valid, as it is too unspecific.

We have had some discussions with you about the registration process in the past and would be very pleased to do so again, as we believe such a process would help solve a number of disclosure and competition issues. To that end we welcome the indicated intent to extend the registration deadline to 19 July, though wonder if that will give you sufficient time to do this subject justice, with interested and serious parties. As U.S. fiscal year-ends tend to be 31 December, it may be worth considering a further extension to, say, September.

As regards inspection and enforcement, we believe the substance of the underlying proposed rules allows suitable flexibility and is to the point. However, we do have a few detailed comments on the proposed rules and discussion thereof.

1. The discussion in the consultation paper envisages a number of issues that the Board will consider. We understand the underlying rationale, but note that the paper seems to regard government as the only possible appointer directly of individuals within an independent system. We believe there are other effective alternatives. For example, here in the UK, government delegates its responsibility to approved supervisory bodies such as us, operating for these purposes within a tight legal and independent oversight framework, which includes public oversight by a government approved but non-government operated organisation that is constitutionally structured to be independent of firms, the profession and the government.

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2. It is unclear to us how transparent the Board's system will be in the decision making process as to how suitable the home country system is. Is it intended that an individual regulator (or firm) can apply for a review of an unfavourable PCAOB decision?

3. Proposed rule 4011 requires individual firms to submit a summary of the home country system. In practice, as acknowledged in the discussion, the assessment will be on a system by system basis, rather than firm by firm and we believe it would be more sensible if the provision of the information came directly to you from the home country regulator, particularly as some of the information required by the PCAOB may not be readily apparent to firms. The Board will know the identity of the regulator from the additional information on this subject that you are proposing to include in registration applications.

4. It is unclear to us from our reading of the discussion in the paper, whether the Board is intending that it will always include its own expert to participate in a local inspection visit, or whether such participation will depend on the assessment of the calibre of the relevant non-US system. Given the case by case approach the Board intends to adopt generally, we assume and hope that the latter interpretation is the correct one to adopt.

We would be pleased to discuss any aspect of this submission with you. As agreed at a recent meeting we will forward you further details of our system and its oversight separately and we look forward to further discussions on implementation of the proposed rules.

Yours faithfully,

Eric E Anstee

INVESTOR IN PEOPLE

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January 23, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 013
Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms

Gentlemen:

The Japanese Institute of Certified Public Accountants is pleased to submit a comment on the Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms issued by the Public Company Accounting Oversight Board.

We understand Japanese auditing firms would request that the PCAOB rely on the Japanese professional oversight system by submitting written petitions describing Japanese laws and other information to assist the Board in evaluating such system's independence and rigor under the proposed Section 4011. Japanese auditing firms are subject to oversight and inspection by the CPA and Auditing Oversight Board (CPAAOB) pursuant to the Articles 46-9-2 and 49-4 of the Certified Public Accountants Law of Japan, as amended (Law No. 103, 1948). CPAAOB is to be established in the Financial Services Agency (FSA) of Japan in April this year. It will consist of Chairman and no more than nine commissioners who are to be appointed by the Prime Minister with the consents of both Houses of the Diet. The members shall exercise their authorities independently. Thus, it will be independent of the profession. We understand Japanese auditing firms would submit description of the oversight system by the CPAAOB when requesting that the PCAOB rely on that system. However, the amended Certified Public Accountants Law of Japan will be effective on April 1, 2004, and the details of the CPAAOB inspection program over Japanese audit firms has yet to be announced, and as such, it is difficult for Japanese audit firms that expect to petition the Board to provide at present preliminary information that can be necessary for the PCAOB to evaluate the CPAAOB inspection work program as described in the Rule 4011.

We plan to provide the PCAOB with necessary information about the CPAAOB as soon as CPAAOB inspection program is available in the near future. We would earnestly request the PCAOB to understand the situation in Japan and grant Japanese auditing firms a certain period of time (a few months) before they submit petition with detailed information about the CPAAOB inspection work program.

Very truly yours,

Akio Okuyama
Chairman & President
The Japanese Institute of Certified Public Accountants

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26 January 2004

Dear Mr Secretary

PCAOB Rulemaking Docket Matter No. 013
Proposed rules relating to the oversight of non-U.S. public accounting firms

General observations

KPMG greatly appreciates this opportunity to comment on behalf of the non-U.S. firms on the Public Company Accounting Oversight Board's (PCAOB or Board) proposed rules relating to the oversight of non-U.S. public accounting firms. We reaffirm our support for the efforts of the Board in furthering the public interest through improving financial reporting, governance, and audit quality.

This letter is organized by first providing a number of general observations and comments on the proposed rules relating to the oversight of non-U.S. public accounting firms followed by responses, as applicable, to the proposed amendments to Board rules (PCAOB Rule 1001, PCAOB Rule 2100, PCAOB Rule 4011 and PCAOB Rule 5113) and the instructions to Form 1.

KPMG agree with the Board's observation that certain aspects of the oversight provisions of the Sarbanes-Oxley Act of 2002 (the 'Act') and the Board's rules raise special concerns for non-U.S. firms and support the Board's efforts to develop a framework under which non-U.S. firms could implement the Act's provisions. We welcome the Board's dialogue with foreign counterparts, the development of cooperative arrangements for oversight and discipline, and the recognition that those foreign counterparts share many of the same objectives as the Board. Further, we are encouraged that the Board is guided by the view that it will allocate its resources in a cost efficient manner that seeks to minimize unnecessary duplicative administrative burdens on non-U.S. registered firms. Where competent national regulators exist, we concur with the Board's approach to place reliance on the home country system to the maximum extent possible. This approach will

prevent unnecessary duplication. However, the proposed rules do not limit, in practice, the Board's authority and, therefore, we are concerned that the proposed rules may well result in dual oversight. In addition, the proposed amendments do not alleviate the legal impediments raised in our comment letter (28 March 2003) to PCAOB Rulemaking Docket Matter No. 001 which continue in many circumstances to prevent the Act being fully applied in practice. We are also concerned by the proposed approach which does not envisage a collaborative approach to the evaluation of different countries oversight systems, rather, the Board determines whether a non-U.S. system falls short by applying its own standards to foreign jurisdictions.

We believe that national, or supranational (such as the EU), competent regulatory authorities should oversee foreign public accounting firms. The framework for regulation of non-U.S. firms should be based on the principle that the home country should have primary responsibility for registration and control of oversight and discipline, with each non-U.S. country committing to meet certain requirements regarding independent oversight and cooperation in investigations with other competent regulators. Information would be shared with the Board on an agreed basis.

We acknowledge that the Act directs the Board to establish a registration system and inspection and enforcement programs for accounting firms that audit or play a substantial role in the audit of U.S. public companies (Sections 102, 104(a) and 105). Furthermore, Section 106 requires that non-U.S. public accounting firms comply in the same manner, and to the same extent, as a public accounting firm in the U.S. However, the proposed framework under which the Board can rely on a non-U.S. system 'to an appropriate degree' does not address the concerns of foreign firms; the inefficiency and inequality of dual oversight as a result of the Board's proposed ability to initiate an inspection, commence disciplinary proceedings or impose a sanction on a non-U.S. firm.

Dual oversight is undesirable as it will be inefficient, costly and could result in conflicts between national regulators. We believe that the existence of two regulators undertaking investigations and disciplinary actions is a cause for major concern and would not improve audit quality or financial reporting. The current proposals could result in two regulators investigating the same matter with potentially differing outcomes. This will be detrimental to confidence in the audit process and capital markets.

We believe the practical application of the proposed oversight system will also be difficult. The Board will need to be sensitive to the cultural differences within each jurisdiction and require a considerable number of staff with language skills to be able to effectively apply the proposed rules on a global scale.

The proposed rules would also create a double jeopardy for auditors who will be subject to both U.S. and national disciplinary systems. This would contravene the principles of natural justice.

As currently drafted, the Act cannot be enforced in a number of jurisdictions or applied consistently across territories due to the legal impediments to compliance with the

proposed oversight and discipline rules, as outlined in our response to PCAOB "Rulemaking Docket Matter No. 001" (see comment letter dated 28 March 2003). In addition, we also understand that the European Union may develop new rules that would have the effect of strengthening and broadening current rules preventing the export of data as part of the modernisation of the existing 8th Company Law Directive. The legal impediments cannot be overcome by the non-U.S. firms but only by the regulators, or even governments of the relevant foreign jurisdiction. As such, the proposed system can only work if the Board cooperates with non-U.S. regulators and governments.

For these reasons, we suggest that the Board continue its dialogue with regional and national regulators. Supervision, inspections and discipline should remain the primary responsibility of the home country regulator. Where necessary, however, we would support the active participation of the Board in cooperation with local regulators, provided that the final output and any disciplinary action was clearly the responsibility of the local regulator. Participation by the Board could include PCAOB personnel being part of monitoring, inspection or investigation teams (subject to legal constraints), with the ability to influence the direction of oversight activity. The output of oversight activity could also be shared with the Board, provided it did not relate to individual clients who were not SEC registrants, did not breach data privacy and any other applicable home country laws and was performed under appropriate confidentiality agreements.

This solution would avoid the problems of dual oversight, yet allow the Board to be an active participant in supervising the activities of foreign firms. The Board, after all, always has the ultimate sanction of removing the registration of the foreign firm.

Response to the proposed amendments

Proposed rule on Registration (PCAOB Rule 2100) and Form1 – Application for Registration

The Board has given the opportunity for non-U.S. firms to provide preliminary information about the applicant's home country oversight system (Exhibit 99.3, 'Non-U.S. Oversight System Information' to Form 1 – 'Application For Registration'). Whilst we believe there is merit (in the context of the proposed rules) in the Board obtaining information about foreign regulatory systems, it would be more efficient for the Board to request this information directly from the home country regulators, rather than from individual applicants. A number of countries are currently remodelling their oversight and enforcement systems and home country regulators would be better able to indicate the direction of such change to the Board.

We support the three months registration extension for foreign public accounting firms to 19 July 2004 (PCAOB Rule 2100). This will provide non-U.S. firms with more time to develop new systems and processes to obtain, translate and consider how best to disclose the information requested by the Board as part of registration.

Proposed rule on inspections (PCAOB Rule 4011)

Proposed PCAOB Rule 4011 permits a foreign registered public accounting firm to submit a written petition to the Board for an inspection that relies upon an inspection conducted by a home country system. The petition would describe in detail the non-U.S. system's laws, rules and other information. Release 2003-024 states that the Board has requested this arrangement because "petitions on a firm-by-firm basis allows the Board to take into account differences in the inspection work programs for different firms and also any changes in regulatory regimes that may occur from time to time". However, as drafted, the petitions will describe the local regulatory framework rather than the inspection programmes of individual firms. Therefore, the petitions will not assist the Board in formulating its view based upon "differences in the inspection work programs". As explained above, we believe it would be more efficient for the Board to request information on regulatory systems and indeed work programmes directly from the home country regulators, rather than from individual firms. The individual firms could still petition for home country inspections but would not be required to provide duplicative information about "the non-U.S. system's laws, rules and/or other information to assist the Board in evaluating such system's independence and rigor" (PCAOB Rule 4011(b)).

Release 2003-024 proposes that following a review of the non-U.S. inspecting entity's inspection work papers and inspection report and any work performed by the PCAOB, the Board would issue a PCAOB inspection report for a foreign registered public accounting firm. We believe that whilst the inspection may be a collaborative effort between the Board and home country regulator (subject to legal impediments), the inspection report should be clearly issued by the local regulator. Where necessary, we would also support the use of PCAOB personnel as part of the inspection team, albeit, a number of legal impediments caused by local data protection and data privacy rules would need to be considered. The inspection must be clearly led by home country inspectors working to methodologies set by the home country regulator, although we would expect there to be an increased emphasis on U.S. GAAS and GAAP compliance. Equally there should be a single report for each firm following from the inspection. This approach would avoid the inequity and inefficiency of dual oversight.

Proposed rule on Investigations (PCAOB Rule 5113)

Proposed PCAOB Rule 5113 permits the Board to "rely upon the investigation or a sanction, if any, of a foreign registered public accounting firm by a non U.S. authority". However, this does not limit, in any way, the authority of the Board under PCAOB Rule 5200 to commence disciplinary proceedings or under PCAOB Rule 5300 to impose a sanction.

The proposed approach results in the risk of two sets of investigators coming to different conclusions and the regulators proposing different sanctions. We believe that the final output of any investigation and disciplinary action should clearly be the responsibility of the home country regulator.

Other

The proposed rules do not address potential conflict between the law of certain countries and the Act that might have the effect of preventing the Board undertaking inspections or investigations (PCAOB Rule 2105 addresses conflicts of law in the context of registration). PCAOB Release No. 2003-020 stated that the "cooperative approach envisaged by the Board would also address potential conflicts of law which may arise in connection with an inspection or investigation", however, the amended rules do not provide non-U.S. firms with any guidance where such conflicts of interest might arise. We suggest that a rule similar to PCAOB Rule 2105 is included within the rule amendments.

Finally, we would emphasize that we believe that all of our suggestions can be implemented in a manner that would improve the oversight of foreign firms whilst remaining faithful to the overall objectives of Sarbanes-Oxley.

If you wish to clarify any comments you find unclear or answer any questions our comments raise, then please call or write to Neil Lerner + (44) 207 311 8620, neil.lerner@kpmg.co.uk

Yours faithfully

KPMG

NASBA
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David A. Costello, CPA
President & CEO

January 23, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
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VIA E-mail to **comments@pcaobus.org**

Re: PCAOB Rulemaking Docket Matter No. 013
PCAOB Release No. 2003-024, December 10, 2003
(Proposed Rules Relating to the Oversight of Non-US Public Accounting Firms)

Dear Board Members:

We appreciate the opportunity to offer comments to the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") on its proposed rules relating to the oversight of non-US public accounting firms. The Board is considering the proposed rules for adoption and submission to the Securities and Exchange Commission (the "Commission" or the "SEC") pursuant to the Sarbanes-Oxley Act of 2002 (the "Act").

The National Association of State Boards of Accountancy (NASBA) is the national organization of the accountancy regulators of all states and other US jurisdictions (collectively, the "states"). As stated in our other letters of comment, NASBA's ongoing primary focus is upon rules and policies relating to enforcement, with special attention to fostering federal/state cooperation. NASBA applauds the balanced approach the PCAOB proposes to use in determining foreign firm compliance with public protection requirements.

NASBA supports the premise of the proposal that it is in the public interest, and the interest of investors, to develop an efficient and effective cooperative arrangement where reliance may be placed on the home country system to the maximum extent possible. We believe that the proposals for registration of non-US firms, inspections and investigations and sanctions will accomplish these cooperative arrangements.

In fostering this same focus on international cooperation, the State Boards of Accountancy -- to maintain the authority given to them by state law -- need to uphold the validity and standing of their licenses in the global marketplace. To accomplish this, NASBA's International Qualifications Appraisal Board (IQAB) has worked jointly for several years with the AICPA on forging mutual recognition agreements with other countries' professionals. (For example, NASBA has developed mutual recognition agreements with the Chartered Accountants in Australia and Canada, the CPAs in Australia and the Contadores Publicos Certificados in Mexico, concluding these accountants have substantially equivalent qualifications to those licensed in the US.) These negotiations have been done with guidance from the Office of the US Trade Representative. NASBA understands that those wishing to offer services in all nations party to the GATS are to be treated equivalently

under fair, objective standards. We assume that the PCAOB recognizes the same overarching principle, when applicable, in considering required firm inspections.

When mutual recognition agreements are developed by IQAB, the entry-level qualifications for licensure are considered, including education, examination and experience. By the Sarbanes-Oxley Act's requiring in Section 102 (a)(2)(E) that the PCAOB be provided with "a list of all accountants associated with the firm who participate in or contribute to the preparation of audit reports, stating the license or certification number of each such person, as well as the State license numbers of the firm itself," Congress afforded the PCAOB the benefit of the State Boards' comprehensive licensure process. NASBA recommends that the qualifications of those licensed outside the United States be considered at an early point in the oversight process as an additional factor for the PCAOB to consider in evaluating the rigor of the foreign oversight system.

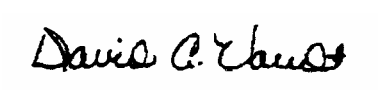
Additionally, Sections 6(g), 6(h) and 6(j) of the Uniform Accountancy Act (UAA) provide that states can grant reciprocal certificates as certified public accountants to foreign accountants who meet standards equivalent to those in the state. This approach is based on professional competence and its objective is to provide international reciprocity to qualified individuals without imposing arbitrary or unnecessary restrictions. Further, Section 14(j) of the UAA allows foreign licensees to provide audit services in the states to foreign based clients regarding reports only being issued in foreign countries.

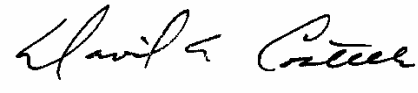
Proposed Rule 1001 (f)(iii) Foreign Registrar states : "The term 'foreign registrar' means an entity, other than an entity existing under the laws of the United States or any state, with which a foreign public accounting firm is required to register." We note that a non-US firm and the individual professionals that perform services in a US jurisdiction which by state law would be considered the practice of public accountancy must register in that state, should such registration be required by state law, in addition to any registration required with a "foreign registrar."

NASBA recommends that the inspection program for foreign registered public accounting firms should address compliance with both US auditing standards and international auditing standards (or other applicable auditing standards). A failure to meet the requirement that may be imposed by the host country could well be a concern for the PCAOB.

The evolving global market depends on the integrity of the information that investors are given -- and independent auditors play a crucial role in promoting that integrity. We continue to believe that close cooperation and a working partnership of the PCAOB and the SEC with NASBA and the State Boards will result in more effective regulatory efforts than otherwise would be achieved. The impact that the PCAOB's rules can have on the international accounting community is significant and we hope that the developing standards for oversight will help in protecting the public both here and abroad.

Sincerely,





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January 26, 2004

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Re: *Rulemaking Docket Matter No. 013, PCAOB Release No. 2003-024, Proposed Rules Relating to the Oversight of Non-US Accounting Firms*

PricewaterhouseCoopers ("PricewaterhouseCoopers")[1] appreciates the opportunity to comment on the Board's *Proposed Rules Relating to the Oversight of Non-U.S. Accounting Firms*, as set forth in Release No. 2003-024 dated December 10, 2003 ("Release"). We support the efforts of the Public Company Accounting Oversight Board (the "Board") to restore investor confidence. We also commend the Board's efforts to establish cooperative means of working with foreign regulators with respect to the inspection and discipline of foreign public accounting firms that are subject to the Board's jurisdiction.[2] We have reviewed the proposed rules of the Board and have the following comments. Following our comments, we also set forth a summary of our suggested revisions to the proposed rules.

Summary of Position

As discussed in more detail below, PricewaterhouseCoopers believes that:

- The Board's proposals regarding amendments to the registration rules need to separate the registration process from the proposed inspection process;

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1 PricewaterhouseCoopers refers to the network of member firms of PricewaterhouseCoopers International, Ltd., each of which is a separate and independent legal entity.

2 Pursuant to Section 106(a) of the Sarbanes-Oxley Act and the Board's Rule 2100, all foreign public accounting firms that provide audit reports on U.S. public company issuers, or who play a substantial role in such audits, are required to register with the Board. We understand the proposed rules to apply only to registered public accounting firms and not to other accounting firms who are not registered but may be required to provide information or work papers pursuant to section 106(b) of the Act or the associated person consent requirement of Form 1, pt. VIII.

- The Board should develop cooperative inspection systems with foreign regulators based on information obtained through direct regulator-to-regulator discussions; foreign firms should not be required or expected to initiate the process, provide information about their own regulatory system, or assess the effectiveness of their home country regulators;

- The oversight role of the Board in relation to the local regulatory authority requires clarification. The proposed rules may lead to dual oversight of a firm without further definition of the respective roles of the Board and the local regulator;

- The rules for inspection of foreign firms, whether conducted by the Board or in conjunction with a foreign regulator, need to take into account legal impediments under foreign law that could impact such inspections;

- The rules regarding reliance on foreign disciplinary proceedings or sanctions should be structured to protect the due process rights afforded to the firms under U.S. law, including rights of appeal to the SEC; and

- The Board's statement of principles on cooperation with foreign regulators in their oversight of U.S. accounting firms similarly needs to be clarified in a number of respects, including providing clarity on how the regulators will interact and how the system will preserve the protections and rights available to U.S. firms under applicable U.S. law.

Proposed rule amendments regarding registration by foreign public accounting firms

PricewaterhouseCoopers supports the proposed amendment to Rule 2001 to extend the deadline for registration by foreign public accounting firms by 90 days to July 19, 2004.

The proposed registration rule amendments also provide for addition of exhibit 99.3 to Form 1. This exhibit provides an optional means for a foreign public accounting firm to provide basic information about its home country regulator. PricewaterhouseCoopers does not object to provision of this information as such. We believe it would be useful to the Board to know (to the extent it does not already) who the relevant regulatory body is in the home country of the foreign firm. That information likely will facilitate the process of developing cooperative relationships between the Board and the foreign regulator.

The Board indicates, however, that this exhibit should be used by a firm that "expects to petition the Board" to permit reliance on home country inspections under proposed Rule 4011.

(Release No. 2003-024, at 5.) By implication, a foreign public accounting firm must decide as part of its registration process whether or not it expects to ask the Board to initiate a review of possible cooperative inspection systems. As discussed below, PricewaterhouseCoopers believes that it should not fall upon foreign public accounting firms to initiate the cooperative process.

In any event, we believe that the registration and cooperative inspection process for foreign firms should not be linked. We believe that exhibit 99.3 should be eliminated from the registration form, in which case the firms in each registering territory, if they wish to do so, can separately submit the names of their regulators to the Board. If, however, the Board decides to retain 99.3 as the method for a firm to identify its regulator, the rules should make clear that if a foreign firm files exhibit 99.3, that will not create any implication or expectation that it will or will not petition the Board for a cooperative inspection system.

Proposed rules regarding inspections of registered foreign public accounting firms

PricewaterhouseCoopers believes that the proposed rules for cooperative inspection systems between U.S. and foreign regulators represent a constructive response to the concerns of non-U.S. regulators and foreign accounting firms. Regulators and firms both expressed concerns about the implications of a U.S. regulatory body exercising "extraterritorial" regulatory power over firms that were not organized or located in the United States, and which were regulated by authorities in their home countries. As the Board acknowledges, many foreign regulatory authorities have effective regulatory structures and many, like the EU and Canada, are putting in place enhanced regulatory bodies. The Board also appropriately recognizes that it may not be the most productive use of its resources to conduct full inspections of foreign public accounting firms that may perform relatively few audits of U.S. issuers. It also correctly recognizes the difficulties of attempting to conduct inspections in foreign nations, given language barriers and other difficulties.

The Board outlines, in general terms, reasonable principles for determining when and to what extent the Board should defer to foreign regulators and for assessing whether reliance on foreign regulators to perform some or all of the inspection function is warranted. However, we believe that the proposed inspection system should be revised to address several key issues.

The Board should assess the effectiveness of a home country regulator and develop cooperative inspection systems based on direct regulator-to-regulator discussions. Foreign firms should not be required or expected to initiate the process, provide information about their own regulatory system, or assess the effectiveness of their home country regulators.

Proposed Rule 4011 provides that a registered foreign public accounting firm may petition the Board for an inspection that relies upon an inspection by a foreign regulator. The

rule contemplates that the firm's petition would provide detailed information about "the non-U.S. system's laws, rules or other information to assist the Board in evaluating such system's independence and rigor." (Release No. 2003-024 at 9.)

PricewaterhouseCoopers believes that this rule should be modified to provide that consideration of a cooperative inspection system, including the exchange of relevant information to assist the Board in its determinations, should be initiated and conducted through direct regulator-to-regulator discussions. We do not believe that it is appropriate to insert a foreign public accounting firm into this process by requiring it to initiate the process by petition. Nor do we believe that it is appropriate or necessary to make the foreign public accounting firm provide information for the Board to consider in deciding whether, and to what extent, it will rely on inspections by foreign regulators. There are several related reasons for this view:

- We believe that it is likely that, regardless of the information supplied by a foreign public accounting firm, the Board will seek to obtain information directly from the relevant non-U.S. regulator in order to assess its system. Indeed, the Release appears to contemplate just that. It refers to "discussions with the appropriate entity or entities within the non-U.S. system concerning an inspection work program" as among the information it will consider. (Release No. 2003-024 at 9.) It also makes clear that any decision to rely on foreign inspections will depend on extensive discussions with the foreign regulator regarding the inspection work process. (*Id*. at 13-14.) In that circumstance, it is difficult to see what benefit is derived from first obtaining a description and assessment of the foreign regulatory system from the regulated entities. Even if such initial information is obtained, it is likely that the Board will ask the foreign regulator to comment on and verify the firm's characterizations.

- The requirements for the petition require the regulated entity – the foreign accounting firm – to tell the Board how its home country regulatory system works. By definition, such information will be less authoritative than a description by the regulator itself. Moreover, the foreign regulator is much more likely than individual firms to be able to provide information relating to the principles that the Board indicates it will consider in evaluating the "independence and rigor" of the home country system. This is especially true for matters relating to adequacy and integrity of the system, independence, transparency, and, most importantly, historical performance.

- The petition process may require the registering firm to make subjective or qualitative judgments about the effectiveness of its home country regulatory systems. If so, the process will create problems:

- The foreign firm's relations with its home country regulator could be impaired if the home country regulator disagreed with aspects of the foreign firm's description of how its home country system worked. It is not difficult to imagine that a home country regulator would not view favorably descriptions of its system that the regulator felt were unduly critical or negative.

- In order to avoid this dilemma, foreign firms may feel pressure to present a positive picture of the home country regulatory system that will not be accepted by the Board. Based on such perceived pressure, we recognize the difficulty that the Board might have in accepting the firms' assessments. In addition, the result could be that both the foreign regulatory system and accounting firms regulated under it will be deemed "tainted" by a negative conclusion by the U.S. accounting regulator. We do not believe that such an outcome serves the goals of generating confidence in the oversight of the auditing profession.

- Aside from these generalized concerns, asking foreign firms to provide information about their home country regulatory system could potentially require them to make subjective assessments about how the system has been applied to them. A firm's opinions about the adequacy of its home country regulatory system and the effectiveness of the foreign regulators may not be viewed as objective.

In light of these considerations, a system that is based on direct regulator-to-regulator consultations between the Board and foreign regulators is preferable. The Board would obtain first-hand information from a foreign regulator about how its system works, how effective the regulator believes it has been, to what extent it satisfies the principles identified by the Board, and how the regulator believe that it can cooperate with the Board in carrying out the Board's inspection program. It is not necessary to compel the firms to stand in the middle of this process. Plus, for the reasons cited above, it is foreseeable that at the end of the day, the Board will find submissions by the firms to be less useful.

The procedures for the Board's evaluation of foreign country regulatory systems should be revised in certain respects.

PricewaterhouseCoopers also believes that several aspects of the proposed process for cooperative inspections need revision, regardless of whether foreign regulators or the firms themselves provide the relevant information to the Board. These include the following:

- The proposed rules articulate a list of five general principles the Board will consider in making its determinations (*see* Proposed Rule 4011(c)(ii)) and provides some guidance about what factors it will take into account with respect to each. (Release 2003-024 at 12.) The Board also indicates that, after it makes its determination about the effectiveness of the foreign regulatory system, it will also consider the degree and nature of cooperation that the foreign regulator is willing to provide. (*Id*.) The rules do not describe how the Board will weigh or assess these various factors and considerations. Indeed, the Board reserves complete discretion to decide what factors it will decide are relevant and the degree of deference it will accord the foreign system based on whatever grounds it chooses. (*Id*. at 12.) We believe the Board should set forth in more detail exactly how it will weigh the relevant factors and make its determinations.[3] The Board should also establish a mechanism for reconsideration or review of these determinations.

- In enumerating the considerations it will consider as part of its process, the Board requires that a foreign system replicate the U.S. PCAOB model in most particulars in order to receive full deference. For example, the Board looks to whether the foreign regulator (i) has power to conduct inspections, initiate disciplinary proceedings, impose sanctions and adopt ethics and independence rules; (ii) is composed of government appointees a majority of whom are not public accountants and has independent operating and administrative authority; (iii) has an independent source of funding; and (iv) has independent rulemaking authority. (See Release 2003-024, at 10-11.) In particular, it appears that in the case of each of these factors, the Board considers any form of self-regulation by accountants or participation, even indirect, in the regulatory process by accountants, to be a substantial negative consideration. (*Id*.) We believe the Board should adopt a more flexible approach. It should be prepared to accept evidence of the effectiveness of the foreign system even if in certain respects it does not follow the U.S. model exactly. The Board should not *per se* preclude full reliance on foreign inspections just because the foreign regulatory structure permits some degree of self-regulation or participation by accountants in the regulatory structure or rule-making. Instead, the Board should assess objectively whether this kind of involvement in fact raises material doubts about the effectiveness of the foreign inspection. Further, we believe that an additional category should be added: the regulator's understanding of US GAAS and GAAP. If the inspection relates to a

[3] In any event, we believe the rules should be modified to include the more detailed discussion of the considerations that the Board would take into account as set forth in Release No. 2003-024 at A2-3 to A2-5. As a matter of notice and administrative procedure, we think that it is appropriate for the actual rules themselves to set forth the relevant criteria.

firm's work on an SEC registrant, it is important that the regulator understand the standards that apply to such work.

- The proposed rule requires each firm that wishes to ask the Board to rely on home country inspections to separately petition the Board and also contemplates that the Board will make individualized determinations as to each firm. (Proposed Rule 4011(a); Release 2003-024, at 9.) We believe that this provision is not feasible and likely to result in inefficiencies and disparate treatment among firms in the same country. If some firms in a country petition and others do not, then Board will find itself in an awkward position. It will be required to conduct full inspections itself on some firms. As to other firms, it will have to decide to rely on local inspections or elect not to rely on such inspections notwithstanding its findings regarding the effectiveness of the non-U.S. system. Such a result would be inefficient for the Board and presents the possibility that different accounting firms in the same country will be subject to different inspection regimes. Instead, the Board should make a decision regarding the degree to which the foreign regulatory system satisfies its criteria and apply it across-the-board to all inspections of all firms in a given country. This also provides another reason to support a direct regulator- to- regulator dialogue.

- We believe that there is a need for clarification on coordination between the Board and local oversight bodies relating to inspections. Our concern is whether under current proposed rules both oversight bodies could carry out inspections that could result in different – and perhaps conflicting – outcomes. We think the Board should endeavor to develop a cooperative inspection process that prevents to the maximum extent possible duplicative regulatory systems and that minimizes the potential inconsistencies, burdens, and costs to foreign firms of compliance with both home country and Board regulation.

- The proposed rule needs to provide for confidentiality of the information provided by firms in connection with petitions to rely on foreign regulator inspections. Rule 2300, which governs confidentiality for registration applications, does not appear to apply here . Nor do the Board's rules regarding confidentiality of inspection information. As noted above, it is problematic to put firms in the position of making qualitative judgments about the effectiveness of their home country regulators. This problem will be compounded if these assessments are made public (other than to the petitioning regulators and affected firms), especially if the Board ultimately does not accept the firm's assessments.

- The proposed rule does not require the Board or its staff to explain the basis for its decisions regarding the effectiveness of the foreign regulatory system or for its

determinations of the scope of reliance on the foreign inspection process. The rules should require such an explanation to the local regulators and impacted firms and also provide a means for review of the Board's determinations. Any such explanation should, of course, protect the confidentiality of information about individual firms or associated persons of such firms to the extent the Board obtains such information or considers it as part of its overall consideration of the effectiveness of a foreign regulatory system.

- The proposed rule should provide for periodic re-evaluations based on changes in the foreign regulatory systems or new information about how the regulatory system is working. Assuming that the trend will be for foreign regulatory regimes to become more effective, that will work in the Board's favor by allowing it to rely increasingly on foreign inspections. The rules should provide explicitly for such ongoing considerations, perhaps on an annual or bi-annual basis.

The proposed rules need to take account of legal impediments on foreign regulators which prevent them from disclosing information.

Any system of regulation of foreign public accounting firms needs to take into account the limitations imposed by local law on the ability of the accounting firms to disclose information. Depending on the country and the information sought, local law may prohibit disclosure of information about audit clients to any third party, including potentially even local regulators. Even where there may be exceptions to permit local regulators to obtain information, that exception may not apply to a foreign – that is, U.S. – regulator. Thus, even if the Board is allowed to conduct inspections of foreign accounting firms directly in the foreign firms' home countries, it would be required to abide by the applicable legal limitations in each country.

Nor would local law in all cases permit the local regulators to turn over such information to a U.S. regulator. In fact, it will be the case in some countries that while a firm may be able to disclose information to its local regulator without breaching any local laws, the local regulator may not be able to disclose such information to the Board. While there may be a local legal obligation on the firm to make disclosures to its local regulator and this would not put it in contravention of other local laws, there may be no such protection in relation to a disclosure outside the jurisdiction. If consent is required, it may also be the case that while consent has been given for the local transfer, it may not have been given for any extra-territorial transfer, and local law cannot compel this.

For example, in the UK, a firm would not contravene the Data Protection Act 1998 by disclosing information to its local regulator. Depending on the circumstances of the proposed transfer of information, the local regulator may not have sufficient grounds for agreeing to the onward transfer of the information to the United States, and, therefore, if it did so, it would be in

breach of the Data Protection Act 1998. France provides another example. The French *Autorité des Marchés Financiers* and the newly-established *Haut Conseil du commissariat aux comptes* have the power to obtain information and documents, including audit workpapers, from a firm, but no ability to share such information and documents with the Board unless a treaty or agreement is entered into between the two regulators or their respective governments Any such sharing would be entirely within the discretion of the French authority concerned and not subject to any influence or control by the firms.

The Board has previously recognized that foreign public accounting firms may be subject to legal impediments that preclude them from complying in all respects with the Board's information requirements. (*Registration System for Public Accounting Firms*, Release No. 2003-007, at 8 & n. 14.) Rule 2105 provides a mechanism for firms to present information regarding these impediments as they affect registration.

However, the Board's proposed inspection rules do not take into account the potential impact of these legal impediments on the proposed inspection process. Indeed, the Board indicates that the it will give great weight to a foreign regulator's willingness to provide to the Board its work papers or work product with respect to any inspection, evaluation or testing. (Release 2003-024, at 13.) That should not be the case where local law prohibits such exchanges and, where the Board would not have power itself to overcome such limitations.[4]

With respect to legal impediments, we would expect the Board to work with the local regulators to identify and address, to the extent possible, the legal impediments, while still recognizing the fundamental principles of the local law. Accordingly, we request that that the Board adopt a procedure, comparable to that in Rule 2105, that allows foreign firms or regulators to demonstrate that there are legal impediments to inspection by the Board. The procedure should also provide for a means by which the Board may rely on inspections by foreign regulators, notwithstanding the legal impediments that may prevent the regulators from providing access to work papers or other information.

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[4] PricewaterhouseCoopers believes that the best solution to this issue is the creation of agreements between the Board and a home country regulator with respect to inspection procedures, comparable to those entered into between the U.S. SEC and foreign securities regulators with respect to multi-jurisdictional securities investigations, if those are consistent with applicable law in the affected foreign nation. Another example of such an arrangement is the US-German Antitrust Accord which has led to effective cross-border cooperation. The point of our comment is that the Board needs to be cognizant of and take into account these limitations as it seeks to implement a cooperative oversight program.

Proposed rules on disciplinary proceedings and sanctions

Proposed Rule 5113 allows, but does not require, the Board to rely in appropriate circumstances on the disciplinary proceedings, including investigations, and sanctions imposed by the home country regulators of a registered foreign public accounting firm. The Board retains discretion to conduct its own disciplinary proceedings and impose its own sanctions if circumstances require. (Release 2003-024 at 14-15.)

We do not disagree that the Board must retain its authority to act independently of the foreign regulator. By the same token, in order to rely on foreign regulatory actions, the Board should make sure that any registered foreign public accounting firm receives the same level of due process and procedural protection that it would in an investigatory proceeding conducted directly by the Board. Both section 105 of the Sarbanes-Oxley Act and section 5 of the Board's Rules prescribe detailed procedures that must be followed in investigations and to impose disciplinary sanctions. These procedures provide substantial due process protections for the rights of accounting firms and associated persons. We believe that equivalent protections are appropriate so that investigations that may involve foreign regulators are handled in a similar manner and firms are afforded comparable protections.

Accordingly, we recommend that the proposed rule should be modified and clarified in certain respects:

- The Board should rely on foreign investigations, discipline or sanctions only when the Board has first made a finding that the foreign procedures and due process protections are comparable to those provided by the Sarbanes-Oxley Act and the Board's detailed procedures. Any person who may be affected by such investigations or disciplinary actions should have notice and the opportunity to be heard by the Board on the question of whether the foreign procedures are adequate.

- The rules should make clear that the Board may rely on the investigation or sanctions of the foreign regulator only to the extent that the conduct at issue arises from the foreign firm's audit of a U.S. issuer (or otherwise bears on the suitability of the foreign accounting firm as a registered entity in the United States). In other words, we believe that it would be inappropriate for the Board to impose sanctions under U.S. law on registered foreign public accounting firms or associated persons of those firms for conduct that is unrelated to its audits of U.S. issuers.

- The rules should be clarified to reflect that to the extent the Board adopts a foreign regulatory sanction as its own, the foreign public accounting firm that is the subject of such sanction will have the same rights of review of the decision

(including reconsideration or appeal to the SEC) as the firms would have of any sanction imposed directly by the Board.

Board cooperation with non-U.S. regulators' oversight of U.S. accounting firms

The proposed rules discussed above relate to the implementation by the *U.S.* regulator (the Board) of its inspection and disciplinary rules with respect to registered *foreign* public accounting firms. The Board in its proposing release also addresses the obverse situation – where a *foreign* regulator seeks the *U.S.* regulator's help in carrying out its responsibilities with respect to a *U.S.* registered public accounting firm. In that situation, the U.S. public accounting firm might be subject to regulation by the non-U.S. regulator because the U.S. firm engages in regulated audit activities with respect to a company whose securities are listed in a foreign country.

In the release, the Board sets forth the principles under which it will cooperate with non-U.S. regulators to the extent that those regulators seek to exercise oversight responsibilities over U.S. registered public accounting firms. PricewaterhouseCoopers does not object in concept to the Board's approach.

However, while the Board does not believe it necessary to propose specific rules to implement this process (Release No. 2003-024 at 15n.13), we believe that the process should be clarified in some respects, by rule or otherwise.[5] Any process by which the Board provides assistance to foreign regulators needs to be implemented in a manner that does not compromise the substantive or procedural rights and protections that registered accounting firms and their associated persons have under the Sarbanes-Oxley Act and the Board's Rules. In particular, we believe that the rules should make clear the following:

- As a condition of any cooperation with foreign regulators, the Board needs to establish that the foreign regulators will provide a level of confidentiality of information relating to the inspections, investigations or sanctions comparable to that required by the Sarbanes-Oxley Act and the Board's Rules. It would be inappropriate for the Board indirectly to disclose such information by sharing it with foreign regulators when it cannot do so itself.

[5] In addition, there may be issues of the Board's statutory authority under the Sarbanes-Oxley Act to provide information or other assistance to foreign regulators to the extent that information or assistance is not sought in connection with a proceeding related to the compliance of a firm with U.S. professional standards or laws.

- In circumstances where the Board has been asked by a foreign regulator to assist in the foreign regulator's oversight of a U.S. firm and its associated persons, the Board should adopt procedures to give the firm and/or affected associated persons the opportunity to address whether the procedures are fair and protect the U.S. firm's rights. The concerns of confidentiality and extension of regulatory jurisdiction in specific circumstances are important. Therefore, the Board should propose rules in this area and provide the firms with an opportunity to comment on the proposal.

PricewaterhouseCoopers' suggested revisions to the proposed rules

For the reasons set forth above, we urge the Board to consider revising the proposed oversight system as follows:

1. **The Board will evaluate the effectiveness of foreign regulatory systems and develop cooperate inspection systems based on direct regulator-to-regulator communications. The registration process should be separated from inspection – information about regulators should be provided separately. A registered foreign public accounting firm may provide the identity and address of its regulator but will not be required to provide any other information about its regulatory system. Provision of such information will not indicate anything with respect to the inspection process – it is merely information provided for the Board's convenience.**

2. **Any system of cooperative inspections or other forms of cooperation between the Board and a foreign regulator will apply to all registered foreign public accounting firms in that jurisdiction.**

3. **The Board will not rule out deferring to foreign regulators simply because the foreign system has elements of self-regulation or otherwise because it does not follow in all respects the PCAOB model.**

4. **In developing a cooperative oversight system with foreign regulators, the Board will seek to minimize duplicative regulation to the maximum extent possible and to minimize the potential inconsistencies, burdens and costs to foreign public accounting firms of compliance with two systems of regulation.**

5. **The Board will maintain the confidentiality of all information submitted to it by firms or foreign regulators with respect to the effectiveness of the foreign regulatory systems.**

6. The Board will explain to the regulators and firms involved its determinations regarding whether and to what degree it will defer to non-U.S. regulators in the inspection process, although it will maintain the confidentiality of any information regarding actions with respect to particular firms or associated persons of such firms. It will provide a means for firms and/or foreign regulators to obtain review of these decisions.

7. The Board will adopt a process for periodic re-evaluation of the cooperative inspection systems.

8. The Board will acknowledge where necessary the limitations imposed by foreign law on disclosure of information to the Board but still consider reliance on non-U.S. inspections in those circumstances. The Board will adopt procedures to permit firms or regulators to submit information about the foreign legal impediments.

9. Conversely, the Board will not rely on foreign inspections unless it is satisfied that the foreign regulator is subject to procedures regarding the confidentiality of inspection reports and other information developed in an inspection that are at least as protective as the Board's procedures.

10. With respect to the regulation of the US firms, the Board will rely on foreign investigations, disciplinary proceedings and sanctions only to the extent that they contain due process protections comparable to those available to firms and associated persons under the Board's rules. Any person subject to sanctions based on foreign regulatory action will have the same rights of review by the Board or the SEC that they would if the regulatory actions were taken directly by the Board.

11. The Board may cooperate with the oversight activities of foreign regulators with respect to U.S. public accounting firms that audit companies in other countries. In connection with such cooperation, at a minimum, foreign regulators will be required to maintain adequate confidentiality safeguards comparable to those provided under applicable U.S. law. The Board should

propose additional rules to clarify how the Board's cooperation would work in practice.

We will be pleased to discuss any of our comments or answer any questions that you may have. Please do not hesitate to contact Richard R. Kilgust at 646-471-6110 regarding our comment letter.

Very truly yours,

PricewaterhouseCoopers

RSM International

26 January 2004

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Office of the Secretary,
Public Company Accounting Oversight Board,
1666 K Street, N.W.
Washington, D.C.
20006-2803
USA

Dear Sir,

PCAOB Rulemaking Docket Matter No. 013

We appreciate the opportunity to comment on the Public Company Accounting Oversight Board's proposed rules relating to the Oversight of Non-U.S. Public Accounting Firms.

RSM International is the world's sixth largest affiliation of independent accounting and consulting firms. Our members operate in more than 70 countries and employ over 19,000 individuals in over 500 offices. RSM International member firms provide a full range of audit and advisory services to clients domestically and internationally. A number of the non-U.S. members of RSM International are planning to register with the Board and are interested in this proposed rule.

RSM International supports the Board in its efforts to find a practical and efficient way to implement its oversight responsibilities for the audit of U.S. and foreign SEC registrant companies by non-U.S. public accounting firms. We believe that the Board's cooperative approach is a reasonable long-term solution to protecting investors, improving audit quality, ensuring effective and efficient oversight of non-U.S. firms and helping to restore public faith in the accounting profession. We encourage the Board to partner with other foreign regulators to design and adopt consistent rules across the globe, which will enhance the efficiency and consistency of compliance and simplify training and monitoring by regulators and audit firms.

We are uncertain that the Board's proposal will provide an efficient and effective short-term solution. We are concerned about the time and complexity of the work involved to establish an agreement with non-U.S. regulators and legislators. Cooperation with regulatory institutes alone may not resolve all of the legal restrictions, including access to working papers. We believe that changes may, in some cases, require legislative action. As in the U.S., legislative action can require a longer period of time. As a result, it may be necessary to develop a phased approach to the Board's implementation plan.

The Board's Proposed Rule on Registration (Rule 2100)

We support the Board's proposal to extend the registration date for non-U.S. firms. However, we have limited basis to conclude that an extension to 19 July 2004 will be adequate for all non-U.S. public accounting firms that want to register with the PCAOB, particularly those firms requiring significant translation assistance.

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The Board's Proposed Rule on Inspections for Non-U.S. Registered Firms (Rule 4001)

Overview of the Proposed Rule

We are supportive of the Board's proposal to place reliance, where possible and appropriate, on a non-U.S. public accounting firm's home country system. We offer the following comments for the Board's consideration in finalising this rule:

- The proposed rule requires that each non-U.S. public accounting firm that petitions the Board to place reliance on its home country system, must provide a detailed description of its home country system's laws, rules and/or other information. This information has to be provided in English to assist the Board in evaluating such system's independence and rigor.

  We do not believe that this requirement is the most practical or efficient way to obtain the necessary information. We believe the proposed approach will be time consuming, redundant and costly and may result in the Board receiving inconsistent information. Additionally, it may put the non-U.S. public accounting firm in the difficult position of making judgments about the very systems they must comply with and the individuals responsible for those systems. In our opinion, the Board should invest the necessary time and resources to obtain the local country regulatory information directly from the home country regulators. This approach will allow the Board to thoroughly understand local country systems and to be in a better position to assess the quality of such systems and to work with such regulators to address any required or recommended enhancements.

  Furthermore, we believe that the Board should clarify the required timing for a non-U.S. public accounting firm to submit a petition for reliance on its home country system. Additionally, the Board should provide guidance on the information required where the regulatory system in a country is changing or is expected to change soon.

- We recommend that the proposed rule and related release outline how the Board plans to fulfil its oversight role when a home country system is deemed by the Board to be inadequate and where there are legal restrictions on access to working papers. This situation is particularly relevant to SEC registrant companies with multi-national operations and who utilize local country auditors for legal, licensing, language and logistical reasons.

- In the interests of transparency and fairness, we recommend that the Rule be amended to require the Board to provide the foreign oversight system regulator and the non-U.S. public accounting firm with an explanation of a Board decision not to place any reliance on that oversight system. In addition, we recommend that the Rule provide for a right of appeal of the Board's decision.

- We recommend that the proposed rule consider the quality of a non-U.S. firm's audit methodology and related monitoring systems along with the home country regulatory system. Similar to the requirement for SEC registrant companies to have effective systems of internal control, audit firms should have robust quality assurance policies, practices and monitoring systems. In particular, we believe that the Board should encourage international networks of firms to adopt robust quality assurance policies and practices and related monitoring procedures to ensure compliance with those practices.

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Principles for determining the Independence and Rigor of a Non-U.S. System under the Proposed Rule

The proposed rule states that, in determining the degree to which the Board may rely on the non-U.S. inspection, the Board will evaluate any other information that it may obtain concerning the degree of the non-U.S. system's independence and rigor. We recommend that the Board take the following into account:

a) In assessing the integrity of the system, we suggest that the Board specifically consider the competence and experience of individuals used as inspectors within that system.

b) In assessing the independence of the system, we suggest that the Board reconsider its criterion that the majority of individuals with whom the system's decision-making authority resides do not hold a license or certification authorising them to engage in the business of auditing and accounting for at least the last five years. We believe that this criterion is unduly restrictive and are concerned that very few regulatory authorities would meet this criterion.

Agreed-Upon Work Programs under the Proposed Rule

The proposed rule provides that, in jurisdictions with the highest level of independence and rigor in a home country system, 'the inspection work-program would be executed by the local inspecting body with the participation of experts designated by the Board'. We recommend that the Board clarify whether it envisages any specific cases where full reliance could be placed on the home country system. For example, after participation of PCAOB experts in the first inspection of a registered non-U.S. accounting firm, might the PCAOB participate in future inspections of the firm on a rotational basis following agreement to the scope of the work-program and agreement to full access to inspection working papers and the inspection report?

Section C - Board's Proposed Rule on Investigation of Non-U.S. Registered firms

We have no comments to make on this proposed Rule.

Cooperation by the Board with Respect to its Non-U.S. Counterparts' Auditor Oversight Responsibilities

We welcome the Board's cooperative approach and its willingness to work with its foreign counterparts in exercising their oversight responsibilities. We believe that a cooperative approach will result in the most effective and efficient process and, as a result, will benefit investors globally by establishing consistent expectations on audit quality.

****

Please contact Kevin Chowdhay (+44 (20) 7865 2321) if you would like to discuss any of these comments.

Yours faithfully,

William D. Travis
Chairman, Transnational Assurance Services Executive Committee, RSM International

SWISS STATE SECRETARIAT FOR ECONOMIC AFFAIRS

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

Berne, 26 January 2004

Our ref: #413345.1 / tsc

Concerns: PCAOB Rulemaking Docket Matter No. 013, PCAOB Release No. 2003-024

Dear Sir or Madam,

We appreciate the opportunity to comment once again on Rules proposed by the PCAOB in the context of the implementation of the Sarbanes-Oxley Act (SOA). The Swiss government, and the Swiss Institute of Certified Accountants and Tax Consultants speaking on behalf of the Swiss auditors' community have already on earlier occasions seized the opportunity to express themselves on various aspects of the SOA and its implementing rules and have, on these occasions, also provided the PCAOB and the SEC with in-depth information about relevant aspects of the Swiss corporate governance regime, applicable domestic legal provisions and existing and planned auditor oversight. We have also explained the areas of conflict between SOA provisions and Swiss law. This background information was further discussed during oral presentations and personal contacts with representatives of the SEC and the PCAOB. As a matter of fact, just a few days ago, on 14 January 2004, we had the pleasure to brief a PCAOB delegation in Berne on the planned ambitious Swiss oversight system and discuss with them key elements of the planned PCAOB regime for non-U.S. public accounting firms.

The main thrust of all these contacts has been to communicate to the responsible U.S. authorities and bodies that Switzerland fully shares the objective of taking effective measures to restore investors' and the public's confidence that has been shaken as a result of corporate excesses and is in turn taking concrete steps to strengthen its corporate governance rules and establish a government-based system of auditor oversight. At the same time, as a country deeply integrated in the global economy and with numerous corporate links with, notably, the United States, Switzerland is keen on avoiding double burdens and obligations for our companies and, in particular, conflicts of laws.

As presented in some detail to the PCAOB visitors to Berne on 14 January 2004, plans for an effective Swiss oversight system have been worked out and await

government approval before being forwarded to Parliament. Taking into consideration the U.S. model as well as relevant EU law, the planned Swiss system sets a high but realistic standard for public accounting firms operating in Switzerland and fully incorporates the principle of home country control. It will, however, not be operating before mid-2005 at the earliest.

I. General remarks

This submission builds on the earlier contacts and the information already provided and only refers to Swiss rules and arrangements to the extent necessary. It comments the various elements of PCAOB Release No. 2003-024 following the same structure as the Release.

By way of general comment, the Swiss government appreciates the step-by-step approach chosen by the SEC and the PCAOB in applying the SOA to non-U.S. public accounting firms and in engaging in a dialogue with the United States' main economic partners to further develop their ideas. It is a proper response to the increased internationalization of financial markets, and indeed a necessity, even for a country of the size and importance of the United States, to rely on international cooperation to develop adequate regulatory responses to a problem that is widely felt. In that context, the principle of home country control is in our view of particular significance and we were pleased to note that the PCAOB relies on this notion in Release No. 2003-024 and in the Briefing Paper on Oversight of Non-U.S. Public Accounting Firms of 28 October 2003. As pointed out in more detail below, we are of the opinion, however, that the PCAOB could go even further in applying this principle vis-à-vis non-U.S public accounting firms without jeopardizing its mandate. In addition, it has to be taken into account that Swiss accounting firms feel some of the consequences of the U.S. oversight system already prior to their registration, and after registration, like companies in other countries, would have to live with a considerable degree of uncertainty until domestic oversight begins to be operational. International cooperation between authorities and responsible bodies based on home country control therefore also has to address this fact and should not just kick in when all formal structures in Switzerland are in place. Finally, while the Swiss government shares the view that public accounting firms should be submitted to a more stringent oversight system, this should not be done at the price of legal security. The proposed rules could also be improved in this regard.

II. Comments to the Release No. 2003-024

A. Board's Proposed Rule on Registration

- While welcoming the three-month extension of the registration deadline for foreign public accounting firms as a step in the right direction, we are questioning whether this extension is sufficient given the considerable amount of work that is necessary to firm up and finally decide on the PCAOB rules for non-U.S. public accounting firms and to take measures necessary for removing the uncertainty that such firms face as regards the consequences of their registration. Registration cannot be looked at in isolation but has to be seen in the light of the engagements that follow it, and in that

regard much is still unclear. We therefore recommend extending the deadline even further.

- We also welcome that a Swiss applicant has the possibility to submit as Exhibit 99.3 of its application documentation a description of the Swiss oversight system. Logically, this would mean for the period before the planned government-based Swiss accounting oversight system becomes operational, that Swiss applicants would need to describe the oversight that they are subject to already now. (Virtually all Swiss applicants are subject to oversight exercised by the Swiss Stock Exchange SWX and the Federal Banking Commission as a consequence of being approved auditors under the Swiss banking oversight system. Furthermore, the oversight system administrated by the Swiss Institute of Certified Accountants and Tax Consultants has been in place for a long time). Is this the meaning of this provision?

- Relating to the possibility of submitting the application for registration via the home country registration entity, there will probably be no immediate benefit for Swiss accounting firms, as such a specific accounting firm registration system will not be operational before July 19, 2004. Moreover, this procedure does not lift any administrative burden from the accounting firms as the information required for registration will not be reduced. As a matter of fact, both Swiss and U.S. accounting firms will have to register twice – once with the U.S. PCAOB and again with the Swiss PCAOB. If other countries set up their own oversight bodies, the accounting firms will have to register with them as well. At least the big accounting firms might then have to register with ten to fifteen different oversight authorities and submit ten to fifteen different applications with varying contents. Switzerland doubts that this is a desirable outcome but welcomes the possibility of submitting the application via the Swiss PCAOB all the same; the latter should serve as the intermediary between the U.S. PCAOB and the Swiss accounting firms. In the same vein, the U.S. PCAOB should function as the intermediary between the Swiss PCAOB and the U.S. accounting firms that are subject to Swiss oversight.

B. Board's Proposed Rule on Inspections for Non-US Registered Firms

- Swiss sovereignty is protected by penal law. According to the Swiss Penal Code (article 271) it is illegal and may be punished by imprisonment (in severe cases up to 20 years) when a person performs acts for a foreign state on Swiss territory, which fall under the authority of an administrative agency or a public official. Aiding and abetting is equally illegal. Clear and legally binding international agreements are therefore necessary if article 271 should be waived and be replaced by a mutually acceptable system (which might then also allow the Swiss PCAOB to rely on inspections of U.S. accounting firms conducted by the U.S. PCAOB).

- Most welcome is the pledge to avoid legal conflicts (page 8). Swiss law stipulates rules on secrecy (professional and other), which may not all be at the free disposal of the concerned issuers and accounting firms. The reliance on home country control would be an appropriate way to avoid such conflicts, especially in the field of inspection of Swiss accounting firms. It is also in the Swiss interest to agree on international cooperation between competent authorities.

- Proposed Rule 4011 (b) provides that a non-U.S. accounting firm has to describe its home country oversight system in detail. This places an unnecessary

administrative burden on the individual accounting firm. The accounting firm will most likely not be able to furnish a detailed presentation due to lacking inside knowledge. In our view, the purpose of the system would be sufficiently served if the individual accounting firm were to list the name and address of its home regulator. This would enable the PCAOB to get in contact with this authority - something it has to do anyway in order to assess the rigor and reliability of the foreign system and in order to agree on the modalities of mutual cooperation.

- On page 9 of the Release, the Board states that the decision on whether the PCAOB will rely on a home country system will be taken on a firm-by-firm basis. Although the Board adds that the first decision on the reliability of a particular system will most likely apply to all accounting firms of the same jurisdiction, Switzerland feels that the PCAOB should rather act on a one-for-all basis. Otherwise, the question would need to be asked what circumstances might justify an unequal treatment of the accounting firms within the same jurisdiction.

- In assessing the independence of a non-U.S. system, the Board proposes to take into account whether a majority of the individuals with whom the system's decision-making authority resides does not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses for at least the last five years immediately before assuming their position in the system (page 11).

As pointed out to the PCAOB delegation that visited Switzerland on 14 January 2004, this requirement cannot be met to its full extent in a small audit market like Switzerland. The number of experts in this field is limited and it may be difficult to find adequate decision-makers not having had any connections to the industry during the last five years prior to their appointment. In addition, the fact that a person holds a license or certification does not necessarily mean in Switzerland that this person actually engages in the business of auditing or accounting. This being said, Switzerland will of course ensure that the people entrusted with the decision-making authority will not be compromised by conflicting interests.

- The Board expects the foreign counterpart to share its work papers or work product (page 13). It is obvious that reciprocity will have to be applied. It is too early to comment on this requirement in detail. Suffice it to say that the issue might lead to conflicts with Swiss administrative and legal assistance principles. In particular, parties must have a possibility to safeguard their legal rights. The same remark applies to the U.S. expert detached to assist in the stand-in inspection by the Swiss PCAOB. Furthermore, an exchange of work papers or work products can only function if questions related to confidentiality and treatment of confidential documents are solved in a mutually satisfactory and predictable way.

C. Board's Proposed Rule on Investigations of Non-U.S. Registered Firms

- The remarks concerning the reliance on home country control and the need for an international agreement (see II B., first bullet point) apply here as well. Once such an agreement is in place, it will solve legal as well as practical questions.

- As long as such a legal basis is missing it might be that certain measures cannot be executed in Switzerland. If such a case were to occur it should be resolved according to the principles agreed upon in the Memorandum of Understanding

between the governments of Switzerland and the U.S. on mutual assistance in criminal matters and ancillary administrative procedures (dated 10/Nov/1987; see 27 I.L.M. 480(1988)+). These principles include: the use of existing mechanisms, early warning and consultation as well as moderation and restraint. After all, the improvement of the quality of public company accounting is a shared goal that can be achieved through efficient administrative cooperation and not through unilateral measures.

- Switzerland therefore welcomes the proposition to rely on investigations and sanctions by a non-U.S. authority. However, rule 5113 contains the term "in appropriate circumstances", which does not provide for the necessary legal certainty. As far as reliance depends on the willingness of the non-U.S. authority to share evidence gathered during the investigation, Switzerland has to make the same reservation as under II B., first bullet point.

- The Board states that rule 5113 does not limit its own authority to commence disciplinary proceedings (page 14). Even though the Board adds (page 15) that it may consider sanctions imposed by non-U.S. authorities, the Board's first statement raises questions with regard to multiple prosecutions (double jeopardy). It is a general understanding that cumulative sanctions for the same offence should be avoided

D. Cooperation by the Board With Respect to its Non-US Counterparts' Auditor Oversight Responsibilities

- Switzerland very much welcomes the Board's willingness to work with its non-U.S. counterparts with regard to such counterpart's oversight responsibilities over U.S. accounting firms. Switzerland agrees that reciprocal treatment is important in the field of international cooperation and is also considering to rely on inspections, investigations and sanctions by the PCAOB. Quite evidently, also this type of cooperation would be greatly facilitated if it were to be conducted in line with modalities set out in an agreement between the two sides.

E. Continuance of the Dialogue and Other Board Programs

- At their meeting on 14 January 2004 in Berne, the representatives of the PCAOB and the responsible Swiss authorities agreed to continue their dialogue with a view to further clarifying the conditions according to which Swiss public accounting firms will be treated under the SOA. Furthermore, they agreed that contacts should be established between the two sides as soon as problems of a kind arose which could not be readily handled between the PCAOB and the accounting firm concerned. This approach to potential problems should also be used prior to registration. We take this opportunity to re-confirm our continued interest in such contacts.

- Contrary to the proposals in the Release, Switzerland is of the firm opinion, however, that such a dialogue should not only aim at establishing an inspection program between the PCAOB and the responsible Swiss authorities but also work out a solid legal basis for cooperation between the two sides. As pointed out at several places above, a clear and legally binding international agreement does not only facilitate this cooperation but is in several regards absolutely necessary to carry

it out. In addition, such an agreement would provide public accounting firms with the necessary legal security for complying with their obligations under the SOA and with Swiss law. Models for such agreements exist and an appropriate legal form can undoubtedly be found.

F. Responsibilities of Non-US Public Accounting Firms Prior to and Subsequent to Registration

- In its Release No. 2003-007, dated 6 May 2003, (REGISTRATION SYSTEM FOR PUBLIC ACCOUNTING FIRMS), the PCAOB in Rule 2105 provided for an exception to the registration requirements insofar as "An applicant may withhold information from its application for registration when submission of such information would cause the applicant to violate a non-U.S. law if that information were submitted to the Board".

- In our understanding this Rule covers not only information provided as part of the application itself (Parts I through VII of Form 1 – Application for Registration), but also information that a non-U.S. public accounting firm would have to produce on the basis of a consent pursuant to Sec. 102(b)(3) of the SOA and Part VIII item 8.1 of Form 1. Indeed, Swiss public accounting firms cannot submit the consents or secure from their associated persons the consents pursuant to Sec. 102(b)(3) of the Act and Part 8.1 (a) and (b) of Form 1 *verbatim*, but only with a reference to the limitations imposed by Swiss law and evidenced in accordance with Rule 2105 in the form of a legal opinion and with copies of the relevant articles of Swiss statutes. While this appears self-evident to us, clarification of this issue would greatly help the Swiss public accounting firms to engage in the registration process without fear that subsequent conflicts between the SOA and Swiss law would expose them to conflicting legal requirements or put their ability to issue audit opinions for issuers at risk.

- Again similarly to Sec. 102(b)(3) of the Act, but independent of and even before registration, Sec. 106(b)(1) and (2) subjects non-U-S. accounting firms to consent requirements. We would appreciate it if the PCAOB for reasons of consistency and homogeneity could make it clear that the same limitations applying to the registration pursuant to Rule 2105 are also valid for the explicit and deemed consent pursuant to Sec. 106(b) of the SOA.

- In theory, the PCAOB or the SEC could seek to obtain information that cannot be received directly from Swiss accounting firms due to limitations imposed by Swiss law, through the respective U.S. public accounting firm that belongs to the same network. We understand that the relationship between accounting firms belonging to the same network or otherwise associated among themselves is not the concern of the PCAOB. We think, however, that it would give Swiss accounting firms additional assurance if the PCAOB would state its policy in this regard clearly.

III. Summary

The Swiss authorities greatly appreciate the PCAOB's efforts to work out an oversight regime for non-U.S. public accounting firms that relies on international cooperation on the basis of home country control. For reasons spelled out in some detail above we are of the opinion that this important principle is not implemented as

far as it could be. In particular, the criteria for evaluating foreign oversight regimes and cooperating with them as well as the rules for conducting inspections and investigations are often vague and illustrative only and leave the PCAOB as the final arbiter almost unlimited discretion in deciding how to implement these tasks. Even in countries having oversight boards with the highest level of independence and rigor it would still be necessary that expert staff designated by the Board participate in inspections – a proviso that is questionable under the principle of home country control. While we have no doubt about the good will of the PCAOB to implement these rules, and interpret the criteria in a pragmatic and reasonable way, such assurances alone present a somewhat soft ground for taking far-reaching decisions such as signing up to an ambitious and potentially conflict-producing regime as the one installed by the SOA.

The criteria for implementing the tasks outlined should thus be considerably sharpened. Protection of confidential information and documentation by the PCAOB should be guaranteed in no uncertain terms. At the same time, the system of home country control should include an international agreement between the PCAOB and countries hosting a number of companies subject to the SOA, which spells out the tasks that can be assumed by the PCAOB's foreign counterparts and the conditions under which these tasks as well as cooperation in general can be implemented. As far as Switzerland is concerned, we are convinced that our planned oversight system will place at the top of the "sliding scale" and thus be able to guarantee a high standard of regulatory control which is also in line with the objectives of the SOA. Until the Swiss system is in place, several possibilities exist. Ideally, the deadline for registration for Swiss firms should be extended until the entry into force of the Swiss system. If this should not be feasible, a pragmatic approach should be used to handle the firm's obligations after registration and before the Swiss oversight body takes up its functions. In that context, an extension of the Rule 2105, *mutatis mutandis*, to the accounting firms' obligations during this interim period could go a long way towards avoiding legal conflicts.

Hanspeter Tschäni
Head of Division
International and European Economic Law

G A O
Accountability * Integrity * Reliability

Comptroller General of the United States

United States General Accounting Office
Washington, DC 20548

January 27, 2004

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803

Subject: *PCAOB Rulemaking Docket Matter No. 013—Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms*

This letter provides the U.S. General Accounting Office's (GAO) comments on the Public Company Accounting Oversight Board's (PCAOB) December 10, 2003, proposed standard on oversight of non-U.S. public accounting firms that audit U.S. public companies.

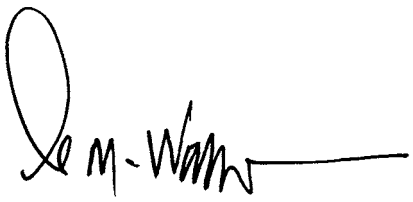
We support the Board's proposal to work with its counterparts in other countries in carrying out its oversight responsibilities and for engaging in constructive dialogue concerning reforms and possible cooperative arrangements for oversight of firms that audit public companies. We believe that the PCAOB's proposed framework—which places varying degrees of reliance on the auditing, quality control, and inspection systems based on the level of independence and rigor of the system in each country—is a sound approach. This approach can help the PCAOB achieve its goal of implementing the registration, inspection, and enforcement requirements of the Sarbanes-Oxley Act of 2002 efficiently and effectively. We believe that this kind of international collaborative approach will also help improve audit quality, ensure effective and efficient oversight of audit firms, and ultimately help restore trust in the auditing profession and strengthen global capital markets. We encourage the PCAOB to move expeditiously to define and implement this program.

GAO actively coordinates with accountability organizations in other countries with similar or complementary missions. Internationally, we participate in the International Organization of Supreme Audit Institutions (INTOSAI), the professional organization of the national audit offices of 184 countries. In addition, as Comptroller General, I started and serve as informal chair of the Auditor General Global Working Group, in which the heads of the national audit offices from 16 countries, which currently represent over 75% of global GDP, meet annually to discuss mutual challenges, share experiences, and identify opportunities for collaboration. By collaborating with such organizations, GAO has helped strengthen professional standards, promote best practices, provide technical assistance, leverage

resources, and develop strategic working relationships that allow us to extend our institutional knowledge and experience around the world.

We thank you for considering our comments on this very important issue. GAO is committed to working with the PCAOB on these issues of mutual interest.

Sincerely yours,



David M. Walker
Comptroller General
of the United States

cc: The Honorable William H. Donaldson, Chairman
Securities and Exchange Commission

The Honorable William J. McDonough, Chairman
Public Company Accounting Oversight Board

WIRTSCHAFTSPRÜFERKAMMER

Körperschaft des
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By E-Mail: comments@pcaobus.org

January 26, 2004
Durchwahl: 100
INT/US/PCAOB/793
- bitte stets angeben -

Dear Sirs,

Re: PCAOB Release No. 2003-24; PCAOB Rulemaking Docket Matter No. 13
Comments on the Proposed Rules Relating to the Oversight of Non-US Public Accounting Firms

We would like to thank you for allowing us the opportunity to comment on the PCAOB proposed rules relating to the oversight of non-US public accounting firms. The Wirtschaftsprüferkammer (WPK) is by law the professional organisation of all public accountants (*Wirtschaftsprüfer* and *vereidigte Buchprüfer*) in Germany. Membership and registration with WPK is mandatory for all professionals. The WPK is a corporation established under public law and operating under the oversight of the Federal Ministry of Economics and Labour. The responsibilities assigned to the WPK by Article 57 of the Law Regulating the Profession of *Wirtschaftsprüfer* include disciplinary oversight and the organisation of external quality assurance of statutory auditors.

We seek to comment the aforementioned proposed rules since they will directly affect not only our members but also the role and operations of our organisation designated by German law.

I. General Comments

As announced in Release No. 2003-20 of October 28, 2003 on the Oversight of Non-US Public Accounting Firms the PCAOB wants to follow a cooperative approach, i.e. the own activities of the PCAOB would depend on an individual assessment of the adequacy and integrity a foreign oversight system for public accountants. The PCAOB itself observes that inspections conducted under PCAOB Rules 4001 and 4002 raise special concerns for non-US registered firms, such as unnecessarily duplicative costs and potential conflicts of law. The Board believes that it is necessary or appropriate in the public interest or for the protection of investors to develop an efficient and effective cooperative arrangement.

However, the approach set out in Release No. 2003-24 does not establish an efficient and effective cooperative arrangement. Regardless of the individual structure and effectiveness of foreign oversight systems, the PCAOB will always claim to participate in inspections and investigations, even if the foreign oversight system fully complies with the principles set out in Rule 4011.

This does not prevent the fundamental problem of duplicative costs and potential conflicts of law for foreign public accountants. Most legal systems would not allow any participation of PCAOB staff in inspection and investigation procedures for reasons of confidentiality and data protection. Many provisions of Rule 4011 are incompatible with other constitutional and legal systems. This will cause further legal conflicts.

From our understanding, a cooperative approach should lead to mutual recognition of public oversight systems of equivalent quality sharing common objectives. This means a principle of home country control where a public accountant – even when acting under a foreign jurisdiction – is only subject to public oversight in his home country. Any other approach would harm the credibility, public trust and – in the end – the effectiveness of an oversight system.

Mutual recognition means not unilateral assimilation of a model required by one party. It needs consensus on general principles of adequacy and integrity of any oversight system giving each party sufficient scope to maintain a system in accordance with its legal system.

We share the PCAOB's objective in protecting the capital market against inadequate financial reporting and auditing. Both, prepares and auditors have to be subject to efficient public oversight. At present, the European Commission and the German legislator work on amendments of capital market regulations to strengthen public interest in the oversight.

However, internationally accepted principles on public oversight would help to establish a common framework for the supervision of public accountants. The European Commission is drafting a new Directive on qualification, registration and oversight of statutory auditors. This Directive will establish a common European framework for public oversight systems in the European Union. The 25 (with effect from May 2004) member states of the European Union will have to endorse the provisions of the Directive.

We therefore propose that the Board should continue negotiations with the European Commission aiming for true and fair mutual recognition of public oversight systems.

II. Assessing foreign oversight systems on firm-by-firm basis

According to proposed Rule 4011 the PCAOB intends to assess the adequacy and integrity of foreign oversight systems on firm-by-firm basis based on the submission of each registrant. Apart from the principle concerns about unilateral assessment of a foreign system as stated above, we do not consider an assessment on firm-by-firm basis appropriate.

The registrant's description of the foreign system's structure, laws, rules and other information may not give a true and complete picture of its adequacy and integrity. Descriptions may differ causing contradictions. This could lead to unnecessary enquiries of the PCAOB which would be both costly and time consuming.

We therefore propose an assessment on country-by-country basis involving the competent authority in the registrant's home country.

III. Registration of foreign public accounting firms

Concerning registration requirements we would like to refer to our general statement on the registration of German public accounting firms with the PCAOB sent to you by letter dated January 15, 2004 (copy enlosed). This general statement included a copy of a legal opinion furnished by the independent law firm Linklaters, Oppenhoff & Raedler identifying legal conflicts with German law resulting from the PCAOB's registration procedures.

The legal opinion shows that many items in the registration procedure conflict with German confidentiality rules, employment law and data protection law – the latter based on legislation of the European Union.

IV. External Quality Assurance

Concerning external quality assurance and inspections we do not agree that a peer-to-peer approach as part of a foreign oversight system must always lead to the additional involvement of the PCAOB.

As you will know, the European Commission adopted a recommendation on the external quality assurance for statutory audits in November 2000. The Commission recommends two models; monitoring and peer review. A recent survey of the Commission showed that most EU member states established a peer review system, like Germany. As required by the Commission these peer review systems include public oversight boards, in Germany, without any participation of professionals. This guarantees sufficient consideration of public interest and the need for transparency.

Release 2003-24 (page 13) states that the PCAOB in general regards inspection systems that involve the profession as less independent and rigorous than other oversight systems. We do object to this assertion. Inspection systems administrated by independent bodies or by government, in which professionals are involved due to their technical expertise, can be organised and administered such that the inspection is equal in independence and rigor to those in systems where staff are employed directly by regulators to carry out the inspections.

We therefore encourage the PCAOB to reconsider its fundamental denial of any peer review system. Following a true and fair cooperative approach we rather recommend a detailed analysis of each individual external quality assurance system – regardless of whether it is based on monitoring or peer review.

V. Inspections and Investigations

As stated, the PCAOB intends to participate – if necessary – in any inspections and investigations performed by a foreign public oversight authority. To what extent depends on the PCAOB's evaluation of the foreign oversight system. However, even when fully complying to the requirements, the PCOAB will reserve the right to send observers.

It is obvious that the legal obstacles referred to under section (III.) for the registration process will also effect any inspections, investigations and adjudications of the PCAOB as prescribed in Release 2003-24. For reasons of confidentiality, data protection, employment, secrecy and na-

tional security obligations of public accounting firms and their clients under German law the PCAOB would not be able to gain access to work papers of the auditor or other sensitive documents and information.

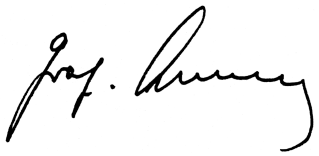
Consequently, the PCAOB could not be allowed to participate in any investigations of German authorities – even as an observer, for reasons of confidentiality. E.g., severe violations of professional rules are sanctioned by special divisions at criminal courts. At first instance a division of the Berlin District Court (*Landgericht Berlin*) is responsible for all cases in Germany. The charge is brought to the court by the chief public prosecutor' s office at the Berlin District Court after own investigations. The investigations and court procedures conform with the German Code of Criminal Procedure defining rights and obligations of all relevant persons involved. There is no provision for the involvement of third parties – like the PCOAB – in these procedures.

VI. Conclusion

We are concerned that the Rules foreseen in the present Release 2003-24 will cause further legal conflicts with regard to inspections and investigations. This has to be resolved before subjecting German public accounting firms to the provisions of the proposed Rules. We urge the PCAOB to forward negotiations with the European Commission working to attain a true and fair cooperative approach and solving potential legal conflicts.

We hope you will find this information helpful. For any questions about this comment letter, please, do not hesitate to contact us.

Yours sincerely,



Hubert Graf von Treuberg
President

Encl.

WIRTSCHAFTSPRÜFERKAMMER

Chamber of
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15. January 2004
Durchwahl:
INT/US/PCAOB/793
- bitte stets angeben -

Registration of German public accounting firms with the Public Company Accounting Oversight Board (PCAOB)

The Wirtschaftsprüferkammer (WPK) is by law the professional organisation of all firms of Public Accountants (*Wirtschaftsprüfer* and *vereidigte Buchprüfer*) in Germany. Membership with WPK is mandatory for all professionals. The WPK is a corporation established under public law and operating under the oversight of the Federal Ministry of Economics and Labour.

The responsibilities assigned to the WPK by Article 57 of the Law Regulating the Profession of *Wirtschaftsprüfer* include to advise its members with respect to their professional obligations and to oversee members' compliance with those obligations. In addition, WPK provides legal opinions on request by courts, state authorities and others.

Based on these legal responsibilities the WPK submits the enclosed legal opinion according to Rule 2105 (b) (2) (ii) of PCAOB Release No. 2003-007, dated May 6, 2003, regarding legal impediments for their members when registering according to Form 1. The legal opinion was furnished by the independent law firm Linklaters Oppenhoff & Rädler.

With respect to the registration of German public accounting firms with the PCAOB the WPK makes the following observations based on the aforementioned legal opinion:

(1) Item 5.1 (a) (1)

With respect to any information about criminal proceedings relating to an employee in the meaning of German employment law (this can include individuals titled as „partners“), any request of a German applicant for this information would infringe German employment law. A waiver of a works council, if existing, or a consent of the individual employees would not be valid in order to eliminate this conflict.

In addition to this conflict with German employment law, this request is in conflict with German data protection law. We believe that none of the statutory exceptions apply for a transfer of such information to the Board. Irrespective whether or not any statutory exceptions apply, a transfer of personal data of employees to the Board would still be an infringement of German data protection law as according to the assessment of the respective data protection authorities, in the US there is no data protection level corresponding to the German data protection laws. These conflicts with German data protection law, in theory, may be eliminated by a consent of each individual involved. However, according to the view of the relevant German data protection authorities, a consent of an employee would not be valid under these circumstances.

Finally, to the extent any information on clients of an applicant is part of the information requested by the Board, any disclosure of this information to the Board would be in conflict with confidentiality obligations. This conflict, however, can be eliminated by a consent of a client. However, it should be noted that such client consent cannot replace any additional consent requirement of individual employees or other data subjects.

With respect to information about the applicant itself or any associated persons not qualifying as employees in the meaning of German employment law, there are no conflicts with German employment law. There are still conflicts with German data protection law that, however, can be eliminated by a consent of the respective individuals, which in this case would be valid. There furthermore could be conflicts with confidentiality obligations, which, again, could be eliminated by a consent of the respective client. One nevertheless should bear in mind that the above stated limitations for employees will apply if information on the applicant itself or associated persons not qualifying as employees is linked with information on employees (e.g. because the proceeding in question relates to several persons, some not qualifying as employees and some qualifying as employees). Whether a consent of an associated person not qualifying as employee can be enforced by an applicant, first of all depends on their contractual obligations vis-à-vis the applicant. It is not possible to enforce any consent required under data protection law.

(2) Item 5.1 (a) (2)

With respect to any information about civil or alternative dispute resolution proceedings initiated by governmental entities relating to an employee in the meaning of German employment law, there is a conflict with German data protection law as according to the assessment of the respective data protection authorities, in the US there is no data protection level corresponding to the German data protection laws. Furthermore, we believe that the statutory exceptions for a transfer of this information to the Board do not apply. Again, a consent of employees is no suitable means of eliminating this conflict.

If any suitable means according to the assessement of the respective data protection authorities of ensuring a sufficient data protection level in the US were in place and any of the statutory exceptions for a transfer of the data would apply, the applicant first of all would have to seek the consent of any existing works council in order to request this information from its employees. Only if such consent of the works council was given, an applicant could start to ask its employees to provide such information. Such consents must be made freely and employees have to be fully informed. At least with respect to existing employees there are no means to enforce such requests of an applicant if the employee does not give his consent.

Additionally, if any client data was part of the information requested by the Board, this would be in conflict with confidentiality obligations that may be eliminated by a consent of the respective client. Again, such client consent cannot replace any necessary consent of the employees.

With respect to information relating to the applicant itself or other associated persons not qualifying as employees, the statements made under 1 above apply respectively, i.e. any conflicts could be eliminated by consent.

(3) Item 5.1 (a) (3)

With respect to any information about disciplinary or administrative proceedings, the same assessment applies as under (2) above.

(4) Item 5.2

With respect to any information about civil or alternative dispute resolution proceedings initiated by private entities, the same assessment applies as under (2) above.

(5) Item 7.1

A transfer of the requested information to the Board is in conflict with German data protection law as according to the assessment of the respective data protection authorities, in the US there is no data protection level corresponding to the German data protection laws. Whether such a transfer would be permissible at all under the „legitimate interests“ exception is doubtful. These conflicts with German data protection law, in theory, may be eliminated by a consent of each individual involved. However, again, the consent of an employee would not be valid under these circumstances.

Furthermore, an applicant, although the collection and transfer of the requested information to the Board under Item 7.1 generally will be permissible according to individual employment law (potential conflicts may be eliminated by the employee's consents), needs first of all to conclude an agreement with the works council on the collection and transfer of such information.

No such restrictions apply with respect to individuals not qualifying as employees in the meaning of German employment law. In this case potential conflicts may be eliminated by consents of the respective individuals.

Finally, there might be conflicts with confidentiality obligations to the extent all the information submitted by an applicant in Form 1 enables the Board to identify for which particular issuer a person to be named under Item 7.1 provided audit services, e.g. if the applicant names only one issuer for which it provided audit services during the last calendar year (Item 2.1, 2.2). Such a conflict may be eliminated by the consent of the respective client, which, however, will not replace any additional consent requirements of any individuals with respect to data protection law.

(6) Item 8.1

There are several actual and potential conflicts with German law as the consents requested under this Item are not limited to such requests of the Board that are in compliance with German law.

Item 8.1 (a) is in conflict with German employment law as the request includes delivery of personal files of employees. This conflict cannot be eliminated by waiver of the works council or a consent of the respective employees.

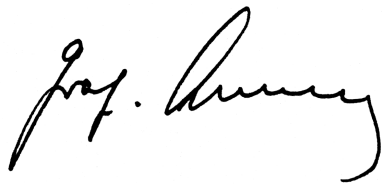
Additionally, this request is in conflict with confidentiality obligations of public accountants as they are not allowed to agree to an obligation to disclose any information on clients without any opportunity to deny such request in case such disclosure is unlawful or a client did not give his consent.

Finally, such consents, if German civil law is applicable, would be void and unenforceable as they contain obligations of an applicant that are in potential conflict with data protection law and confidentiality obligations, as the applicant would be forced to comply with any request of the Board, irrespective whether such actual request is in conflict with German law. To eliminate these conflicts by waivers or consent is not possible for legal reasons and most likely impossible for practical reasons. First of all, an employee consent to this respect would not be valid. Furthermore, a consent in order to eliminate these conflicts would be needed from each individual whose personal data are existing in the enterprises of an applicant and apart from that all clients of an applicant (not only the issuer or comparable clients) would need to consent. There are no means to enforce such consents from such individuals or such clients. Also, as such consents are revocable without any reason, the applicant would have no guarantee that he in the future will be able to comply with the obligations set up by complying with this Item.

With respect to the consents required under Item 8.1 (b) the same assessment basically applies to such consents of the associated persons. Furthermore, to the extent an associated person qualifies as employee in the meaning of German employment law, there is another conflict. No such duties can be enforced vis-à-vis the employees, in particular because they then would have no right to protect themselves from any disadvantages that may result from their testimony or the documents they have to provide.

Members of the WPK are recommended to consider the enclosed legal opinion when registering with the PCAOB according to Form 1. Any violation of professional rules resulting from non-observance of that opinion, especially with respect to the legal obligation to professional secrecy according to Article 43, paragraph 1, sentence 1 of the Law Regulating the Profession of Wirtschaftsprüfer, can lead to disciplinary investigations by the WPK or the Attorney General at the District Court of Berlin.

Sincerely yours



Hubert Graf von Treuberg
President of the Wirtschaftsprüferkammer

Encl. (by mail)

LEGAL OPINION

according to Rule 2105 (b) (2) (ii) of Public Company Accounting Oversight Board (Board) Release No. 2003-007, dated May 6, 2003, as approved by the Securities and Exchange Commission (Commission) by Release No. 34-48180 dated July 16, 2003 regarding conflicts of the request for information in Form 1 with German law

dated December 5, 2003

furnished by
Linklaters Oppenhoff & Rädler

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NOTES

(1) This legal opinion is intended to set out the conflicts with German law that compliance by a German applicant with the requirements of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003, as approved by the Commission by Release No. 34-48180 dated July 16, 2003 would cause.

(2) The structure of this legal opinion is as follows: First of all, the relevant provisions of Form 1 that conflict with German law are cited. Then the relevant portion of conflicting German law is cited, followed by a legal analysis why and to what extent the request conflicts with German law. Finally, there is a statement in the legal analysis of each relevant portion of conflicting German law whether a consent or waiver may eliminate such conflict.

(3) Please note that this legal opinion is intended to answer the general question whether compliance with Form 1 causes any conflicts with German law. This legal opinion was not based on actual cases regarding a specific applicant or a specific piece of information. Accordingly, the outcome of the legal analysis, i.e. whether compliance with the requirements of Form 1 would conflict with German law, to some aspects may vary subject to the actual facts of a case, e.g. whether a person working for an applicant may be qualified as employee or whether an applicant has a works council.

(4) To the extent we cite German legal terms, e.g. names of statutes, or German statutes please be aware that there exist no official English translations of such German legal terms and statutes. Therefore, we introduced a common English translation of such terms but, for the avoidance of doubt, included the original German legal term within the text in brackets and italics. Likewise, the cited German statutes attached as an Annex, for the avoidance of doubt, contain both the English translation and the original German wording.

(5) With respect to some terms often used, we introduced abbreviations that will be explained within the text and in the list of definitions and abbreviations below.

(6) Some of the legal issues regarding the different types of information requested under Form 1 are the same or similar. In order to avoid unnecessary repetitions, we inserted references to previous explanations where applicable, in particular to Sec. A. of this legal opinion.

LIST OF DEFINITIONS/ABBREVIATIONS

Definition/ Abbreviation	Full English Term	Full German Term, if applicable
AO	Accountants Ordinance	Wirtschaftsprüferordnung - WPO
APAA	Accountants' Professional Articles of Association	Berufssatzung WP/vBP
Board	Public Company Accounting Oversight Board - PCAOB	
CC	Civil Code	Bürgerliches Gesetzbuch - BGB
Commission	Securities and Exchange Commission	
DPA	Data Protection Act	Bundesdatenschutzgesetz - BDSG
Item	Any reference to "Item" or "this Item" does refer to the respective item in Form 1 of the PCAOB Release 2003-007, dated May 6, 2003. The exact wording of the respective item referred to is copied in the respective Sec. 1 of this legal analysis.	
WCA	Works Constitution Act	Betriebsverfassungsgesetz - BetrVG

SUMMARY

(1) Item 5.1 (a) (1)

With respect to any information about criminal proceedings relating to an employee in the meaning of German employment law (this can include individuals titled as „partners“), any request of a German applicant for this information would infringe German employment law. A waiver of a works council, if existing, or a consent of the individual employees would not be valid in order to eliminate this conflict.

In addition to this conflict with German employment law, this request is in conflict with German data protection law. We believe that none of the statutory exceptions apply for a transfer of such information to the Board. Irrespective whether or not any statutory exceptions apply, a transfer of personal data of employees to the Board would still be an infringement of German data protection law as according to the assessment of the respective data protection authorities, in the US there is no data protection level corresponding to the German data protection laws. These conflicts with German data protection law, in theory, may be eliminated by a consent of each individual involved. However, according to the view of the relevant German data protection authorities, a consent of an employee would not be valid under these circumstances.

Finally, to the extent any information on clients of an applicant is part of the information requested by the Board, any disclosure of this information to the Board would be in conflict with confidentiality obligations. This conflict, however, can be eliminated by a consent of a client. However, it should be noted that such client consent cannot replace any additional consent requirement of individual employees or other data subjects.

With respect to information about the applicant itself or any associated persons not qualifying as employees in the meaning of German employment law, there are no conflicts with German employment law. There are still conflicts with German data protection law that, however, can be eliminated by a consent of the respective individuals, which in this case would be valid. There furthermore could be conflicts with confidentiality obligations, which, again, could be eliminated by a consent of the respective client. One nevertheless should bear in mind that the above stated limitations for employees will apply if information on the applicant itself or associated persons not qualifying as employees is linked with information on employees (e.g. because the proceeding in question relates to several persons, some not qualifying as employees and some qualifying as employees). Whether a consent of an associated person not qualifying as employee can be enforced by an applicant, first of all depends on their contractual obligations vis-à-vis the applicant. It is not possible to enforce any consent required under data protection law.

(2) Item 5.1 (a) (2)

With respect to any information about civil or alternative dispute resolution proceedings initiated by governmental entities relating to an employee in the meaning of German employment law, there is a conflict with German data protection law as according to the assessment of the respective data protection authorities, in the US there is no data protection level corresponding to the German data protection laws. Furthermore, we believe that the statutory exceptions for a transfer of this information to the Board do not apply. Again, a consent of employees is no suitable means of eliminating this conflict.

If any suitable means according to the assessement of the respective data protection authorities of ensuring a sufficient data protection level in the US were in place and any of the statutory exceptions for a transfer of the data would apply, the applicant first of all would have to seek the consent of any existing works council in order to request this information from its employees. Only if such consent of the works council was given, an applicant could start to ask its employees to provide such information. Such consents must be made freely and employees have to be fully informed. At least with respect to existing employees there are no means to enforce such requests of an applicant if the employee does not give his consent.

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No such restrictions apply with respect to individuals not qualifying as employees in the meaning of German employment law. In this case potential conflicts may be eliminated by consents of the respective individuals.

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respective client, which, however, will not replace any additional consent requirements of any individuals with respect to data protection law.

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Finally, such consents, if German civil law is applicable, would be void and unenforceable as they contain obligations of an applicant that are in potential conflict with data protection law and confidentiality obligations, as the applicant would be forced to comply with any request of the Board, irrespective whether such actual request is in conflict with German law. To eliminate these conflicts by waivers or consent is not possible for legal reasons and most likely impossible for practical reasons. First of all, an employee consent to this respect would not be valid. Furthermore, a consent in order to eliminate these conflicts would be needed from each individual whose personal data are existing in the enterprises of an applicant and apart from that all clients of an applicant (not only the issuer or comparable clients) would need to consent. There are no means to enforce such consents from such individuals or such clients. Also, as such consents are revocable without any reason, the applicant would have no guarantee that he in the future will be able to comply with the obligations set up by complying with this Item.

With respect to the consents required under Item 8.1 (b) the same assessment basically applies to such consents of the associated persons. Furthermore, to the extent an associated person qualifies as employee in the meaning of German employment law, there is another conflict. No such duties can be enforced vis-à-vis the employees, in particular because they then would have no right to protect themselves from any disadvantages that may result from their testimony or the documents they have to provide.

LEGAL OPINION

Legal Opinion according to Rule 2105 (b) (2) (ii) of Public Company Accounting Oversight Board (Board) Release No. 2003-007, dated May 6, 2003, as approved by the Securities and Exchange Commission (Commission) by Release No. 34-48180 dated July 16, 2003 regarding conflicts of the request for information in Form 1 with German law

A. Item 5.1 (a) (1) of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

Item 5.1 Certain Criminal, Civil and Administrative Proceedings

a. Indicate whether or not the applicant or any associated person of the applicant is a defendant or respondent

1. in any pending criminal proceeding, or was a defendant in any such proceeding in which a judgement was rendered against the applicant or such person, whether by plea or after trial, during the previous five years;

…

b. In the event of an affirmative response to Item 5.1.a, furnish the following information with respect to each such proceeding:

1. The name, filing date, and case or docket number of the proceeding.

2. The name and address of the court, tribunal, or body in which such proceeding was filed.

3. The names of all defendants or respondents in such proceeding who are also the applicant, any person listed in Part VII, or any person associated with the applicant at the time that the events in question occurred.

4. The name of the issuer or other client that was the subject of the audit report or comparable report.

5. With respect to each person named in Item 5.1.b.3, the statutes, rules, or other requirements such person was found to have violated (or, in the case of a pending proceeding, is charged with having violated).

6. With respect to each person named in Item 5.1.b.3, the outcome of the proceeding, including any sentence or sanction imposed. (If no judgement or award has yet been rendered, enter the word “pending”.)

Note: Foreign public accounting firm applicants need only disclose such proceedings for the applicant and any proprietor, partner, principal, shareholder, officer, or manager of the applicant who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Conflicting German Law

2.1 Employment Law

Item 5.1 (a) (1) is in relation to information about employees in conflict with basic principles of German employment law following Art. 2 (1) German Constitution (*Grundgesetz- GG* -); Sec. 134; 138; 242; 307 (1) German Civil Code (*Bürgerliches Gesetzbuch - BGB -;* hereinafter referred to as the "**CC**"), Sec. 2 (1); 23 (3); 75 (1); (2); 80 (1); 87 (1); 94 (1) Works Constitution Act (*Betriebsverfassungsgesetz - BetrVG -;* hereinafter referred to as the "**WCA**") and Art. 6 (2) European Convention on the Protection of Human Rights. Submission of the required information would cause the applicant to violate German employment law. It will not be possible to eliminate the conflict by obtaining consents or waivers.

2.2 Data Protection Law

Item 5.1 (a) (1) is in relation to personal data potentially in conflict with Sec. 4 (1) of the German Data Protection Act of 1990 (*Bundesdatenschutzgesetz - BDSG* -; hereinafter referred to as the "**DPA**") as substantially amended in 2001 in order to implement the EC Directive 95/46/EC. Apart from that, Item 5.1 (a) (1) is in conflict with Sec. 4b (2) DPA, the rules on cross-border transfers of personal data.

It is generally possible to eliminate the conflict by obtaining consents or waivers. However, according to the view of the relevant German data protection authorities, a consent of an employee would not be valid under these circumstances.

2.3 Confidentiality Obligations

Item 5.1 (a) (1) is in relation to client data in conflict with confidentiality obligations of the applicant and/or any associated persons as stipulated by Sec. 43 (1) Accountants Ordinance (the "**AO**" - *Wirtschaftsprüferordnung- WPO*-), Sec. 9 of the Accountants' Professional Articles of Association (the "**APAA**" - *Berufssatzung WP/vBP*), Sec. 323 (1), 333 German Commercial Code (*Handelsgesetzbuch - HGB*-), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB* -). It will be possible to eliminate the conflict by obtaining consents or waivers of the clients. However, it should be noted that irrespective of a client consent additional consents of individuals regarding data protection may be necessary.

3 Employment Law

At the time being, there is no uniform legal code covering the rules of German employment law. Sources of law are widely scattered. A commonly recognized distinction is drawn between individual employment law, describing the rules governing the direct relationship, rights and duties of the employer and employees, and collective employment law, comprising the law on works council and trade union involvement including the rights of the works council to co-determination as provided for in the WCA.

3.1 Applicable rules of individual employment law on submitting information about criminal proceedings

3.1.1 Legal framework of German employment law

Individual German employment law is based on contract law. This means that both parties, employer and employee, are basically free to negotiate and regulate their relationship including all rights and duties by mutual consent, Sec. 311, 611 CC,

Sec. 105 German Industrial Code (*Gewerbeordnung - GewO* -). Each contract of employment and the whole employment relationship is governed by general principles of contract law which are stated inter alia in Sec. 242 CC, providing for a mutual obligation to respect the principle of equity and good faith, in Sec. 134 CC, providing that a contract conflicting with a legal prohibition is void, or Sec. 138 CC, according to which a contract violating generally accepted standards of morality is void. Further, it is generally understood that the basic contract law principles are not able to deal with the structural social difference between employer and employee which results in an imbalanced bargaining position, normally for the employee's detriment. E.g. the civil law rules itself provide for restrictions on the contractual freedom for employers in the use of standard terms and provisions, Sec. 305 to 310 CC. These rules have just been introduced to the CC and their scope, content and application in detail is still widely discussed and disputed in the German legal profession. In addition, a whole range of employment law legislation and individual provisions from various different statutes and jurisdiction complement to the legal rules of employment law, most of these rules are mandatory and cannot be contracted out.

As a further and most important source of law, the German Constitution and the jurisdiction of the Federal Constitutional Court (*Bundesverfassungsgericht - BVerfG*) provide for a number of basic rights (e.g.: Art. 1 (1), the basic right to human dignity; Art. 2 (1), the basic right to free development of the personality (also known as general freedom to act); Art. 3, equality before the law and principle of non-discrimination; Art. 9, the right to form associations to safeguard and improve working and economic conditions; Art. 12, occupational freedom; Art. 14, basic guarantee of property and principle "property entails obligations"; Art. 15, socialization) which partly are directly applicable, partly influence the employment law system and the relationship between employer and employees as they form part and have an impact on the contents of the principle of equity and good faith (Sec. 242 CC).

3.1.2 Employees as subject matter of German employment law

Even though the legal framework of employment law needs to be composed from various different sources, all these rules apply the same definition of an employment relationship and they apply only to those who qualify as an "employee". The definition of an employee itself is not provided in statute, but has been explained by the employment courts on the basis of the historical understanding, generally requiring a contractual relationship under which a person is obliged to work for someone else for a specific period of time receiving remuneration in return. The Federal Employment Court usually follows a two-fold test according to which a person who is integrated in the working organization of the contract partner (*Eingliederung*) and therefore personally dependent (*Weisungsgebundenheit*) is an employee. Executives of a company holding a position as board member (*Vorstand*) or managing director (*Geschäftsführer*) are not considered to be employees. However, the major divide here is between employment and self-employment, between a contract of employment and a contract for services. The decisive point is how the relationship is handled in practice and not whether the parties involved consider themselves to be independent or in an employment relationship. Generally, a person who is regarded as employee will be subject to the entire employment legislation, regardless of his

name, title or position in the employer's organization, the amount of remuneration, his specific skills or the importance of his tasks.

The terms used in this Item to define the notion of "associated person" for "foreign public accounting firm applicants", i.e. "proprietor, partner, principle, shareholder, officer, or manager" are not legally defined terms under German employment law and thus not directly related to the German term "employee". Thus, the use of one of these terms for a public accountant working for an applicant has no influence on the legal qualification. There are different ways of organizing a public accounting firm in Germany apart from an individual public accountant practicing alone. One alternative are legal persons, which by law are not represented by all shareholders, but by the management (not all shareholders form part of the management). Most large or medium sized German public accounting firms are organized as a stock corporation (*Aktiengesellschaft - AG*) or a private limited company (*Gesellschaft mit beschränkter Haftung - GmbH*). Although some of the public accountants may have stock or share in such companies, they will be not involved in the actual management of the firm. Nevertheless, they may be awarded titles such as "partner". Accordingly, one would normally expect to find that at least the majority of "officers" and "managers", and many persons titled "partner" as well, will fall under the definition of "employee" and will therefore be covered by German employment law. A „shareholder" may as well be an employee, if he works under a contract of employment in the public accounting firm in which he holds shares. On the other hand, board members and managing directors do not qualify as employees, even if such a person does not hold any shares of the company he is working for. The shareholding relationship as such does not qualify as an employment relationship. Alternatively, a public accounting firm could be organized as a partnership in the meaning of general German civil law (*Gesellschaft bürgerlichen Rechts - GbR*) or in the meaning of the Partnership Act (*Partnerschaftsgesetz*), in which the partners by law are participating in the management (but by agreement can be excluded from management functions). Accordingly, even if "proprietor" and "principle" are no generally defined categories of German law either, but as far as they relate to the owners of a public accounting firm organized as partnership, those persons will normally not be subject to employment law provisions. As a conclusion, one has to state that the rules of Item 5.1 will in most cases relate to employees under German law.

3.1.3 General rule on employer's right to reveal information about its employees to third parties

There is no statutory legal rule about the right of an employer to inform third parties about personal details of an employee. Following general legal principles and case law from both, the Federal Constitutional Court (*Bundesverfassungsgericht*) and the employment courts (*Arbeitsgerichte*), the German legal position can be described as follows:

Employers are entitled to provide information to third parties about their current or former employees only if (1) there is no explicit or implied contractual term that prohibits such passing of information, (2) if the information is connected to the employment relationship and (3) the third party requesting this information has a justified interest in obtaining it. The employee has the right to be informed about all information the employer passes to third parties.

This legal position is based on the following:

Art. 2 (1) of the German Constitution stipulates the basic right to free development of the personality. The Federal Constitutional Court has developed this right to freedom of personality to a so-called general right to a respected and protected personal sphere including basic social rights, combined in the legal term of the general personal right (*Allgemeines Persönlichkeitsrecht*). One important application is the restriction of the disclosure of personal information to the public or third parties. The Federal Constitutional Court has further developed on the same basis a right for personal self determination of the data of a person (*Informationelles Selbstbestimmungsrecht*). The German law on data protection, which applies in addition to the employment law rules analyzed in this section of our legal opinon and which is discussed in detail below (see 4), is, inter alia, one consequence of the state's obligation to provide for the necessary protection of this basic right of personal data self determination. However, the scope of this basic right goes beyond the data protection and applies to all kinds of information and personal data. So far, the basic right of personal data self determination has been held to be directly applicable only in the relationship of an individual vis-à-vis the state, but it can be derived from jurisdiction that this basic right will also be applied in cases between citizens, e.g. in employment relationships.

The exact scope of these basic rights has to be defined in detail on a case by case basis. However, regarding employment relationships, they generally include the employer's obligation to protect the employee's rights of personality as far as possible. The employee shall be protected against too widely stretched controls or exploring of his personality. Further, the personal information which has come to the knowledge of the employer must be kept confidential and shall generally not be exposed to third parties, even if the process of obtaining such information was legitimate. In case the employer's legitimate interests conflict with this duty to protect, the different legal interests and basic rights have to be balanced. A core area of protection of the personality is absolutely protected against interfering and therefore not subject to a balancing of interests.

The strict approach of the courts regarding the general personal right may be illustrated by two examples:

In 1997, the Federal Constitutional Court has held that an (state) employer was not entitled to ask its employees about their involvement nor engagement in the former state intelligence service of the communist German Democratic Republic prior to 1970, thereby rendering invalid legislation which imposed such questioning as a condition of state employment (BVerfG AP No. 39 ad Art. 2 GG).

In another recent case, the Federal Employment Court ruled on the conditions under which a local public bank was allowed to investigate files from the personnel department using auditors from a regional public bank organization where the local bank was a full member. The auditors were by law bound to confidentiality. The court held that the investigation was a violation of the general personal right of the employee in question, but that this violation was justified as the purpose of the audit was to investigate fraud allegations against this employee and therefore the employer had a legitimate business interest in doing so. The court stressed that the employer had to observe the duty to review the personnel file before handing it over to the auditors and to take from the file all personal information irrelevant for

the purpose of the pertinent audit (BAG AP No. 21 ad. Sec. 611 CC Persönlichkeitsrecht).

On the basis of the before mentioned, the question on the legal position on the lawfulness of providing information about criminal proceedings to a third party needs to be addressed by answering two questions, (1) whether the necessary information can be lawfully obtained and (2) whether such information may be lawfully passed on to a third party.

3.1.4 Requesting the information from an employee

In general, an employer can obtain information about an employee either by the employee disclosing the information to him or by requesting the information from the employee.

The employee's duty to disclose information without being asked is very limited. Sec. 242 CC provides a mutual obligation to respect the principle of equity and good faith. Accordingly, the employee needs to disclose facts that would inhibit him from fulfilling his contractual duties or that would lead to a severe and permanent disturbance in the contractual relationship between the parties.

The right of an employer to ask is much wider. Corresponding to it, an job applicants or an employee has the duty to answer permitted questions correctly, while he, on the other hand, may answer incorrectly without facing legal consequences if the question was not admissible.

The details of the content of the legitimate questions of the employer are subject of discussions among courts, which on a European and a German level took an increasingly restrictive approach, and the legal literature. As a generally accepted starting point, it is agreed that in a contractual relationship one party has to answer questions on facts important for the exercise of the contract and about which the asking party, without any fault, has no definite information. However, this applies only if the party asked can easily provide the necessary information. Accordingly, the employer has always the right to obtain information about the professional qualifications of an employee. Furthermore, the employer may ask questions about circumstances which are related to the employment performance. These questions should always relate to the present situation. A legitimate interest of the employer will fade with time, i.e. if the instance is far back, there may be no legitimate interest anymore.

The Federal Employment Court summarized the legal position as follows (BAG AP No. 24 ad Sec. 242 CC Auskunftspflicht):

(i) The basic condition is a recognized, justified and protected interest of the employer to request such information. This interest must be an interest connected to the employment relationship, and, more precisely, be connected with the employee's direct or indirect duties within the employment relationship. It is not sufficient to merely show a general connection between the request and the employment relationship.

(ii) The obligation to answer such questions must not amount to an excessive burden for the employee in comparison to the employer's interest in obtaining such information. Thus, no obligation to answer exists if the employer is able to obtain such information lawfully by other means. In

case a question relates to aspects protected by the general personal right of the employee, the question is only legitimate if it appears justified after balancing the different interests of both parties applying the principle of proportionality. The core area of privacy must be protected by all means.

(iii) The existing law on the burden of proof shall be respected. The employer may not use the right to ask questions to obtain information in contrary to the legal burden of proof.

Applying these rules, neither an employee nor a job applicant has to disclose a criminal conviction to the employer, unless the conviction is registered in the Federal Central Register (*Bundeszentralregister*) and is subject to disclosure from that register which only applies for severe crimes for a certain period (for details please see 4.4.3 below). Convictions that will not be disclosed from this register may under no circumstances be requested by an employer. Furthermore, the conviction needs to be relevant for the specific occupation of the employee. Depending on the specific duties and position of the employee, the legitimate interest of the employer to ask for criminal convictions related to the employment may vary and be broader, especially in the public sector. Questions regarding pending criminal proceedings may be unlawful in Germany with respect to the presumption of innocence under Art. 6 (2) European Convention for the Protection of Human Rights. At least one case has been decided in favour of the employee on this basis by a German employment court.

3.1.5 Submitting the information to a third party

Regarding the question whether the employer is entitled to pass on information which he has obtained from its employees to a foreign third party, the answer is based on the same legal rules and considerations.

The German employment courts dealt with this question mainly in connection with reference letters and oral references regarding former employees to new employers. The Federal Employment Court in one of its very early rulings decided that the employer would be entitled to disclose employment related information about an ex-employee to any other person, who has a legitimate interest in obtaining such information. The Federal Employment Court further held that the employer was not bound by a duty of confidentiality except in cases where such duty was expressly agreed in the employment contract. In a later judgment in 1984, the Federal Employment Court has confirmed its view and held as a matter of principle that employers are generally free to help other employers in guarding their interests. However, the Court held in this ruling as well that the employer was not entitled to reveal information that was not connected to the performance and the conduct of the employee at work. It can further be concluded from that judgment that, when disclosing information, the employer has to respect the basic personal rights of the employee and the limits on the right to obtain information imposed thereby. Thus, the disclosure of information that legitimately cannot be requested from the employee is certainly not allowed.

German legal literature since then has taken a critical view that the Court would uphold its view in a new case that the employer would be allowed to disclose such information at all. Based on the legal development, especially regarding the basic personal right and the right on data self-determination, they argue that there exists

a duty of the employer to keep data of the employee confidential, unless there is a contractual arrangement with the employee under which an employer may be entitled to disclose specific information. The consequence would be that the employer is not allowed to disclose such information to third parties without the consent of the employee.

Finally, even if an employer would be generally entitled to pass specific information to a third party, the employer would remain responsible for the further use of this information by the third party. Under the general principle of equity and good faith, which entails an employer's duty of care for his employees, the employer would need to ensure that the information provided to a third party is kept secure and that this third party guarantees to maintain confidentiality as regards personal information of the employees. If the third party does not guarantee confidentiality, the employer would not be allowed to submit such information, regardless whether the third party has itself a legitimate interest in obtaining such information.

3.2 Application of these rules on Item 5.1 (a) (1) and 5.1 (b) (1) - (6)

On the basis of the above stated rules (see 3.1), the request of the Board under Item 5.1 (a) (1) and 5.1 (b) (1) - (6) conflicts with German law.

3.2.1 Requesting the information from an employee

Regarding this Item, requesting information about pending or past criminal proceedings during the previous five years, already the request of such information from employees of the applicant would be unlawful. The terms "any pending criminal proceeding" and "any such proceeding in which a judgment was rendered against such person during the previous five years" will apply to a very wide variety of criminal proceedings and cover all types of criminal offences, many of which, from traffic related offences to family related offences, have no connection with the employment relationship nor the specific functions of the employee. This, generally, was not changed by the Board's statements made in PCAOB Release 2003-011, published July 18, 2003 on FAQs that it in some cases will not consider a registration incomplete if offences relate to some sorts of traffic related offences are not included or if information on some groups of employees is restricted to some offences listed in the Board's statements. At least under German law it is not clear, which offences or which employees will be exempted and these statements were not contained in a ruling of the Board, but merely in a general statement that cannot be considered to be an amendement of the request under this Item. Furthermore, the terms do not only relate to severe offences which may be disclosed from the Federal Central Register, but to all convictions including minor cases. Finally, the request under this Item includes with respect to each such proceeding detailed information on the proceeding including, inter alia, the names of <u>all</u> defendants or respondents in such proceedings and the outcome of the proceeding including any sentence or sanction imposed.

The employer has no legitimate interest in obtaining information on any criminal proceeding which is not related to the employment relationship. The employer, furthermore, has no legitimate interest in obtaining information on minor criminal proceedings or criminal proceedings except certain severe cases which date back as far as five years ago, nor to obtain knowledge about pending criminal proceedings which are of minor importance or unrelated to the employment

relationship. There is no legitimate interest why the employer should obtain information on the names of such persons associated with the employer who by themselves are not subject to the requests of Form 1 of the Board but who have been subject to any criminal proceeding together with an employee who is now qualifying as person for whom the requirements of the Board have to be fulfilled, as this might refer to offences which have nothing to do with the employment relationship at all but severely disturb such other associated person's privacy.

3.2.2 Submitting the information to a third party

Even it the employer should be in possession of information about such criminal proceedings of an employee, the employer would not be entitled to disclose such information to the Board. The Board is not a future employer of the employee nor does it have a legitimate interest (in the sense as described in 3.1.4 above) to obtain information on all criminal proceedings of a specific employee. The employer would not be able to force the employee to consent to disclose such information to the Board and a consent would be likely to be held unenforceable (see 3.5.2 below for details).

Eventually, the employer would not be entitled to disclose any personal information about the employee to the Board. PCAOB Release No. 2003-007 Appendix 1 Rule 2300 provides the approach of the Board on public availability of applications and confidential treatment requests. According to Appendix 1 Rule 2300 (a) - (h) an application for registration shall be made publicly available as soon as practicable, provided that the applicant did not request confidential treatment of specific information. In case of information submitted to the Board with a request for confidential treatment, the Board's Director of Registration and Inspection shall determine whether the requested confidential treatment is granted. There shall be no guarantee that information for which confidential treatment is requested will not be published nor do the rules provide for a possibility to withdraw information submitted with a request for confidential treatment in case such confidential treatment is denied. Thus, based on these rules, without taking into consideration the possibility to generally object to the submitting of information based on PCAOB Release No. 2003-007 Appendix 1 Rule 2105, the Board does not guarantee that it will keep such information confidential. Under these circumstances, an employer would not be entitled to provide personal information of his employees such as information on pending or past criminal proceedings to the Board.

3.3 Applicable rules on works council involvement on submitting of information about criminal proceedings

3.3.1 Basic rules of works constitution law

The German works constitution law - mainly through the WCA and the case law of the employment courts - regulates the cooperation between employer and employees on the level of the single enterprise or operation (*Betrieb*).

Under the WCA, the basic idea is that the employer is not given sole discretion over the organization of the enterprise and the operations or the assignment and the composition of the staff. The works constitution law restricts the managerial authority whenever it feels it is required in the interests of both, the workforce as a whole and the personality as well as social and health protection of the individual employee. The works council has certain legal rights of co-determination, which

can be enforced by the works council through conciliation boards even against the wishes of the employer. Such rights mainly concern operational, social or staff matters. In addition, there are numerous simple rights of participation stipulated by law that entitle the works council to be informed, heard and consulted particularly before decisions are made by the employer.

3.3.2 Scope of application of the WCA

The employees are not obliged to elect a works council, and if they do not do so, the provisions of the WCA, with minor exceptions, will not apply to the particular enterprise. However, employees in most enterprises of a significant size have elected a works council and it is known that works councils have been elected in some of the important German public accounting firms as well.

If a works council was established, the WCA applies to all employees who are engaged in the relevant enterprise or operation of the employer. An employee in the sense of the WCA is any person who by contract on dependent employment under private law undertakes to perform work for her or his employer. This unrestricted application of the WCA means first of all that all employees of the employer, regardless of their occupation, title or salary, are represented by the works council. The only exempted group of employees are executives.

Executives are defined by Sec. 5 (3) WCA as employees who - by their contract of employment and their position in the company or enterprise - are (1) entitled within their own responsibility to engage and dismiss employees on behalf of the enterprise, or (2) are endowed with general representation or power of procuration, the latter also being important in relation to the employer, or (3) regularly carry out other duties which are important for the existence and development of the company or the enterprise and execution of which requires special experience and knowledge, if by doing so, they either essentially make decisions within their own responsibility or substantially influence these decisions. It does not suffice therefore if, as a matter of form only, the employee is granted certain powers in his contract of employment, nor is it sufficient to qualify as executive within the meaning of the WCA if the employee actually assumes the functions pursuant to the above mentioned details but is not expressly provided with such duties according to his contract of employment. Numerous conflicts and legal actions dealt with the definition of executives, especially regarding high qualified and highly paid employees. In one case of particular importance dating back to 1975 the Federal Employment Court held that the certified auditors of a public accounting firm who were all granted power of procuration were to be regarded as executives rather than normal employees in the sense of the WCA. In this decision, the court had to consider whether the granting of power of procuration to a relatively large group of a professional company would satisfy the legal requirement that the procura shall be important in relation to the employer or whether the granting of procura in this case was more an act to appreciate a certain standing and title in the company. The decision of the court was eventually based on the fact that the certified auditors in the pertinent company were considered to be working in a position which would from itself grant them the position as executives, as the public accounting company was not able to fulfil its professional services only with the certified auditors. On the other hand, the Federal Employment Court has held that the mere transfer of project responsibility or the pro forma assignment as superior

of a number of employees would not be sufficient to qualify a person as executive, if such person was not enabled to make decisions of importance within their own responsibility or substantially influence these decisions.

As mentioned above under 3.1.2, the terms “associated person” for a “foreign accounting firm applicant” are not defined in detail and may well vary from firm to firm and indeed from jurisdiction to jurisdiction. Therefore, it depends on the internal organization of the applicant whether persons who have been assigned any titles are employees at all, are employees to whom the WCA applies or whether such persons are executives and therefore exempt from the application of the WCA. In Germany, the titles “partner”, “principal”, “officer” or “manager” are not legally defined and it depends solely on the applicant in question how such titles are assigned. Given that the Board rules apply in the first place to persons who are involved in the audit services for an issuer, it is most likely that those persons are professionals of the applicant and not managers of the public accounting firms internal business. Therefore, it is likely that at least some of those professionals are neither involved in the engagement or dismissal of employees, nor do they have general power of procuration which is important in relation to the employer, nor do they regularly carry out duties which are important for the existence and development of the employer company by making decisions within their own responsibility. The judgment of the Federal Employment Court cited above cannot be held generally applicable in the sense that all professional employees are to be regarded as executives in the meaning of the WCA. Under German Employment Law even highly specialized, well-paid professionals may belong to the general workforce represented by the works council, even if those persons themselves might consider such classification meaningless or even ridiculous.

Thus, it is likely that the information requested by the Board relates to persons who are considered as non-executive employees to whom the WCA is fully applicable.

3.3.3 Important aspects and principles of works constitution law related to the request for and disclosure of employee related information

Employer and works council are expressly bound by Sec. 2 (1) WCA to cooperate in a spirit of mutual trust for the good of the employees and the enterprise. This includes the duty to generally behave with honesty and openness on both sides. The employer must seriously examine any proposal and wish brought forward by the works council.

Furthermore, Sec. 75 (1) WCA obliges employer and the works council to ensure that every person employed in the enterprise is treated according to the principle of law and equity. This means that employer and works council have to consider the employees’ personal, social and economic concerns with respect to all their actions and agreements.

Sec. 75 (2) WCA provides that employer and works council must safeguard and protect the untrammelled development of the employees’ personality. This involves first of all that the employees’ privilege as to his general personal right and his right on data self-determination must not be impaired. The protection of the personal rights has to be ensured in all measures taken by the employer. However, Sec. 75 (2) WCA does not provide for direct legal consequences in case the employer violates his obligations imposed by this provision. Some legal authors discuss

whether the works council is entitled to obtain directly an injunction if it detects any infringement of the employer's duties under Sec. 75 (2) WCA. But the Federal Employment Court has recently held that, while Sec. 75 (2) WCA contains the duty to protect the general personal right of the employee and to take care that any violations of this right are abolished, it does not directly entitle the works council to enforce the abolition of such violation by legal means. However, according to Sec. 23 (3) WCA, which only applies to gross violations against the WCA by the employer, the works council can apply for an injunction against acts of the employer violating the principles protected in Sec. 75 (2) WCA, provided that the employer clearly and severely violates his obligations under the said provision.

Sec. 87 (1) WCA contains real co-determination rights of the works council, i.e. the employer may not decide on his own but has to ask the works council for its approval. Of particular importance is Sec. 87 (1) No. 1 WCA, which provides for co-determination rights in matters relating to the proper running of the enterprise and the conduct of employees in the enterprise. The application of this rule has been widely stretched by the courts. It e.g. includes regulation on checks at the gates or other monitoring regulations such as the use of works passes, notification of arrival at or departure from the workplace, time clocks, bans on smoking and drinking, introduction of a clothing regulation, regulations of the parking of vehicles, the safekeeping of employees' belongings on the premises, the use of company telephones, regulations on whether or not employees may listen to the radio during working hours and regulations on the conduct of employees in so far as they concern the proper running of the enterprise. The regulations in question always have to be of a general nature and not of the kind of instructions given to individual employees with regard to conduct since these are not subject to co-determination. In 2003, the Federal Employment Court held that the co-determination right according to Sec. 87 (1) No. 1 WCA is also applicable if the employer orders employees to report on a form about their individual shareholdings in public companies. It should be noted that the Federal Employment Court did recognize a case of works council co-determination rights even though the employer's order regarding the questionnaire to disclose the stock keeping was only directed to a selected number of employees and not to the entire workforce.

According to Sec. 94 (1) WCA the works council has a co-determination right if the employer wants to introduce staff questionnaires. The co-determination right of the works council relates to the structuring of the contents of such questionnaires as well as the authoring of existing ones. If no agreement is reached on their content, the matter has to be decided by the conciliation committee (for details see 3.4.2 below). This provision applies as well if the employer submits questions orally to the job applicant or employee with the aid of a standardized catalogue of questions and takes written notes on the answers. The works council's right to co-determine the content of such questionnaires was established in order to ensure that only those questions are asked for which the employer can claim a legitimate need for information. The content of a questionnaire can be considered legally admissible if the employer has asked for the individual employee's personal data within the scope of his legal entitlement. In any case, the staff questionnaires may not contain any legally inadmissible questions, even if they have been approved by the works council.

3.4 Application of the works council rules on Item 5.1 (a) (1) and 5.1 (b) (1) - (6)

For the following considerations we assume that at least some of the persons subject to the request under this Item are employees and do not qualify as executives as defined in Sec. 5 (3) WCA (see 3.3.2 above). Furthermore, we assume that within the enterprise of the applicant a works council has been elected.

Given these assumptions, the works council has to be involved in an applicant's decision to comply with the request under this Item.

3.4.1 Rights of works council regarding the content of the request of employer

As stated above, already the request for information required under Item 5.1 (a) (1) by the employer from its employees would be a violation of German law (see above 3.2.1). With respect to his obligation to ensure that all laws and regulations protecting the employees are kept in the enterprise following from Sec. 80 No. 1 WCA the works council would be called to note and examine such violation and to consult with the employer to urge him to respect the law. In case the employer does not follow such advice, the works council would be entitled to discuss the matter with the employees concerned and to make official proposals to the employer stating that and why a specific act of the employer is a violation of the employee's rights. Eventually, the works council would have to initiate proceedings under Sec. 23 (3) WCA to obtain an injunction against the employer's attempt to collect information from the employees which he is not entitled to collect.

The same obligation follows from Sec. 75 (2) WCA, as the attempt to obtain the required information on all of the employee's criminal proceedings of the past five years and all pending criminal proceedings will be an infringement of the employees general personal right. Sec. 75 (2) WCA does not provide directly for consequences if the employer acts against the duties stipulated therein. But, again, the works council has the right to be heard and to discuss with the employer in particular matters raising the works council's concern on the protection of the basic personal right of the employees and, in case the employer is not willing to abolish a practice recognized as infringement of German law and in particular of Sec. 75 (2) WCA, this might be seen as a major irregularity under Sec. 23 (3) WCA. The works council could ask for a court order of injunction under Sec. 23 (3) WCA. Such court order might stop the employer from asking the pertinent questions to its employees. Furthermore, the individual employees would be entitled to claim damages from the employer as Sec. 75 (2) WCA is regarded as a rule of law made for the protection of the employees (Sec. 823 (2) CC).

It follows from both provisions that the works council has no discretion in concluding agreements with the employer which contain the sanctioning of infringements of employee's personal rights. Instead, such agreements or understandings would be void and a works council concluding such agreements would act illegally and might find itself to be subject to proceedings under Sec. 23 (1) WCA which provides that a quarter of the employees of the enterprise, the employer or a represented trade union could initiate proceedings in the employment court to dissolve and order a new election of the works council.

3.4.2 Rights of works council regarding implementation process

Irrespective the content of a request of the employer, the employer would not be entitled to obtain these information without prior involvement of the works council and conclusion of an agreement with the works council. Sec. 87 (1) WCA would

apply to an employer who wants to obtain information on criminal proceedings from all employees employed on specific positions which he intends to assign to an audit for a client who is an issuer. In this case, the works council has a co-determination right in all matters dealing with the running of the enterprise and the conduct of employees in the enterprise. Obtaining specific information from a group of employees which is defined according to general criteria has already been regarded by the Federal Employment Court as triggering the co-determination right of the works council (BAG NZA 2003, 166). The co-determination procedure requires that the employer informs the works council in detail about the reason, extent and further use of the information he wants to collect. Works council and employer will then negotiate a works agreement which covers all aspects of such collection of information and may include restrictions on the further use of the information collected. Even though the details of the works agreements depend entirely on the parties and the individual situation, it can be anticipated that a prudent works council would include rules in any agreement dealing with the collection of employee information for ensuring the protection of such data. If employer and works council are not able to conclude an agreement, the case can be referred by one of the parties to a conciliation board which would negotiate the matter further and eventually make a decision. The conciliation board normally consists of two or three representatives from both sides (works council and employer) and an independent chairmen, normally a judge from an employment court or regional employment court, who has the casting vote in case of a tie. It would be possible that the conciliation board comes to a decision which makes the original aim of the employer so burdensome that the employer would not consider continuing such project. In case the employer would go ahead with a project subject to co-determination rights, e.g. the collection of data from employees in connection with an assignment to a specific audit, without fulfilling the co-determination procedure, the employees would be entitled to neglect the employer's demands and the works council could obtain an injunction from the employment court to stop the employer from acting alone in matters of co-determination rights.

The organized collection of information on employees' criminal proceedings and pending criminal proceedings might further fulfil the definition of an employee questionnaire which according to Sec. 94 (1) WCA is subject to a co-determination right of the works council. The questions which an employer has to install in order to obtain the necessary information requested by the Board under this Item fall under the definition of an employee questionnaire as developed by the courts (which requires that the employer submits questions to a group of employees defined by general terms and collects the answers in a form or a form-like order). The consequences of the existence of a works council's co-determination right regarding the request of necessary information are the same as described before for Sec. 87 No. 1 WCA, i.e. the employer is obliged to initiate negotiations with the works council to agree on a works agreement and in case no agreement is reached the matter is to be referred to a conciliation board which will decide by majority voting. Acting without respecting the co-determination procedure entitles the employees to withhold the information required, furthermore the works council may initiate proceedings to stop the employer by a court injunction.

As a conclusion, it has to be stated that the works council has the duty to prevent the employer from illegally collecting information from the employees of the enterprise. Further, the employer would only be able to obtain the information, even if it was in line with the employees' rights, if he concluded the necessary works agreement to fulfil his obligations under Sec. 87, 94 WCA. As the information requested cannot be obtained in line with the law, works council and the conciliation board would be obliged to deny any works agreement necessary for the collection.

3.5 Elimination of conflicts by consent/waivers

3.5.1 General rules on consents and waivers in an employment relationship

It follows from the contractual basis of German employment law that the parties are generally in a position to agree on additional rights and obligations. However, the supposed structural imbalance in bargaining power between employer and employee resulted in number of protective statutes and civil law rules providing for restrictions on the contractual freedom for employers in the use of standard terms and provisions, Sec. 305 to 310 CC. If the employer asks the employee to consent to a particular measure or to waive a particular right, this would be regarded as a contractual agreement and would as such fall under the restrictions on standard terms and provisions of the CC.

Apart from the restrictions of the CC for the use of standard terms and provisions, certain laws are regarded as substantial and therefore they cannot be contracted-out nor waived by the employees. This is particularly true for a core area of the basic rights and indeed for a core area of the general personal right as defined by the Federal Constitutional Court on the basis of Art. 2 (1) German Constitution.

3.5.2 Application of these rules to new entrants

With respect to new entrants, the employer, in general, would have the chance to include in the employment contract all the provisions and declarations which he needs to conduct the employment relationship according to his needs. However, language which covers that the employee was obliged to disclose to the employer (with regular updates) the information required for complying with the Board's request under this Item would be held unenforceable, depending on the facts of the individual case. Sec. 307 (1) CC renders unenforceable terms which unreasonably impair the employee contrary to the principle of equity and good faith. The principle of equity and good faith has to be interpreted in line with the basic rights of the German Constitution. A clause covering the request of the Board under this Item would infringe the general personal right of the employee in a way which would be regarded as quite severe, as it requires full disclosure of all criminal proceedings for the past five years and all pending criminal proceedings and does not guarantee that such information is not made available to the public. For an employee agreeing to such a clause could mean that he has to inform his employer about details of his private life which have nothing to do with the employment relationship nor with his professional qualification or career. It can well be argued that such duty to disclose infringes the core area of the general personal right and therefore is to be regarded as violating the principle of equity and good faith forming the basis of the employment contract.

As a consequence, such a clause containing the employee's consent to the collection and disclosure of information to the Board would be unenforceable.

3.5.3 Application of these rules to existing employees

For employees who are already employed by the employer it can be generally anticipated that the employment contract does not include such a clause covering the request of the Board under this Item discussed above under 3.5.2. If the employer would ask the employee to consent to disclose information required by the Board, this would be qualified as an offer for an amendment of the employment contract.

Leaving aside the result from the analysis under 3.5.2 above (that such a clause would be unenforceable), which certainly applies to employed personal in the same way as it applies to new employees, the employer could not force an employee to agree to such alteration of the contract. It is one of the basic principles of contract law that both parties must agree to a change of the contract

However, German employment law provides for a specific mechanism if the employer considers a change in the terms of the contract necessary, the so-called termination for alteration (*Änderungskündigung*), as provided for in Sec. 2 Employment Protection Act (*Kündigungsschutzgesetz – KSchG* -). Such termination for alteration is only valid if made for a justified cause, which could be based on conduct or personal circumstances of the employee or on compelling business requirements of the employer. There is no case law on the question whether a termination for alteration could be based on the employer's assessment that it was necessary to introduce certain rules of conduct in the employment contract. However, there is no reason why such termination for alteration should not be acceptable if compelling business reasons on the employer's side exist. One might be able to argue that in certain circumstances a public accounting firm has compelling business reasons to fulfil requirements imposed by a foreign oversight board if the public accounting firm can show that work for a client which is subject to the supervision of such foreign oversight board accounts for a significant part of its business and that it would have to stop providing services for such client if the requirements could not be met. However, it would be a condition for such termination for alteration that the new employment term was proportionate to the pertinent compelling business reasons, reasonably acceptable for the employee and in line with general employment law. Thus, for example, compelling business reasons could never justify to reduce wages below an applicable collectively agreed minimum wage. In the case of the request of the Board under this Item, the termination for alteration to obtain a consent would not be possible, as the requirements themselves violate basic principles of German employment law (see 3.2, 3.4 above).

Accordingly, it is not legally possible to consent to a duty to report the required information to the employer nor to waive the protection granted under the general personal right following from Art. 2 (1) German Constitution. In case an employee voluntarily does provide the necessary information this would in itself not form an offence, but this employee could stop doing so any time he wishes and the employer would not have any remedies in case the employee does not tell the truth.

3.5.4 Works council

Imposed by Sec. 75 (2) and 80 No. 1 WCA, the works council is under a legal duty to ensure that within the enterprise for which it is responsible employee rights are respected and the rules of law obeyed. The works council has no discretion to waive the duties or rights assigned to him by law. Further, even if some employees would voluntarily provide the employer with the necessary information and statements, the works council would still be under a duty to stop this activity. It has been discussed already under 3.4 that the works council would not be allowed to conclude a works agreement consenting to the employer requesting the information required by the Board.

4 Data Protection Law

It should be noted that German data protection law applies to personal data of individuals, irrespective of the qualification of such individuals as employees in the meaning of employment law. It is a separate layer of law generally applicable independently from other legal aspects (although the different areas of law may influence each other to some extent if based on similar constitutional rights). Thus, even if a request for information would be not in conflict with employment law or confidentiality obligations, there still may be a conflict with data protection law.

4.1 Application of DPA

According to Sec. 1; 2; 3 (1), (3), (4), (5), (7), (8) DPA, the DPA is applicable to the collection, processing (including the transfer to a third party) or use of personal data by a data controller (whether a public or a private body) located in Germany in so far as no other German federal legal provisions are applicable to such personal data.

It should be noted that the DPA is not directly applicable to all applicants as there are different state data protection laws in place in each German state (16 in total) that apply to private bodies located in the respective state. However, as these state data protection laws relevant for the present questions contain the same rules as the DPA, we refrained from citing the individual respective provisions of each of these 16 state data protection laws.

4.1.1 Personal data

Personal data means any information concerning the personal or factual circumstances of an identified or identifiable individual (the data subject).

First of all, any information requested under Item 5.1 (a) (1) related to any associated person as a defendant or respondent of criminal proceedings would be qualified as personal data.

If the applicant is an individual public accountant, all information requested under this Item as well qualifies as personal data. Information relating to any other applicant will only be considered not being personal data if it is not linked to any individuals. Such a link of information to an individual could be established e.g. if the applicant is a partnership and if the name of some or all of its partners are part of the name of such partnership. In this case, all information requested under this Item would be considered as personal data.

If information requested under Item 5.1 (b) (3) contains the names of some associated persons (even if the applicant itself is a legal entity bearing not the

name of its shareholders), the whole information requested by this Item would be qualified as personal data. Please note that this would also include the name of the managing director or a member of the board of directors, if the applicant is organised as a legal entity (private limited company or stock corporation).

Finally, it has to be noted that not only personal data about public accountants may be included in the information requested by the Board, but also personal data of other individuals. In particular with respect to the information requested in Item 5.1 (b) (4), to the extent the proceeding relates to an issuer or other client, the information may be considered as personal data if such issuer or client is an individual or may lead to the identification of an individual, e.g. in case of a partnership.

4.1.2 Data controller

Any applicant, be it a public accounting firm or a single accountant, will be considered as private body and data controller in the meaning of the DPA, i.e. an organization which collects, processes or uses personal data for its own purposes.

4.1.3 Collection, processing or use

The delivery of the requested information by an applicant to the Board under this Item involves several relevant actions under the DPA.

First of all, the applicant collects personal data, i.e. by requesting data from the data subject.

Thereafter, several forms of processing (processing includes storage, modification, transfer, blocking and erasure of personal data) are involved. The applicant would need to store the collected personal data internally. As a second step, the registration involves a transfer of personal data, i.e. the disclosure to a third party of personal data stored or obtained by means of data processing either through transmission of the data to the third party or through the third party inspecting or retrieving data held ready for inspection or retrieval, from the applicant to the Board. The Board would be qualified as a third party in the meaning of the DPA as it is a person or body other than the data controller.

4.1.4 No other federal legal provisions on personal data applicable

No other federal legal provisions on personal data are applicable. In particular, as the information request under this Item does not relate specifically to tele services, media services or telecommunication services, the respective acts governing these business areas are not applicable.

4.1.5 Conclusions

The rules of the DPA are applicable to the information request of the Board under this Item to the extent the requested information contains any personal data, i.e. any information relating to an identified or identifiable individual, even if the applicant itself is not such an individual.

4.2 Basic Rule Regarding a Transfer of Personal Data

According to Sec. 4 (1) of the DPA, any collection, processing or use of personal data by the data controller is not permitted unless one of the alternative exceptions named in this provision applies. The exceptions are:

- Compliance with legal obligations outside the DPA (see 4.3 below);
- One of the exceptions of the DPA applies (see 4.4 below); or
- The data subject gives a valid consent (see 4.5 below).

Furthermore, when applying these exceptions, one always has to apply the guiding general principles of the DPA:

- The collection, processing or use of personal data is only permissible if it is adequate, relevant and not excessive in relation to the purpose for which it is processed. Hence, only the minimum amount of personal data may be transferred to the Board.
- Personal data must not be kept longer than is necessary for the purpose for which it is being processed. This also applies to a public accounting firm which stores personal data in order to be able to comply with the Board's requests or the Board itself. It has to be evaluated for each type of data how long storage is necessary.

Regarding information on criminal convictions it is important to know that there exist specific rules on such information in Germany. In Germany there is a Central Federal Register (*Bundeszentralregister*) on criminal convictions that contains all criminal convictions irrespective of the amount or type of fines or imprisonments and some administrative decisions. Requests to the Central Register are only open for the affected individuals themselves (e.g. for the purposes of providing the excerpt to a perspective employer) or public authorities (see 4.4.3 for further details). One should note that some criminal proceedings, if they ended only in minor fines, will never be reported in such excerpts. Furthermore, a large number of criminal proceedings will not be reported anymore after three years. In such cases, an individual legally may claim that it never has been subject to such criminal proceedings which need not to be reported in an excerpt anymore.

Finally, even if one or several of these exceptions apply, additional requirements apply to a transfer of personal data outside the EU/EEA (see 4.6 below).

4.3 Compliance with legal obligations outside the DPA

This exception allows for a collection, processing or use of personal data if it is necessary in order to comply with a legal obligation outside the DPA. For this purpose, it is not sufficient that compliance with any such legal obligations in some way or the other involves dealing with personal data. For the purpose of this exception, it is necessary that the respective legal obligation explicitly allows and requests the collection, processing or use of such personal data.

Specific German laws which require registration with the Board or otherwise establish a legal obligation of an applicant to transfer personal data to the Board - and thereby justify such data processing under the DPA - do not exist.

Although not explicitly stated, the DPA makes it quite clear that only German legal obligations are within the scope of this exception. If foreign legal obligations were to be recognized as a basis for processing in Germany the entire mandatory German law could be easily circumvented. Thus, the Sarbanes-Oxley Act of 2002 or any rules of the Board and the Commission are not sufficient for this exception.

4.4 Exceptions based on DPA

As the applicants are private bodies in the meaning of the DPA, only the exceptions contained in Sec. 11, Sec. 28, Sec. 29 and Sec. 30 DPA are, in general, applicable.

4.4.1 Sec. 28 (1) No. 1 DPA

Under Sec. 28 (1) No. 1 DPA, the collection, storage, modification, transfer or use of personal data as a means of the data controller's own business purposes shall be admissible in accordance with the purposes of a contract or a quasi-contractual fiduciary relationship with the data subject.

Relating to personal data of any individual working for an applicant, first of all, no contract between these individuals persons and the Board is in place allowing such transfer. Regarding any contracts between these individuals and an applicant, a distinction has to be made with respect to the different contractual relationships.

In some cases partners or proprietors may have contractual relationships that are not qualified as employment contracts under German employment law. In such cases, it depends on the exact scope of the obligations of the individuals vis-à-vis the applicant whether a request for information containing personal data about such individuals falls within the purpose of such a contractual relationship. Thus, with respect to these contractual relationships, we cannot assess in general whether this exception is given.

With respect to all employment relationships in the meaning of German employment law, irrespective of the title of the individual, the question whether the request for such information and transfer of such information to the Board serves the purposes of the employment relationship with such individuals is closely linked to employment law issues. The collection and processing of personal data does not serve the purpose of an employment contract if the employment contract does not contain an obligation of an employee to provide such personal data to his employer for the purpose of transferring such personal data to the Board. In particular with respect to this Item relating to any criminal proceedings irrespective whether they relate to the employment relationship, according to German employment law an applicant is not allowed to collect all the information requested by the Board (for details please see 3.2 above). Accordingly, this exception does not apply.

With respect to personal data of clients, the contractual relationship to be considered under this exception would be the client contract with the applicant. Unless there is an explicit provision in such a client contract that the client has to provide personal data not only for the applicant's internal use but also for the purpose of a transfer to the Board, we do not believe that there is, at least in existing client contracts, an implied obligation of a client to provide personal data for such purposes. At least with respect to such existing client contracts, we believe that this exception does not apply.

4.4.2 Sec. 28 (1) No. 2 DPA

Under Sec. 28 (1) No. 2 DPA, the collection, storage, modification, transfer or use of personal data as a means of the data controller's own business purposes shall be admissible in so far as this is necessary to safeguard legitimate interests of the data controller and there is no reason to assume that the data subject has an overriding legitimate interest in his data being excluded from processing or use.

It certainly can be argued that an applicant in general has a legitimate interest in registering with the Board in order to be eligible to render professional services to a US-listed company or subsidiaries of such a company.

Whether there are any reasons to assume that a data subject has an overriding legitimate interest in his data being excluded from the processing or use has to be assessed on a case-by-case basis. This means that a data controller, when assessing whether this statutory exception applies, must carry out a general review of all circumstances relating to a specific group of individuals. There is no separate assessment needed for each individual, unless the circumstances relating to such an individual vary considerably from the circumstances of the other indivduals of the same group or the data controller becomes aware of specific circumstances leading to another result. Regarding the request for information under this Item, all data subjects possibly affected on the side of an applicant may be considered as one unique group of individuals. Accordingly, an applicant must assess whether there are any reasons to believe that the affected persons may have such overriding legitimate interests. If there, based on this assessment proves to be such a reason, the statutory exception does not apply and the intended transfer of data is not permissible.

We believe that based on the following criteria there are a number of reasons to assume that the data subjects have overriding legitmate interests in their data being excluded from the processing or use of their personal data and, thus, the request for information regarding this Item does not fall into this exception:

(i) Although the DPA does not state explicitly a ranking between the different alternatives of the exceptions contained in Sec. 28 DPA, it is the common understanding that, if there is a contractual relationship in the meaning of Sec. 28 (1) No. 1 DPA between the data controller and the data subject and the planned collection, processing or use of personal data is not in accordance with the purposes of such contractual relationship, one, within the exception of Sec. 28 (1) No. 2 DPA, only may argue in exceptional cases that the data controller has an overriding legitimate interest in such collection, processing or use of personal data. Thus, in particular with respect to employment relationships (see 4.4.1) the request for information under this Item may not fall under this exception.

(ii) Even if one does not consider in particular the relationship between the before mentioned exceptions, the findings with respect to the applicable German employment law (see 4.4.1) whereas the applicant may not request such information from its employees, clearly indicates that the data subjects have a legitimate interest not to disclose such data to the applicant or the Board.

(iii) The information requested by the Board under this Item is very sensitive. In particular in the light of the proposed publication of the registration by the Board, such a publication may have very far reaching consequences for a data subject. The publication of such information may impair the data subjects' professional careers in the future even if they no longer work or are associated with the applicant. Because of this sensitive nature of the information, the legitimate interest of the data subjects in excluding such a

transfer may be established easier than in other cases regarding less sensitive data.

(iv) As the request of the Board under this Item relates to all criminal proceedings irrespective of their severity and also to all judgements during the last five years, individuals would have to report such criminal proceedings to the applicant and the Board that they would not be obliged to report to any public authority or prospective employer in Germany or that would not be available to anyone from the Central Federal Register (*Bundeszentralregister*) on criminal convictions (for details please see 4.2 above). This in our view is a very strong indication that a data subject, be it an employee or any other person, including any partner or shareholder, has a legitimate interest that such a collection, processing or use of personal data does not take place.

(v) Finally, it should be noted that the broad request for information may infringe one of the basic data protection principles. The collection, processing or use of personal data is only permissible if it is adequate, relevant and not excessive in relation to the purpose for which it is processed. According to Sec. 101 (a) of the Sarbanes-Oxley Act of 2002, it is the purpose of the Board to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports. Although its seems generally to be legitimate for this purpose to request some information relating to these specific issues, the request for information under this Item seems too broad compared to the purpose of this request. The Board requests information on all criminal proceedings, irrespective whether they in any way relate to the professional behaviour of the data subjects or not. Furthermore, it requests information on any criminal proceedings irrespective of their severity. This assessement, generally, was not changed by the Board's statements made in PCAOB Release 2003-011, published July 18, 2003 on FAQs that it in some cases will not consider a registration incomplete if offences relate to some sorts of traffic related offences are not included or if information on some groups of employees is restricted to some offences listed in the Board's statements. At least under German law it is not clear, which offences or which employees will be exempted and these statements were not contained in a ruling of the Board, but merely in a general statement that cannot be considered to be an amendement of the request under this Item. Thus, this request for information has to be considered as being excessive in the meaning of the DPA.

4.4.3 Sec. 28 (1) No. 3 DPA

Under Sec. 28 (1) No. 3 DPA the collection, storage, modification, transfer or use of personal data as a means of fulfilling one's own business purposes shall be admissible if the data is generally accessible or the data controller would be entitled to publish them, unless the data subject's legitimate interest in its data being excluded from processing or use clearly outweighs the justified interest of the controller of the filing system.

Accordingly, the personal data may be collected and transferred to the Board if the applicant is able to collect them from generally accessible sources. Public registers

or information that may be requested from public authorities can qualify as such generally accessible sources. However, it should be noted that not each public register or right to request information from a public authority is considered as being generally accessible. It is a common understanding that such public registers or information requests to public authorities for which a person requesting such information must prove any type of special interest will not be considered as being generally accessible.

To give an example for generally accessible public sources, data published in the professional register of public accountants (*Berufsregister*) and the commercial register (*Handelsregister*) can be submitted to the Board. E.g. a public accounting firm acting as an auditor for a stock corporation must be published in the commercial register and all certified public accountants are listed in the professional register of public accountants. Access to these data may be requested even without proving a special interest.

However, information concerning criminal proceedings as requested by the Board under this Item may not be collected by the applicant from generally accessible sources.

Information about criminal proceedings, first of all, is stored in the Federal Central Register of Germany. However, according to Sec. 30 et seq. of the Act on the Federal Central Register (*Bundeszentralregister-Gesetz*), information regarding criminal proceedings may only be requested by the data subject itself or public authorities. Hence, there is no general access.

Furthermore, judgements of courts in criminal proceedings are not generally accessible either. Although in principle any criminal trial is public and in such trials the names of the individuals will be identified, the same does not apply to criminal judgements. According to Sec. 406 e German Criminal Proceedings Act (*Strafprozeßordnung*) and the applying general principles, in particular of the German constitution regarding privacy rights, access to such judgements first of all is limited to persons that can claim a legal interest in obtaining such a judgement. Therefore, irrespective whether such legal interest may be applied to a transfer of such a judgement or the information contained therein to the Board, this source by itself would not qualify as generally accessible. Furthermore, it should be noted that, even if a court hands out a judgement, under normal circumstances the names of defendants or respondents and all other persons will be deleted. Thus, even if an applicant would be able to obtain a copy of such judgement, it would not be possible to retrieve the information requested by the Board under Item 5.1 (b) from such sources.

Furthermore, we cannot see any right by which an applicant or the Board would be entitled to publish such information, which would be an alternative prerequisite under this exception.

Finally, it has to be assessed on a case-by-case basis (in the meaning explained in detail in A.4.4.2) whether, even if data is generally accessible, the data subject has a legitimate interest in its data being excluded from processing which outweighs the justified interest of the data controller. A similar process considering the interests of the parties must take place as under Sec. 28 (1) No. 2 DPA. Although the difference is that there it is sufficient to show any reason for an overriding

legitimate interest of the data subject whereas under Sec. 28 (1) No. 3 DPA one has to show a clearly outweighing legitimate interest of the data subject, we believe that the different arguments regarding the interests of the data subjects mentioned before (see 4.4.2 above) also in this instance are very strong.

4.4.4 Sec. 28 (3) No. 1 DPA

Under Sec. 28 (3) No. 1 DPA a transfer of personal data shall also be admissible insofar as it is necessary to protect the justified interest of a third party and if there is no reason to assume that a data subject has a legitimate interest in its data being excluded from transfer.

This exception is similar to the exception given by Sec. 28 (1) No. 2 DPA. For this exception, no legitimate interest of the data controller is relevant, but a legitimate interest of a third party receiving such data. For the purpose of this exception it may be assumed that the Board in general has such a legitimate interest.

Again, it should be noted that the decision, whether this exception applies, can only be made on a case-by-case basis (in the meaning explained in detail in A.4.4.2).

Again we believe that there are very strong indications that this is not the case and to assume that data subjects have a legitimate interest in their data being excluded from such transfer. To this respect, the same reasons apply as stated with respect to the exception given under Sec. 28 (1) No. 2 DPA (see 4.4.2 above). It should be noted that whereas under the exception of Sec. 28 (1) No. 2 DPA one has to show reasons to assume that data subjects have an overriding legitimate interest, for the purposes of the exception given in Sec. 28 (3) No.1 DPA it is sufficient that there reasons to assume that there exist any legitimate interests of the data subjects. Hence, from a viewpoint of the affected data subjects, the before stated reasons are even a stronger argument against a transfer in relation to this exception.

Furthermore, it is doubtful whether the Board has a legitimate interest with respect to all the information requested by it under this Item. The information request relates to all sorts of criminal proceedings irrespective of their severity and their relation to the professional behaviour of the applicant or associated person. At least with respect to such criminal proceedings that are irrelevant for the Board's purposes, the Board may not claim to have a legitimate interest.

4.4.5 Sec. 28 (3) No. 2 DPA

Under Sec. 28 (3) No. 2 DPA a transfer of personal data shall be admissible to avoid threats to the state security and public safety and to prosecute criminal offences if there is no reason to assume that a data subject has a legitimate interest in his data being excluded from such transfer.

First of all, it is very doubtful whether the information requested by the Board serves to avoid threats to state security or public safety. Any threat must be actual and concrete, the request of the Board under this Item does not only relate to actual threats but to very general cases that may only give rise to any sort of threat in the future.

In any event, the Board may not rely on this exception as state security and public safety do only relate to national, i.e. German, state security and public safety.

4.4.6 Sec. 11; 28 (3) No. 3; Sec. 28 (3) No. 4; Sec. 28 (6) - (9); Sec. 29; Sec. 30; Sec. 35 DPA

The DPA contains further exceptions for collection and processing of personal data by private bodies that do not apply to the information request of the Board. We only would like to mention these exceptions for the purposes of completeness:

(i) A transfer of personal data to an entity commissioned to process data for the data controller under Sec. 11 DPA is only applicable to a commissioning of data within the EU/EEA.

(ii) The exceptions given under Sec. 28 (3) No. 3; Sec. 29 do only relate to a transfer of personal data for the purpose of marketing and public relations. As the request of the Board does not relate to such purposes, these exceptions are not applicable.

(iii) The exception given under Sec. 28 (3) No. 4 DPA only relates to scientific research or other scientific purposes that are not applicable to the request of the Board.

(iv) The exceptions given under Sec. 28 (6) to (9) DPA relate only to sensitive data. According to the DPA sensitive data are data in relation to race and ethnicity, political opinions, religious or philosophical convictions, union membership, health and sexual life. As no such data are per se involved in the request of the Board, these exceptions are not applicable. Furthermore, the requirements of these exceptions are very strict. Practically, the processing of such data requires the consent of the data subjects.

(v) The exception given by Sec. 30 DPA only relates to anonymous data. However, the request of the Board includes explicitly the names of the individuals.

(vi) Sec. 35 DPA only relates to the correction, erasure and blocking of personal data, however, not to a transfer.

4.5 Elimination of conflict by consent/waivers

The consent of the data subjects (i.e. the individual concerned, e.g. the affected employees of the public accounting firm or individuals employed by the public accounting firm's client or by a third party) generally would permit the applicant to legitimately disclose the requested data to the Board. Such consent must be individual, specific, informed, freely given, express and in writing. It should be noted that these requirements apply irrespective of any additional requirements set up by other laws, e.g. whether any such consent would be valid with respect to employment law.

A consent principally may be revoked by the data subject without any reason with effect for the future unless the consent was part of a contractual agreement and enabling the fulfillment of such agreement. In case of such a revocation the Board would no longer be entitled to use the information.

4.5.1 Requirements of valid consent

(i) The consent must be individual, i.e. it is not required from the applicant or its corporate client but from each and every concerned individual whose data are contained in the information to be revealed to the Board, i.e. the

individual public accountants, be it shareholders, proprietors or employees and any other individual.

(ii) The consent has to relate to a specific set of data and to a specific purpose of the intended data processing. Usually, a list of data or categories of data to be transferred is included in the consent declaration.

(iii) Among other things, informed consent means that the data subject has to be informed in detail about the purposes of the processing and, in certain cases, about the consequences of a refusal to consent.

(iv) Furthermore, the consent has to be freely given (regarding the question whether the consent of an employee may be freely given, please see 4.5.2 below).

(v) In addition, the consent must be express and in writing.

4.5.2 Employee consent

Under the before stated circumstances, an employee consent under German law would not be valid.

Under German law it is generally doubtful whether the before described requirements for a valid consent can be fulfilled in an employment relationship, i.e. whether employees can freely give their consent vis-à-vis their employer.

So far, the Art. 29 EC Data Protection Working Party, has taken the general view that, as a matter of fact, employees often have no choice to refuse their consent: "The Art. 29 EC Data Protection Working Party takes the view that where as a necessary and unavoidable consequence of the employment relationship an employer has to process personal data, it is misleading if it seeks to legitimise this processing through consent. Reliance on consent should be confined to cases where the worker has a genuine free choice and is subsequently able to withdraw the consent without detriment." The working party set up pursuant to Article 29 of the EC Directive 95/46/EC is an independent advisory body whose opinions are not directly legally binding for the authorities in the member states.

It has to be noted that the German data protection authorities in general take the same view as the Art. 29 EC Data Protection Working Party. The highest federal and state data protection authorities in German meet regularly in the so called "Düsseldorfer Kreis" (Düsseldorf circle) and issue common statements regarding their interpretation of the DPA. Although these statements are not directly enforceable law, they express the way how these data protection authorities interpret the DPA in a way binding upon themselves and may be considered as regulations. Thus, any data controller applying the DPA has to take into consideration these statements very carefully and runs the risk of infringing the DPA when acting other than expressed in these statements. As a consequence, the data protection authorities may impose fines upon such data controllers infringing the DPA as determined by their statements.

This does not mean that an employee consent is considered in all cases as being void. There is a distinction to be made between cases where a consent is directly linked to the employment relationship and other cases that occur only in connection to the employment relationship and do not concern the work or the core

of the employment relationship itself. E.g. the Düsseldorfer Kreis in the past has considered a case to seek an employee consent for the monitoring of Emails and the use of the Internet at the workplace as being directly linked to the employment relationship. With respect to a consent of employees to process personal data pertaining to stock option plans of the employer, some authorities may consider an employee consent being appropriate.

With respect to the information requested by the Board under this Item, the Düsseldorfer Kreis has taken the view that such information from employees is a necessary and unavoidable consequence of the employment relationship as the registration is necessary for the employer in order to carry out any audit work relating to issuers. Furthermore, the information due to its sensitive nature relates to the core of the employment relationship and may have severe consequences for an employee in case of a disclosure.

Accordingly, the German data protection authorities would not consider an employee consent as a suitable exception. This was confirmed by the responsible working group of the Düsseldorf Kreis for cross border data transfers in a unanimous assessment. An official statement of the Düsseldorfer Kreis comprising the highest German data protection authorities expressing this view is announced to be issued on the next regular meeting of the Düsseldorfer Kreis (a translation of this official statement will be included in the Annex to this Legal Opinon).

4.6 Safeguarding of sufficient data protection level in case of a cross-border transfer outside the EU/EEA

Even if one of the before described exceptions of the general prohibition to collect, process or use personal data according to Sec. 4 (1) DPA applies, in case of a cross-border transfer of personal data outside the EU/EEA additional requirements under the DPA must be satisfied. Generally, there are several alternatives in order so safeguard a sufficient data protection level by the recipient of the personal data:

- An assessment of all circumstances within the recipient country may lead to the conclusion that there is a sufficient data protection level (see 4.6.1 below);
- Any of the statutory exceptions mentioned in Sec. 4c (1) DPA, including a consent of the data subject, is given (see 4.6.2 below); or
- An agreement guaranteeing a sufficient data protection level between the submitting and the receiving party is in place (see 4.6.3 below).

4.6.1 Sec. 4b (2), (3) DPA

There are different ways to assess whether a recipient country has a sufficient data protection level in the meaning of Sec. 4b (2), (3) DPA. First of all, the EU Commission has recognised some countries which laws provide in general a sufficient data protection level (at the time being Switzerland, Hungary, Argentine and partly Canada). These decisions are binding. The US are not considered in general to have such a sufficient level of data protection.

With respect to some cases, the EU Commission and the US government agreed on the so-called “safe-harbour rules”. Any recipient adhering to these rules is considered as guaranteeing a sufficient data protection level unless any circumstances show the opposite. It should be noted that these rules are only

applicable to private entities subject to regulation by the US Federal Trade Commission of the US Department of Transfer. As the Board has not at the time being adhered to these principles, this exception does not apply.

4.6.2 Sec. 4c (1) DPA

According to the exceptions stated in Sec. 4c (1) DPA, any transfer cross-border outside the EU/EEA may be admissible even if the recipient does not guarantee an adequate level of data protection. These exceptions are, per se, not given in the present case.

(i) According to Sec. 4c (1) No. 1 DPA the data subject may give his consent. Please note that to this respect the same requirements apply as described before (see 4.5 above). In particular the consent of employees in such instances would not be valid.

(ii) According to Sec. 4c (1) No. 2 DPA a transfer must be necessary for the performance of a contract between the data subject and the data controller. Relating to the request for the information under this Item, the employment relationship is not a suitable means of justification for such a transfer (see 4.4.1 above).

(iii) The exception under Sec. 4c (1) No. 3 DPA only relates to a transfer necessary for the conclusion of a contract with the data subject. This is not intended by the Board's request.

(iv) The exception of Sec. 4c (1) No. 4 DPA relating to a transfer necessary on important public interest grounds or for the enterprise, exercise or defence of legal claims does not apply either. Again, public interests only relate to German public interests.

(v) Sec. 4c (1) No. 5 DPA allows for a transfer necessary in order to protect vital interests of the data subject. Such interests are not involved in the present case.

(vi) Sec. 4c (1) No. 6 DPA allows for a transfer made from a register which is intended to provide information to the public and which is open to the consultation either by the public in general or by any person who can demonstrate a legitimate interest, to the extent that the statutory conditions are fulfilled in the particular case. As stated above (see 4.4.3 above), the existing German registers are either not open to the public or, in case of a request for judgements by a court, would be open in general to the applicant or the Board if they can demonstrate a legitimate interest, but would not contain the data requested by the Board under this Item.

4.6.3 Sec. 4c (2) DPA

In accordance with Sec. 4c (2) DPA the competent supervisory authority may nevertheless authorise individual transfers of personal data if the data controller agrees with the recipient on adequate safeguards with respect to the protection of privacy and the exercise of the corresponding rights, in particular resulting from contractual clauses or binding corporate regulations. This exception does not apply unless there are any agreements in place between the applicant and the Board that are either based on the EU model clauses (in this case no approval of the

German data protection authorities may be needed) or based on individual clauses (in this case, an approval of German data protection authorities before their execution is required in any case).

4.7 Conclusions

The DPA is applicable to the information requested by the Board under this Item. It would only be inapplicable if it does not contain any data relating to an identified or identifiable individual, be it a shareholder or proprietor of the applicant, employees of the applicant or issuers or persons related to the issuer.

We believe that the statutory exceptions for the collection, processing or use of personal data, i.e. a transfer to the Board, do not apply.

In principle, the consent of the data subject may be a suitable exception permitting a transfer. However, this only applies with respect to such persons which are not employees of the applicant. With respect to the consent of employees, the relevant data protection authorities would not accept an employee consent as a suitable exception.

In addition, the requirements regarding a cross-border transfer of personal data outside the EU/EEA currently are not fulfilled. Although consent of the data subjects in general would be a suitable exception, the same problems with respect to employee consent arise.

5 Confidentiality Obligations

With respect to confidentiality obligations it as well should be noted that this is a different layer of German law to be applied independently from other areas of law such as employment and data protection law. It espescially should be noted that the confidentiality obligation exists vis-à-vis the client, i.e. a company, not necessarily vis-à-vis all individuals involved (e.g. employees or customers of the client). Such individuals still have their own rights, e.g. under employment and data protection law. Accordingly, a consent of a client enabling an applicant to disclose information to the Board cannot replace any necessary consent of individuals if the information relates to data on such individuals.

5.1 Application of Confidentiality Obligations

The confidentiality obligation of public accountants only relates to such information concerning the accountant-client relationship. Although the request under Item 5.1 (a) mostly relates to information about the applicant or any associated person, nevertheless such information may include also information protected under the confidentiality obligation. According to Item 5.1 (b) (4) the information shall contain the name of an issuer or other client that was the subject of an audit report or comparable report, if applicable to the respective criminal proceeding requested under this Item. In these cases, client information which is subject to confidentiality obligations, is part of the information requested by the Board under this Item.

5.2 Basic Rules and Scope of Confidentiality Obligations

As a general principle, public accountants shall keep confidential all facts and circumstances, which they are entrusted with or which they become aware of in the course of their professional work.

- This basic principle of the professional law of public accountants is set forth in Sec. 323 German Commercial Code (*Handelsgesetzbuch - HGB-*) and Sec. 43 AO.

- Also Sec. 9 of the APAA triggers the public accountant's duty to keep information confidential. In addition, Sec. 9 APAA provides that a public accountant shall take the appropriate measures to ensure that such facts and circumstances shall not be known to third parties who are not entitled to such information. Hence, public accountants shall not only refrain from revealing confidential information by providing information or documents to the Board or by allowing the Board to conduct inspections or investigations of their business, but also shall actively prevent that such information is leaking out.

- Furthermore, any illegitimate disclosure by a public accountant is a criminal offence pursuant to Sec. 203 German Penal Code (*Strafgesetzbuch - StGB* -) and Sec. 333 German Commercial Code (*Handelsgesetzbuch - HGB* -) and is subject to fines and imprisonment of two years maximum.

- Finally, an implied duty of confidentiality follows from the contract between the public accounting firm and the client.

- The public accountant's duty to keep information confidential is in principle mirrored by a right to refuse to testify. For example, according to Sec. 383 Civil Procedure Act (*Zivilprozessordnung - ZPO* -), Sec. 53 Criminal Procedure Act (*Strafprozessordnung - StPO*) and Sec. 385 General Tax Act (*Abgabenordnung - AO* -), public accountants have the right to refuse to testify in civil, criminal and tax proceedings. As a rule, the public accountant is also entitled to refuse to testify in administrative proceedings vis-à-vis the tax authorities and other governmental agencies. In light of the aforementioned professional obligations, the public accountant needs an express release from such obligations in order to be legally allowed to testify.

- Furthermore, in accordance with the public accountant's right to refuse to testify, pursuant to Sec. 97 Criminal Procedure Act, the working papers of an public accountant cannot be seized for use as evidence in criminal proceedings to the extent the public accountant has a right to refuse to testify. German civil procedure, even after the introduction of certain obligations to provide documents in a court proceedings introduced recently, does neither provide for a discovery phase nor does it allow the seizure of documents otherwise.

The public accountant's duty of confidentiality is far reaching and includes all circumstances the public accountant (1) was made aware of by the client and (2) got aware of at the occasion of rendering professional services to a client. This entails not only information which the client intentionally made available to the public accountant in view of his professional activity but also all information the public accountant becomes aware of due to his professional activities even if such information is unrelated to the public accountant's professional task.

There are only limited exceptions to these confidentiality obligations. As a general rule, it should be noted that any exceptions are limited to the purposes for which they were granted. It is not possible to apply them to other cases and different purposes. The exceptions include the following.

- Statutory exceptions allowing for disclosure of client related data.

- The requested information is publicly available.

- Legitimate interests / self defence allow for a disclosure of confidential information.

- Consent of the client.

5.3 Statutory exceptions

Sec. 57b (3) AO contains an explicit exception to the principle of confidentiality in order to ensure effective quality control by the German statutory oversight body, the Chamber of Public Accountants (*Wirtschaftsprüferkammer*).

However, as an exception to the general principle of confidentiality its scope of application is limited to the bodies explicitly mentioned. Thus, this exception cannot be extended to the quality control and general oversight of the Board.

Other existing statutory exceptions, e.g. relating to banking oversight or money laundering, do relate to completely different purposes and, thus, are not applicable here.

5.4 Publicly available information

As far as information is brought into the public domain by the client itself, e.g. by publishing it in a public register, such information does not have to be kept confidential by the public accountant. For instance, German law provides that any stock corporation has to publish the public accountants it has retained and the annual financial statements in the commercial register (Sec. 119, 130 (5) of the Stock Corporations Act (*Aktiengesetz - AktG-)* and Sec. 325 Commercial Code). Hence, an applicant is entitled to disclose the names of all German issuers for which he prepared annual financial statements, yet only after this information has become part of the commercial register.

However, the information requested by the Board under this Item, although it may contain information under public domain, is not limited to such information. It always will be connected with information on a criminal proceeding relating to an audit report issued for such a client. As stated before (see 4.4.3 above) this information is not in the public domain, but access to judgements of a court are limited to certain persons claiming a legal interest in such a judgement and, apart from that, the names may not be included in copies of such judgements.

Hence, this exception does not apply.

5.5 Legitimate interest / Self-defence (Notstand)

5.5.1 Legitimate interest

The legitimate interest exception is not explicitly stated in the statutes, but based on case law. However, no case law exists with respect to the request of the Board under this Item or comparable cases. The courts have traditionally only accepted the disclosure of client information to the extent such disclosure was required to enable the public accountant to sue the client for professional fees or to defend himself against the allegation of professional misconduct. Otherwise, it was argued that the public accountant could not collect debts or defend himself. The confidentiality obligation of lawyers, which is very similar to the public accountant's one, is explicitly only excluded in the event of alleged professional misconduct, debt collection or other statutory exceptions. The request under this Item does not fulfil the decided cases which first of all relate to civil proceedings.

Having said this, it is unlikely whether the courts will extend their decisions to the disclosure of client information to the Board even though one could argue that a public accounting firm has a legitimate interest in registering with the Board. The

client's interest in retaining a registered public accounting firm is unlikely to be taken into account as a legitimate interest in favour of a disclosure because the client can give its consent if it agrees to release the public accountant from his confidentiality obligation.

In any event, even if a legitimate interest in the transfer of data to the Board was acknowledged by the courts in general, it has to be evaluated in every single case whether an overriding interest in confidentiality exists. For example, the disclosure of a litigation involving alleged fraud in relation to audit reports could seriously impair the client's legal position and, therefore, lead to a prevailing interest of the client in confidentiality.

5.5.2 Self defence

The disclosure of information to the Board can not be based on self-defence. An action in self-defence presupposes that the disclosure is required to protect prevailing legitimate interests protected by the law. Since an action in self-defence requires that both the client's interest in confidentiality and the public's trust in the confidential treatment of public accounting information is taken into account it is rather unlikely that the courts come to the conclusion that the public accountant's interest in registering with the Board prevails.

In particular, considering Appendix 1, Rule 2300 of the PCAOB Release 2003-007 regarding secrecy in case of a publication of the registration, it becomes clear that the client's interest in confidentiality is not guaranteed.

In addition, self-defence is considered to be ultima ratio. Hence, prior to acting in self-defence it has to be ensured that the disclosure cannot be based on the client's consent.

5.6 Elimination of conflict by consent

A public accountant is released from his duty to keep information confidential in the event the client consents to disclose client information. Such consent has to be given by the client, i.e. its legal representatives (however, not by each affected subject as would be the case in relation to data protection). In order to consent validly, the client has to have a proper understanding of the scope of information the disclosure of which he is permitting. The law does not require the consent to be given in writing. However, given the serious implications, in particular with regard to potential penal liability, we strongly recommend to rely on written express consent only.

The mere fact that a client who retains a registered public accounting firm is aware of the public accounting firm's obligations vis-à-vis the Board (and might even have an interest in an effective quality control) is not sufficient to assume an implied consent of the client, in particular given the importance of the principle of confidentiality. This is indirectly confirmed by Sec. 57b (3) AO which provides the only explicit exception to the principle of confidentiality in order to ensure effective quality control by the German statutory oversight body, the Chamber of Public Accountants (*Wirtschaftsprüferkammer*). Such an exception would not have been necessary if the client was deemed to have impliedly consented. Furthermore, it is doubtful whether such clients that are no issuers, have a full understanding of the need of public accountants to register with the Board.

Even if the representative of a corporate client, i.e. its management, is violating internal rules of corporate governance by granting consent to reveal information, such consent

would be legally binding and the public accountant could rely on it. However, whether or not the management is internally permitted to release the public accounting firm from its confidentiality obligations bears effect in relation to the likelihood whether or not a public accounting firm is able to obtain such consent. The answer to this question requires a thorough consideration of the conflicting interests in a Board approved audit report and in maintaining confidentiality. For example, the interest in confidentiality could prevail in case of a German subsidiary of a SEC-listed corporation, who itself has no interest in a Board approved audit report. Finally, we would like to draw your attention to the fact that consent is required from each and every client whose information will be released to the Board. For example, in the course of general inspections and investigations as well as disciplinary proceedings against a public accountant the Board also might get aware of information of non-SEC-listed clients who have no incentive to allow such disclosure.

Finally, it should be noted that similar to data protection law, a consent principally may be revoked by a client without any reason with effect for the future. In case of such a revocation the Board would no longer be entitled to use the information.

5.7 Conclusion

To the extent the information requested by the Board under this Item contains any information about the client, i.e. the name of an issuer that was in any way subject of one of the criminal proceedings to be reported to the Board, the confidentiality obligations apply. Apart from a consent that has to be given by the client via its legal representatives, no exceptions apply to a disclosure of such information to the Board.

B. Item 5.1 (a) (2) of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

Item 5.1 Certain Criminal, Civil and Administrative Proceedings

a. Indicate whether or not the applicant or any associated person of the applicant is a defendant or respondent

…

2. in any pending civil or alternative dispute resolution proceeding initiated by a governmental entity (including a non-US. jurisdiction) arising out of the applicant's or such person's conduct in connection with an audit report, or a comparable report prepared for a client that is not an issuer, or was a defendant or respondent in any such proceeding in which a judgement or award was rendered against the applicant or such person, whether by consent or otherwise, during the previous five years;

…

b. In the event of an affirmative response to Item 5.1.a, furnish the following information with respect to each such proceeding:

1. The name, filing date, and case or docket number of the proceeding.

2. The name and address of the court, tribunal, or body in which such proceeding was filed.

3. The names of all defendants or respondents in such proceeding who are also the applicant, any person listed in Part VII, or any person associated with the applicant at the time that the events in question occurred.

4. The name of the issuer or other client that was the subject of the audit report or comparable report.

5. With respect to each person named in Item 5.1.b.3, the statutes, rules or other requirements such person was found to have violated (or, in the case of a pending proceeding, is charged with having violated).

6. With respect to each person named in Item 5.1.b.3, the outcome of the proceeding, including any sentence or sanction imposed. (If no judgment or award has yet been rendered, enter the word “pending”.)

Note: Foreign public accounting firm applicants need only disclose such proceedings for the applicant and any proprietor, partner, principal, shareholder, officer, or manager of the applicant who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Conflicting German Law

2.1 Employment Law

Item 5.1 (a) (2) is in conflict with, and submission of the required information would cause the applicant to violate German employment law according to Art. 2 (1) German Constitution; Sec. 134; 138; 242; 307 (1) CC; Sec. 2 (1); 23 (1); 75 (1); (2); 80 (1); 87 (1); 94 (1) WCA. However, it will be possible to eliminate the conflict by obtaining consents from the employees if such consents are made freely and employees have been fully informed about the possibility that the information could be made available to the public.

2.2 Data Protection Law

Item 5.1 (a) (2) is in relation to personal data potentially in conflict with Sec. 4 (1) DPA. Apart from that, Item 5.1 (a) (2) is in conflict with Sec. 4b (2) DPA, the rules on cross-border transfers of personal data.

It is generally possible to eliminate the conflict by obtaining consents or waivers. However, with respect to consents of employees, such consents would not be valid.

2.3 Confidentiality Obligations

Item 5.1 (a) (2) is in relation to client data in conflict with confidentiality obligations of the applicant and/or any associated persons as stipulated by Sec. 43 (1) AO, Sec. 9 APAA, Sec. 323 (1), 333 German Commercial Code (*Handelsgesetzbuch - HGB*-), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB* -). It will be possible to eliminate the conflict by obtaining consents or waivers of the clients.

3 Employment Law

3.1 Applicable rules of individual employment law on submitting information about civil or alternative dispute resolution proceedings

The general legal position of German employment law with respect to personal information has been explained above under A.3.1. All legal aspects discussed there apply in the same way to German applicants regarding the requirements under Item 5.1 (a) (2).

3.2 Application of these rules on Item 5.1 (a) (2) and 5.1 (b) (1) - (6)

3.2.1 Requesting the information from an employee

In respect of proceedings initiated against the applicant alone or against the applicant and one or a group of his employees, the applicant usually will know about such proceedings from his own knowledge. Concerning other proceedings, as discussed already in detail under A.3.2.1 above, an employer can obtain information from his employees either by direct disclosure or by asking questions.

The employee's duty to disclose information without being asked follows from the principle of equity and good faith and is limited to facts that would inhibit an employee from fulfilling his contractual duties or that would lead to a severe and permanent disturbance in the contractual relationship. Even if the information required under Item 5.1 (a) (2) relates to the performance of the employee, he will not generally be obliged to inform the employer about all such proceedings, but only about such proceedings the outcome of which could be severe in a sense that it hinders the employee from performing his contractual duties or forms a major disturbance in the contractual relationship.

Concerning the employer's right to obtain information from the employee, he has the right to obtain information about circumstances which are related to the employment performance. However, the legitimate interests of the employer are limited to the present situation and fade with time. Applying these rules, an employee would not be bound to disclose all his professional wrongdoings and related proceedings to the employer, unless the proceeding is still pending or the proceeding was sufficiently severe to have still some relevance for the employment relationship. However, proceedings as referred to in Item 5.1 (a) (2) will normally be sufficiently severe to be legitimately requested by the employer, especially as the Board in the case of foreign applicants requires only information on professional employees, where the employer has a wider entitlement to ask questions.

However, there may be circumstances where a particular proceeding as referred to in Item 5.1 (a) (2) is of minor significance and dates back several years. In such circumstances it will be doubtful whether the employee would still be required to inform the employer about such a proceeding; especially, should the notion "audit report, or a comparable report prepared for a client that is not an issuer" in Item 5.1 (a) (2) refer not only to reports prepared for clients of the applicant, but as well to reports prepared by or in association with the associated person for clients of the previous employer, if such proceeding had taken place during a previous employment of the employee and the employee could reasonably fear that revealing this proceedings might be detrimental to his career. As the law on the employer's right to obtain information form his employees depends form the balancing of both party's interests, the outcome of an employment court dispute in such a case is impossible to predict.

With the exception of such specific cases, it can be concluded that the employer would be able to obtain the information required under Item 5.1 (a) (2) including the details as listed in Item 5.1 (b) (1) – (6).

3.2.2 Submitting the information to a third party

As discussed above under A.3.2.2, the question whether the employer is entitled to disclose information which he has obtained from its employees to the Board is neither regulated in statute nor decided by the competent employment courts. It is only with the consent of the employee that an employer is entitled to reveal information that is connected to the performance and the conduct of the employee at work. When disclosing such information the employer has to respect the basic personal right of the employee and the limits on the right to obtain information imposed thereby. It was further concluded that if the third party does not guarantee confidentiality, the employer would not be allowed to submit private information, regardless whether the third party has itself a legitimate interest in obtaining such information.

On this legal basis, it is doubtful whether the employer would be entitled to submit the information required to the Board. The Board is not the employer of the employees and not a German public or governmental authority competent to issue directions to German employees. The employer's interest to disclose the information requested under this Item to the Board follows only from the fact that this is a requirement for registration of foreign public accounting firms and thus for providing audit services to certain companies, which is not directly related to the employment contract. The main concern against such disclosure of information to the Board follows from the fact that the Board does not guarantee that it will keep such information confidential. According to the PCAOB Release No. 2003-007 Appendix 1 Rule 2300 (a) - (h) an application for registration shall be made publicly available as soon as practicable, provided that the applicant did not request confidential treatment of specific information. In case of information submitted to the Board with a request for confidential treatment, the Board's Director of Registration and Inspection shall determine whether the requested confidential treatment is granted. There shall be no guarantee that information for which confidential treatment is requested will not be published nor do the rules provide for a possibility to withdraw information submitted with a request for confidential treatment in case such confidential treatment is denied.

Under these circumstances it would not be possible to fulfil the requirements of the Board without obtaining the employees explicit consent. If an employee who must be fully aware of the possibility of publishing the information provided consents to the disclosure of his information and such consent was rendered freely and without applying undue pressure on the employee, such consent would be most likely to be valid and the employer could provide the requested information to the Board. Without consent of the employee, the employer would not be entitled to fulfil the Board requirements under Item 5.1 (a) (2).

3.3 Applicable rules on works council involvement on submitting of information about civil or alternative dispute resolution proceedings

The general legal aspects of German works constitution law with respect to personal information have been explained above under A.3.3. All legal aspects discussed there apply in the same way to German applicants and their enterprises regarding the requirements under Item 5.1 (a) (2).

However, as the information required under Item 5.1 (a) (2) is much more related to the occupation and professional conduct of the employees than the information requested under Item 5.1 (a) (1) and does not constitute a similar infringement of the employees general personal right, the conclusions are different.

3.4 Application of the works council rules on Item 5.1 (a) (2) and 5.1 (b) (1) - (6)

For the following considerations it is anticipated that the works constitution law applies to the relevant enterprise and the associated person in question (see A.3.4 above).

Under his obligation to ensure that all laws and regulations protecting the employees are guarded in the enterprise following from Sec. 80 No. 1 WCA the works council would be called to examine whether the collection and submitting of the information requested under this Item was in line with German law and especially the principles of the employees' basic rights. Sec. 75 (2) WCA contains the same obligation. As already discussed above under 3.2.1, 3.2.2, the information referred to in Item 5.1 (a) (2) is related to the employment and professional conduct and thus collecting of such information by the employer will normally not be an infringement of the general personal right of the employees. However, the works council has the right to be heard and to discuss with the employer any aspects it regards as problematic in connection with such passing of information. One area where a works council might raise concerns is the question of the Board's duty to confidentiality of the information submitted. However, in our opinion the works council would not be entitled to obtain an injunction against the employer submitting the information to the Board just on the reason that the possible publication amounts to an infringement of the employees' general personal rights and becomes therefore an issue under Sec. 75 (2), 80 No. 1, 23 (3) WCA.

However, even if the information could be obtained and disclosed in line with the law, the employer would not be entitled to obtain these information without prior conclusion of an agreement with the works council, as Sec. 87 (1) WCA provides that the works council has a co-determination right in all matters dealing with the running of the enterprise and the conduct of employees in the enterprise. Obtaining specific information from a group of employees which is defined according to general criteria has already been regarded by the Federal Employment Court as triggering the co-determination right of the works council. This rule does apply to any applicant employer who needs to obtain information on Item 5.1 (a) (2) from all employees employed on specific positions which he intends to assign with an audit for a client who is an issuer or a comparable report.

The organized collection of Item 5.1 (a) (2) - information might furthermore fulfil the definition of an employee questionnaire which according to Sec. 94 (1) WCA is subject to a similar co-determination right of the works council.

The co-determination procedure is analyzed in detail above under A.3.4. All aspects discussed there apply here as well.

Therefore, the employer would only be able to obtain the information requested in Item 5.1 (a) (2) if he concluded the necessary works agreement to fulfil his obligations under Sec. 87, 94 WCA. Prior to the conclusion of such works agreements employees could object to take part in submitting information (even if they have generally consented to provide such information) and the works council could initiate proceedings to stop the employer with a court injunction.

3.5 Elimination of the conflict by consents or waivers

3.5.1 General rules on consents and waivers in an employment relationship

The general legal position of German employment law with respect to employees' consents and waivers has been explained above under A.3.5.1. All legal aspects discussed there apply in the same way to German foreign public accounting firm applicants regarding the requirements under Item 5.1(a) (2).

3.5.2 Application of these rules to new entrants

The legal position regarding the contractual clause obliging new employees to inform the employer about certain circumstances and consent to the submission of such information to a foreign third party has been analyzed above under A.3.5.2. The same rules apply with respect to Item 5.1 (a) (2).

However, as the information required under Item 5.1 (a) (2) is related to the employment relationship and the professional conduct, such a clause in an employment contract to obtain information might be considered valid as it is covered by the legitimate business interest of the employer and balanced and therefore does not unreasonably impair the employee. Concerning the disclosure to a foreign third party, the outcome of a legal analysis would depend on the wording of such a clause, as is would be necessary to make the employee fully aware that the employer cannot guarantee (as explained in greater detail in A.3.2.2) that the information submitted under this term would be kept confidential.

As a consequence, such a clause including an employee consent to the collection and disclosure of information to the Board would be enforceable.

3.5.3 Application of these rules to existing employees

For employees who are already employed by the employer it can be generally anticipated that the employment contract does not include such a clause covering the request of the Board under this Item discussed above under 3.5.2. If the employer would try to seek consent to obtaining the information required by the Board and to disclosing it, this would be regarded as an offer for an amendment of the employment contract. The employee would be free to accept such an offer and to give the necessary consent to the collection and disclosure of information to the Board, but, however, his consent to do would only be valid if he acted without undue pressure and had been free to refuse such offer.

On the basis of the analysis of the employer's right to issue a termination for alteration as provided already above under A.3.5.3, it can be stated here that, even if the public accounting firm can show that work for a client which is subject to the supervision of the Board accounts for a significant part of its business and that it would have to stop providing services for such client if the requirements of the Board could not be met, the termination for alteration would most probably not be effective as the employer could not guarantee that the information required by the Board is kept confidential (as explained in greater detail in A.3.2.2). No employee has to accept that private information as referred to in Item 5.1 (a) (2) is made available to the public without his explicit consent.

Accordingly, although it is legally possible for an employee to consent to an obligation to report the required information to the employer and to disclose this information to the Board, a termination for alteration of the employment contract to include such consent as a clause of the employment contract would not be valid.

3.5.4 Works council

Even if all employees consent to report the required information to the employer and to the disclosure of this information to the Board, the employer still needs to conclude a works agreement with the works council based on Sec. 87 (1) No. 1, 94 WCA.

4 Data Protection Law

4.1 Application of DPA

The statements made under A.4.1 above apply respectively. Accordingly, the rules of the DPA are applicable to the information request of the Board to the extent the requested information contains any personal data. Such personal data includes information about any individual associated persons of the applicant, however, may also include the applicant itself or the client.

4.2 Basic Rule Regarding a Transfer of Personal Data

The statements made under A.4.2 apply respectively. Any collection, processing or use of personal data by the data controller is prohibited unless one of the exceptions named in Sec. 4 (1) DPA applies. Furthermore, the general principles of data protection law must be complied with.

4.3 Compliance with legal obligations outside the DPA

The statements made under A.4.3 apply respectively. There is no German legal obligation outside the DPA to transfer these data to the Board.

4.4 Exceptions based on DPA

4.4.1 Sec. 28 (1) No. 1 DPA

First of all, the statements made under A.4.4.1 apply respectively. However, the legal assessment varies as it, generally speaking, may be a valid content of an employment contract that an employer requests from his employees the information requested by the Board under this Item (please see 3.2.1). However, this only relates to the right of an employer to request such information for its own purposes. With respect to the fact that this information is only needed to be transferred to the Board and that no confidentiality of such information is guaranteed by the Board (as explained in greater detail in A.3.2.2), one might hardly argue that such a transfer would serve the purpose of an employment contract between the applicant and its employees. This, however, could be changed for the future with respect to the content of an employment contract if the employee gives his consent (please see 3.5 above).

Furthermore, the requirements to seek works councils' approval (please see 3.4 above) must be regarded in cases in an enterprise of the applicant exists a works council. If such works council's approval is not obtained, it can hardly be argued that a transfer serves the purpose of an employment contract.

4.4.2 Sec. 28 (1) No. 2 DPA

The statements made under A.4.4.2 apply respectively. Whether the legitimate interest exception is given in this case has to be assessed on a case-by-case basis

(in the meaning explained in A.3.2.2). Even if this request is not as sensitive as the request under Item 5.1 (a) (1) regarding criminal proceedings, we believe that the data subjects still have a very strong interest in not disclosing such data. In particular, the arguments named in A.4.4.2 (iii) still apply. The request relates to data that may effect that data subject's professional career, especially regarding the planned publication of such data. Furthermore, the arguments named in A.4.4.2 (i), (ii) still apply as it is not per se in accordance with existing employment contracts to request such information from employees. Accordingly, no legitimate interest of an employer can exist.

4.4.3 Sec. 28 (1) No. 3 DPA

The statements made under A.4.4.3 apply respectively. Regarding civil proceedings, there is no central register in Germany. Regarding a request for a copy of respective judgements, such requests first of all are subject to the applicant showing a legal interest in such an information according to Sec. 299 (2) of the Act on German Civil Proceedings (*Zivilprozeßordnung - ZPO-*), Sec. 78 of the Act on Financial Courts Proceedings (*Finanzgerichtsordnung - FGO* -), Sec. 120 of the Act on Social Courts Proceedings (*Sozialgerichtsgesetz - SGG* -), Sec. 46 (2) of the Act on Labour Court Proceedings (*Arbeitsgerichtsgesetz - ArbGG* -). Because of this requirement to show a special interest, this would not be qualified as publicly accessible source. Furthermore, the courts in most cases will not release the names of the parties involved which, however, are part of the request of the Board.

4.4.4 Sec. 28 (3) No. 1 DPA

The statements made under A.4.4.4 and B.4.4.2 apply accordingly. Even if information on civil proceedings is not as sensitive as information on criminal proceedings and related to professional behaviour of the data, we still believe that the data subjects have a legitimate interest in excluding a transfer of their data.

4.4.5 Sec. 28 (3) No. 2 DPA

The statements made under A.4.4.5 apply respectively.

4.4.6 Sec. 11; 28 (3) No. 3; Sec. 28 (3) No. 4; Sec. 28 (6) - (9); Sec. 29; Sec. 30; Sec. 35 DPA

The statements made under A.4.4.6 apply respectively.

4.5 Elimination of conflict by consent/waivers

The statements made under A.4.5 apply respectively. Any consent of the data subject must be individual, specific, informed, freely given, express and in writing. Again, an employee consent would not be valid regarding this request as it is closely linked to the content of the employment relationship.

4.6 Safeguarding of sufficient data protection level in case of a cross-border transfer outside the EU/EEA

The statements made above under A.4.6 apply accordingly. The possible options for a safeguarding of a sufficient data protection level in the country of the recipient are not given, as the Board is neither subject to the safe-harbour rules nor has concluded a respective agreement on the safeguarding of a sufficient data protection level.

Again, consent would be a possible exception apart from cases of employee consent that would not be valid.

4.7 Conclusions

To the extent personal data relating to any individual are involved when complying with the request of the Board under this Item, the DPA applies. In this case, the general prohibition of any collection and processing of personal data applies. We believe that the statutory exceptions given by the DPA do not apply. Furthermore, there are no guarantees in place for a sufficient data protection level in the US. Accordingly, a transfer of information to the Board is prohibited by these provisions as well. Although in general consent of the data subject would be a suitable means of eliminating these conflicts with German law, such a consent of employees would be no suitable means.

5 Confidentiality Obligations

5.1 Application of Confidentiality Obligations

The statements made under A.5.1 apply accordingly. To the extent information about a client is requested under this Item, client confidentiality obligations apply.

5.2 Basic Rules and Scope of Confidentiality Obligations

The statements made under A.5.2 apply accordingly. Client confidentiality obligations set up by several statutes and the contractual relation with the client apply. The duty of confidentiality is far reaching and includes virtually all information relating to a client. One of the existing exceptions to client confidentiality must be satisfied in case of a transfer with such exceptions to be interpreted narrowly.

5.3 Statutory exceptions

The statements made under A.5.3 apply accordingly. There are no statutory exceptions for a transfer of such data to the Board.

5.4 Publicly available information

The statements made under A.5.4 apply respectively. There are no publicly accessible sources relating to civil proceedings which are open without showing special interests and that will produce information containing the names of clients.

5.5 Legitimate interest / Self-defence (Notstand)

5.5.1 Legitimate interest

The statements made under A.5.5.1 apply accordingly. The legitimate interest exception, even if the information request under this Item may relate to one of the cases accepted by German courts (i.e. debt collection or alleged professional misconduct), these exceptions do only apply for the purpose for which they were granted. I.e. they were made in the interest of the applicant, not in the interest of a third party like the Board. Thus, a transfer of such information may not be based on this exception.

5.5.2 Self defence

The statements made under A.5.5.2 apply accordingly. The request under this Item may not be considered as a case of self defence.

5.6 Elimination of conflict by consent

The statements made under A.5.6 apply accordingly. The applicant may seek a client consent for disclosure of any information relating to the client under this request. Such consent should be given explicitly.

5.7 Conclusion

To the extent the information requested by the Board under this Item contains any information about a client, e.g. when being a party to such a civil proceeding, the confidentiality obligations apply. The only applicable exception would be a consent of the respective client.

C. Item 5.1 (a) (3) of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

Item 5.1 Certain Criminal, Civil and Administrative Proceedings

a. Indicate whether or not the applicant or any associated person of the applicant is a defendant or respondent

…

3. in any pending administrative or disciplinary proceeding arising out of the applicant's or such person's conduct in connection with an audit report, or a comparable report prepared for a client that is not an issuer, or was a respondent in any such proceeding in which a finding of violation was rendered, or a sanction entered, against the applicant or such person, whether by consent or otherwise, during the previous five years. Administrative or disciplinary proceedings include those of the Commission; the Board, any other federal, state, or non-US. agency, board or administrative or licensing authority; and any professional association or body. Investigations that have not resulted in the commencement of a proceeding need not be included;

b. In the event of an affirmative response to Item 5.1.a, furnish the following information with respect to each such proceeding:

1. The name, filing date, and case or docket number of the proceeding.

2. The name and address of the court, tribunal, or body in which such proceeding was filed.

3. The names of all defendants or respondents in such proceeding who are also the applicant, any person listed in Part VII, or any person associated with the applicant at the time that the events in question occurred.

4. The name of the issuer or other client that was the subject of the audit report or comparable report.

5. With respect to each person named in Item 5.1.b.3, the statutes, rules or other requirements such person was found to have violated (or, in the case of a pending proceeding, is charged with having violated).

6. With respect to each person named in Item 5.1.b.3, the outcome of the proceeding, including any sentence or sanction imposed. (If no judgment or award has yet been rendered, enter the word “pending”.)

Note: Foreign public accounting firm applicants need only disclose such proceedings for the applicant and any proprietor, partner, principal, shareholder, officer, or manager of the applicant who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Conflicting German Law

2.1 Employment Law

Item 5.1 (a) (3) is in conflict with, and submission of the required information would cause the applicant to violate, German employment law according to Art. 2 (1) German Constitution; Sec. 134; 138; 242; 307 (1) CC; Sec. 2 (1); 23 (1); 75 (1); (2); 80 (1); 87 (1); 94 (1) WCA. However, it will be possible to eliminate the conflict by obtaining consents from the employees if such consents are made freely and employees have been fully informed about the possibility that the information could be made available to the public.

2.2 Data Protection Law

Item 5.1 (a) (3) is in relation to personal data potentially in conflict with Sec. 4 (1) DPA. Apart from that, Item 5.1 (a) (3) is in conflict with Sec. 4b (2) DPA, the rules on cross-border transfers of personal data.

It is generally possible to eliminate the conflict by obtaining consents. However, with respect to consents of employees, such consents would not be valid.

2.3 Confidentiality Obligations

Item 5.1 (a) (3) is in relation to client data in conflict with confidentiality obligations of the applicant and/or any associated persons as stipulated by Sec. 43 (1) AO, Sec. 9 APAA, Sec. 323 (1), 333 German Commercial Code (*Handelsgesetzbuch- HGB-*), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB -*). It will be possible to eliminate the conflict by obtaining consents or waivers of the clients.

3 Employment Law

3.1 Applicable rules of individual employment law on submitting information about administrative or disciplinary proceedings

Please refer to B.3.1 above, as the legal position on the information requested in Item 5.1 (a) (2) applies entirely to the analysis on Item 5.1 (a) (3).

3.2 Application of these rules on Item 5.1 (a) (3) and 5.1 (b) (1) - (6)

Please refer to B.3.2 above as the legal position on the information requested in Item 5.1 (a) (2) applies entirely to the analysis on Item 5.1 (a) (3).

3.3 Applicable rules on works council involvement on submitting of information about administrative or disciplinary proceedings

Please refer to B.3.3 above, as the legal position on the information requested in Item 5.1 (a) (2) applies entirely to the analysis on Item 5.1 (a) (3).

3.4 Application of the works council rules on Item 5.1 (a) (3) and 5.1 (b) (1) - (6)

Please refer to B.3.4 above, as the legal position of the information requested in Item 5.1 (a) (2) applies entirely to the analysis on Item 5.1 (a) (3).

3.5 Elimination of the conflict by consents or waivers

Please refer to B.3.5 above, as the legal position of the information requested in Item 5.1 (a) (2) applies entirely to the analysis on Item 5.1 (a) (3).

4 Data Protection Law

4.1 Application of DPA

The statements made under A.4.1 above apply respectively. The rules of the DPA are applicable to information requested by the Board under this Item to the extent the information contains personal data.

4.2 Basic Rule Regarding a Transfer of Personal Data

The statements made under A.4.2 apply respectively. The collection and transfer of personal data to the Board is prohibited unless one of the exceptions applies.

4.3 Compliance with legal obligations outside the DPA

With regard to the supervision of the public accountants' quality standards no statutory law exists providing for an information exchange between the US and the German authorities. Pursuant to Sec. 57a et seq. AO, the Chamber of Public Accountants (*Wirtschaftsprüferkammer*) is entitled to carry out a review in order to check the quality of a public accountant. As a result of such investigation, the qualification of the public accountant is described in a report. This report is strictly confidential and, as a rule, only for internal use of the Chamber of Public Accountants. The individuals who carried out the investigation shall not reveal any details of the investigation to any un-authorized third party. Therefore, the Board cannot obtain any information in relation to such investigations from the Chamber of Public Accountants.

However, with respect to insider trading the Commission and the equivalent German authority, the Federal Supervisory Authority for the Finance Sector (*Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin*) have been working together on the basis of a memorandum of understanding. The authorities committed themselves to comply with requests for information within the framework of their national laws. Accordingly, the Federal Supervisory Authority for the Finance Sector is permitted to transfer data required for the supervision of stock exchanges to the Commission. However, the Commission may only use such data for the limited purpose indicated by the Federal Supervisory Authority for the Finance Sector, but not for other purposes, i.e. complying with the requests of the Board under this Item.

Other legal obligations requiring a transfer of personal data to the Board outside the DPA that might be applicable do not exist.

4.4 Exceptions based on DPA

Please refer to B.4.4 above as the findings apply accordingly. In particular, there are no public accessible sources available with respect to these proceedings. Access to judgements or awards of administrative proceedings are limited in the same way as access to civil proceedings. Disciplinary proceedings before the Chamber of Public Accountants (*Wirtschaftsprüferkammer*) are not publicly available at all.

4.5 Elimination of conflict by consent/waivers

Please refer to the statements made in A.4.5, an employee consent would not be valid.

4.6 Safeguarding of sufficient data protection level in case of a cross-border transfer outside the EU/EEA

Please refer to the statements made in A.4.6, there are no sufficient guarantees regarding a safeguarding of a sufficient data protection level. Again, although a consent may be a valid means of eliminating this conflict, it is very doubtful whether employee consent would be valid.

4.7 Conclusions

To the extent personal data relating to any individual are involved when complying with the request of the Board under this Item, the DPA applies. In this case, the general prohibition of any collection and processing of personal data applies. We believe that the statutory exceptions given by the DPA do not apply. Furthermore, there are no guarantees in place for a sufficient data protection level in the US. Accordingly, a transfer of information to the Board is prohibited by these provisions as well. Although in general consent of the data subject would be a suitable means of eliminating these conflicts with German law, an employee consent would not be valid.

5 Confidentiality Obligations

Please refer to the statements made under B.5 that apply accordingly.

D. Item 5.2 of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

Item 5.2 Pending Private Civil Actions

a. Indicate whether or not the applicant or any associated person of the applicant is a defendant or respondent in any pending civil proceeding or alternative dispute resolution proceeding initiated by a non-governmental entity involving conduct in connection with an audit report, or a comparable report prepared for a client that is not an issuer.

b. In the event of an affirmative response to Item 5.2.a, furnish the following information with respect to each such proceeding:

1. The name, filing date, and case or docket number of the proceeding.

2. The name and address of the court, tribunal, or body in which such proceeding was filed.

3. The names of all defendants or respondents in such proceeding who are also the applicant, any person listed in Part VII, or any person associated with the applicant at the time that the events in question occurred.

4. The name of the issuer or other client that was the subject of the audit report or comparable report.

5. With respect to each person named in Item 5.2.b.3, the statutes, rules or other requirements such person was found to have violated.

Note: Foreign public accounting firm applicants need only disclose such proceedings for the applicant and any proprietor, partner, principal, shareholder, officer, or manager of the applicant who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Conflicting German Law

2.1 Employment Law

Item 5.2 is in conflict with, and submission of the required information would cause the applicant to violate, German employment law according to Art. 2 (1) German Constitution; Sec. 134; 138; 242; 307 (1) CC; Sec. 2 (1); 23 (1); 75 (1); (2); 80 (1); 87 (1); 94 (1) WCA. However, it will be possible to eliminate the conflict by obtaining consents from the employees if such consents are made freely and employees have been fully informed about the possibility that the information could be made available to the public.

2.2 Data Protection Law

Item 5.2 is in relation to personal data potentially in conflict with Sec. 4 (1) DPA. Apart from that, Item 5.2 is in conflict with Sec. 4b (2) DPA, the rules on cross-border transfers of personal data.

It is generally possible to eliminate the conflict by obtaining consents or waivers. However, with respect to consents of employees, such an employee consent would not be valid.

2.3 Confidentiality Obligations

Item 5.2 is in relation to client data in conflict with confidentiality obligations of the applicant and/or any associated persons as stipulated by Sec. 43 (1) AO, Sec. 9 APAA, Sec. 323 (1), 333 German Commercial Code (*Handelsgesetzbuch- HGB-*), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB -*). It will be possible to eliminate the conflict by obtaining consents or waivers of the clients.

3 Employment Law

Please refer to the statements made under B.3 as from a German employment law perspective it makes no difference whether such proceedings are initiated by a governmental entity or a private entity.

4 Data Protection Law

Please refer to the statements made under B.4. From a German data protection law perspective it makes no difference whether the proceedings where initiated by a governmental entity or a private entity.

5 Confidentiality Obligations

Please refer to the statements made under B.5 as from the perspective regarding confidentiality obligations it makes no difference whether such proceedings were initiated by a governmental entity or any other entity.

E. Item 7.1 of the Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

List the names of all accountants associated with the applicant who participate in or contribute to the preparation of audit reports. For each such person, list every license or certification number (if any) authorizing him or her to engage in the business of auditing or accounting. For each such license or certification number, furnish the name of the issuing state, agency, board, or other authority.

Note: For purposes of this Item, applicants that are not foreign public accounting firms must list all accountants who are persons associated with the applicant and who provided at least then hours of audit services for any issuer during the last calendar year. Applicants that are foreign public accounting firms must list all accountants who are a proprietor, partner, principal, shareholder, officer, or manager of the applicant and who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Conflicting German Law

2.1 Employment Law

Item 7.1 does not conflict with rules of individual German employment law. An employer will generally be entitled to collect and to disclose the requested information to the Board.

Regarding collective employment law, the collection and transfer of the requested information according to Sec. 75 (2), 80 No.1 WCA will be subject to information rights of the works council and according to Sec. 87 (1) No.1, 6 WCA will be subject to co-determination of the works council. i.e. before the necessary data are collected and transferred to the Board the conclusion of an agreement with the works council is necessary.

2.2 Data Protection Law

Item 7.1 is in relation to personal data potentially in conflict with Sec. 4 (1) DPA. There are reasons to assume that one of the statutory exceptions may apply and the transfer of the requested information to the Board in general could be admissible. However, Item 7.1

would still be in conflict with Sec. 4b (2) DPA, the rules on cross-border transfers of personal data.

It is generally possible to eliminate the conflict by obtaining consents or waivers. However, with respect to consents of employees, such an employee consent would not be valid.

2.3 Confidentiality Obligations

Item 7.1 could in relation to client data be in conflict with confidentiality obligations of the applicant as stipulated by Sec. 43 (1) AO, Sec. 9 APAA, Sec. 323 (1), 333 German Commercial Code (*Handelsgesetzbuch- HGB-*), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB* -), if, taking into consideration all information transferred by an applicant in Form 1, it is possible to make conclusions for which particular issuers the named public accountants provided audit services.

It is possible to eliminate the conflict by obtaining consents or waivers of the clients.

3 Employment Law

3.1 Applicable rules of individual employment law on submitting information about employees to third parties

The general legal position of German employment law with respect to personal information has been explained above under A.3.1. All legal aspects discussed there apply in a similar way to German applicants regarding the requirements under Item 7.1.

3.2 Application of these rules on Item 7.1

The employer's duty under Item 7.1 requires that the employer makes the necessary arrangements and internal filings to secure his ability to deliver the requested information. As discussed already in detail under A.3.2.1 above, an employer can obtain information from his employees either by direct disclosure or by asking questions. The employee's duty to disclose information without being asked follows from the principle of equity and good faith. Concerning the employer's right to obtain information from the employee, he has the right to ask for information about circumstances which are related to the employment relationship and performance. Applying these rules, it seems more or less obvious that an employer has the right to obtain information on the license or certification number and on the authorizing authority. In most cases, the employer will already have such information, e.g. in its personal files of the employees. Furthermore, the employer will have access to the data providing in detail in which audit reports the employee has participated or contributed.

As discussed above under A.3.2.2, the question whether the employer is entitled to disclose information which he has obtained from its employees to the Board, is neither regulated in statute nor decided by the competent employment courts. When disclosing information about his employees the employer has to respect the basic personal right of the employee and the limits on the right to obtain and disclose information imposed thereby.

For the information requested by the Board under Item 7.1 there is no conflict to these general legal rules. Even though the Board is not a German public or governmental authority competent to issue directions to German employees, the employer's interest to disclose the information requested under Item 7.1 to the Board follows from the fact that this is a requirement for registration of foreign public accounting firms and thus for

providing audit services to certain companies (*issuers*). The information requested under 7.1 would generally not be regarded as information on which the employee has a specific interest for keeping such information confidential nor which the employer needs to consider as an infringement of the basic personal right. Further, it will generally not conflict with German employment law that the Board does not guarantee keeping confidential information received (as explained in detail in A.3.2.2) as the information is of a rather general type. However, it cannot be excluded that employees whose names have been disclosed in official publications of the Board request from their employer not to provide such information any more and that an employment court would grant an injunction to this effect based on the specific circumstances of any specific case. Consequently, employers will have to consider the individual circumstances of the employees whose data are sent to the Board and whether it follows from the specific circumstances of each employee that the personal basic rights demand that the information requested remains confidential. In such an exceptional case, the employer would indeed be prohibited to provide the Board with the information requested, and there would consequently be an exceptional conflict between German employment law and Item 7.1.

In general, therefore, it would be possible to fulfil the requirements of the Board even without obtaining an employee's explicit consent.

3.3 Applicable rules on works council involvement on submitting information about employees to third parties

The general legal aspects of German works constitution law with respect to personal information have been explained above under A.3.3. All legal aspects discussed there apply principally in the same way to the requirements under Item 7.1.

3.4 Application of the works council rules on Item 7.1

For the following considerations it is anticipated that the works constitution law applies to the relevant enterprise and the associated person in question (see A.3.4 above).

As the information required under Item 7.1 is limited to name, no. of authorizing certificate, pertinent authority and working for an issuer, the restrictions based on an infringement of the basic personal right should not apply here. However, under his obligation to ensure that all laws and regulations protecting the employees are guarded in the enterprise following from Sec. 80 No. 1 WCA the works council would be called to examine whether the collection and submitting of the information requested under Item 7.1 was in line with German law and especially the principles of the employees' basic rights. Sec. 75 (2) WCA contains the same obligation. As already discussed above the information referred to in Item 7.1 will normally not lead to an infringement of the general personal right of the employees. However, the works council has the right to be heard and to discuss with the employer any aspects it regards as problematic in connection with such passing of information. One area where a works council might raise concerns is the question of the Board's duty of confidentiality of the information submitted. However, in our opinion the works council would not be entitled to obtain an injunction against the employer submitting the information to the Board just on the reason that the possible publication amounts to an infringement of the employees' general personal rights and becomes therefore an issue under Sec. 75 (2), 80 No. 1, 23 (3) WCA.

However, even if the information could be obtained and disclosed in line with the law, the employer would not be entitled to obtain these information without prior conclusion of an agreement with the works council, as Sec. 87 (1) No. 1 WCA provides that the works

council has a co-determination right in all matters dealing with the running of the enterprise and the conduct of employees in the enterprise. This rule does apply to any applicant employer who needs to obtain information on Item 7.1 from all employees employed on specific positions which he intends to assign with an audit for a client who is an issuer or a comparable report, and it will further apply on the transfer of the information on Item 7.1 to the Board.

The computerized collection of Item 7.1 information, including the implementation of new technical means to obtain such information from data present somewhere in databases, might furthermore be subject of a co-determination right under Sec. 87 (1) No. 6 WCA which prevents the use of technical devices capable of supervising the employee without prior conclusion of an agreement with the works council.

The co-determination procedure is analyzed in detail above under A.3.4.2. All aspects discussed there apply here as well. Therefore, the employer would only be able to obtain and transfer the information requested in Item 7.1 if he concluded the necessary works agreement.

3.5 Elimination of the conflict by consents or waivers

The potential conflicts with employees could be eliminated by obtaining the individual employees consent. In any case, it will be necessary to conclude a works agreement with the works council as otherwise the works council could obtain an injunction and stop the employer from providing the information as requested in Item 7.1. However, the works council would be entitled to waive its right to conclude such works agreement.

4 Data Protection Law

4.1 Application of DPA

The statements made under A.4.1 above apply respectively. The rules of the DPA are applicable to information requested by the Board under this Item to the extent the information contains personal data. The information requested under Item 7.1 contains several sets of data: (1) the respective individual is a certified public accountant with the named license or certification number; (2) the respective individual is employed by or a member of the applicant; (3) the respective individual is either a proprietor, partner, principal, shareholder, officer or manager of the applicant (not any other staff); (4) the individual provided at least ten hours of audit services for any issuer during the last calendar year. All these statements qualify as personal data in the meaning of the DPA even if it is not entirely clear which position the individual has within the applicant or for which issuer the individual carried out audit services.

4.2 Basic Rule Regarding a Transfer of Personal Data

The statements made under A.4.2 apply respectively. The collection and transfer of personal data to the Board is prohibited unless one of the exceptions applies.

4.3 Compliance with legal obligations outside the DPA

The statements made under A.4.3 apply respectively. There is no German legal obligation outside the DPA requiring a transfer of the requested information to the Board.

4.4 Exceptions based on DPA

4.4.1 Sec. 28 (1) No. 1 DPA

Under Sec. 28 (1) No. 1 DPA, the transfer of personal data to the Board would be admissible if such a transfer was in accordance with the purposes of a contract or similar relationship between the applicant and the accountants in the meaning of this Item. Accordingly, a transfer of the Board must not only be permissible with respect to employment law (which it actually is, provided the works council's consent has been obtained), but it must serve the purpose of an employment contract that such information is transferred to the Board. Whether or not this is the case, depends on the individual contracts between the applicant and the public accountants. Regarding existing employment contracts, there will be no such contractual purpose. Thus, this exception, usually, does not apply.

4.4.2 Sec. 28 (1) No. 2 DPA

Accordingly, a transfer of personal data to the Board by an applicant could be admissible if it is necessary to safeguard a legitimate interest of the applicant and there is no reason to assume that the data subject has an overriding legitimate interest in his data being excluded from the transfer. As described in further detail under A.4.4.2, this has to be assessed based on a case-by-case analysis.

Generally, it can be argued that the desire of an applicant to register with the Board is a legitimate interest of an applicant in order to be eligible to render professional services relating to issuers.

Whereas, regarding the information requested by the Board under Item 5, there is some strong indication that the data subjects have an overriding interest in their data being excluded from such a transfer mainly based on the sensitive nature of such information (like e.g. criminal or disciplinary proceeding), it is not entirely clear whether the data subjects also have an overriding interest regarding the information requested by the Board under this Item. Nevertheless, there are some reasons to be considered:

(i) Although the information requested by the Board under this Item is not of a highly sensitive nature, it contains some information which usually is not publicly available or may be retrieved only by considerable efforts. For example the professional register of public accountants in Germany does not contain the exact position inside a public accounting firm (e.g. manager or partner). This usually as well isn't published by the public accounting firms in Germany themselves. Furthermore, information to what extent public accountants are involved in providing audit services for a particular client normally is no publicly available information (for details regarding the professional register please see E.4.4.3 below). Making available such information to the Board will not make only the applicant but also the listed employees subject to supervision of the Board which could end in personal consequences for the public accountants which they otherwise would not be subject to.

(ii) The Board intends to publish the information requested under this Item without a guarantee that it will be kept confidential (as explained in detail in A.3.2.2). This would mean that information, which in Germany can be kept confidential and not even has to be published within the professional register, may become public even if the public accountants and public accounting firms chose not to publish such information.

(iii) According to one of the basic principles of German data protection law, personal data may only be collected and transferred for a specific purpose. Such a purpose must be determined in sufficient detail before the intended transfer. Although the general purposes of protecting the interests of investors and further the public interest in the preparation of audit reports are defined in the Sarbanes Oxley Act of 2002, it, from a data subject's perspective, is not entirely clear what the Board will do with the requested information.

Thus, although there are some indications that the data subjects have an overriding interest in their data being excluded from a transfer to the Board, we cannot exclude that this exception could apply.

4.4.3 Sec. 28 (1) No. 3 DPA

Under Sec. 28 (1) No. 3 DPA, the transfer of personal data to the Board would be admissible if the data was generally accessible or the applicant would be entitled to publish them unless the public accountant's legitimate interest in its data being excluded from transfer clearly outweighs the justified interest of the applicant. Generally accessible sources are public registers if they are generally accessible, i.e. without having to establish a special interest in order to get access to them.

With respect to public accountants in Germany, there is a professional register of public accountants operated by the German Chamber of Public Accounts (*Wirtschaftsprüferkammer*). According to Sec. 37 (2) AO, this professional register is open to the public without limitation, thus establishing a generally accessible source in the meaning of Sec. 28 (1) No. 3 DPA. The professional register for public accountants contains data such as the name, date of birth, day of certification and issuing authority, the business address, professional status (e.g. proprietor, (managing) director or employed public accountant) and the name of other proprietors and business addressed of further branches of a partnership. Furthermore, each public accounting firm is listed including the names of all public accountants it engages.

Accordingly, all this information generally may be transferred to the Board by an applicant based on this exception if the information is limited to the scope of publicly available data.

However, the information requested under this Item is not limited to the set of data published in the professional register. By submitting the name of a public accountant, an applicant furthermore makes the statement that the respective public accountant was employed at least on the manager level and provided at least ten hours of audit services for any issuer during the last calendar year. This information cannot be split from the before described information available from the professional register. Accordingly, this exception does not apply to the information requested by the Board under this Item, unless there are other generally accessible sources for the whole set of information requested under this Item, which we are not aware of. To the extent, any information is required under this Item with respect to persons that are not accountants in the meaning of the German AO, no information is included in this register anyway.

4.4.4 Sec. 28 (3) No. 1 DPA

Similar to the analysis made under E.4.4.2 above, a transfer may be in the legitimate interest of the Board. Whether this exception applies, is subject to a case-by-case analysis taking into consideration whether the data subjects have a legitimate interest in their data being excluded from such a transfer. Similar to above exceptions, there are reasons to assume that the data subjects may have such a legitimate interest although the nature of the requested information is not as sensitive as the information requested under Item 5.

4.4.5 Sec. 28 (3) No. 2 DPA

This exception does not apply, for details please see A.4.4.5.

4.4.6 Sec. 11; 28 (3) No. 3; Sec. 28 (3) No. 4; Sec. 28 (6) - (9); Sec. 29; Sec. 30; Sec. 35 DPA

This exception does not apply, for details please see A.4.4.6.

4.5 Elimination of conflict by consent/waivers

Please refer to the statements made in A.4.5, an employee consent would not be valid.

4.6 Safeguarding of sufficient data protection level in case of a cross-border transfer outside the EU/EEA

Please refer to the statements made in A.4.6, there are no sufficient guarantees regarding a safeguarding of a sufficient data protection level. Again, although a consent may be a valid means of eliminating this conflict, an employee consent again would not be valid.

4.7 Conclusions

All information requested under this Item qualifies as personal data. Thus, the DPA applies. The transfer of the requested information by an applicant to the Board generally cannot be based on the “publicly available information” exception. It is doubtful, but, however, cannot be excluded that such a transfer could be based on the “legitimate interests” exception. Therefore, such a transfer from an applicant to a third party located in the EU/EEA could be admissible. However, regarding a transfer to the Board, there are no guarantees in place for a sufficient data protection level in the US. Accordingly, a transfer of information to the Board is prohibited. Although in general consent of the data subjects would be a suitable means of eliminating these conflicts with German data protection law, a consent of employees would not be a suitable means.

5 Confidentiality Obligations

By submitting the information requested under this Item to the Board, an applicant makes the statement that the named public accountants were involved in providing at least ten hours of audit services for <u>any</u> issuer during the last calendar year. As explained in greater detail in A.5 above, the confidentiality obligations are far stretched and include the existence of a client relationship as such. By disclosing the names of public accountants involved in providing audit services for a particular issuer, this client relationship would be disclosed as well. Thus, if it is possible to make the conclusion from a registration of an applicant, that one or several public accountants were engaged in providing audit services for a particular client, the confidentiality obligations would be infringed. This, for example, could be the case if an applicant under Item 2 of Form 1 only names one issuer. In this case, although under Item 7.1 an applicant is not requested to name the particular issuer

for which the public accountants provided audit services and this as well could have been work for another issuer, it cannot be excluded that there may be some correct assumptions for which particular issuer work has been carried out. In such cases there would be also a conflict with confidentiality obligations.

As described before, such conflicts with confidentiality obligations can be eliminated by the consent of the respective clients.

F. Item 8.1 (a) of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

Item 8.1 Consent to Cooperate with the Board and Statement of Acceptance of Registration Condition

Furnish, as Exhibit 8.1, a statement, signed on behalf of the applicant by an authorised partner or officer of the applicant in accordance with Rule 2104, in the following form:

a. [Name of applicant] consents to cooperate in and comply with any request for testimony or the production of documents made by the Public Company Accounting Oversight Board in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002.

…

Note 1: Other than the insertion of the name of the applicant in paragraphs (a), (b) and (c) of this Item, Exhibit 8.1 must be in the exact words contained in this instruction. The consents required by paragraph (b) of this Item must be in the words of Note 2 below and must be secured by the applicant not later than 45 days after submitting this application or, for persons who become associated persons of the firm subsequent to the submission of this application, at the time of the person's association with the firm. Consents required by paragraph (b) of this Item are not required to be furnished as an exhibit to this form.

Note 2: Other than the insertion of the name of the associated person, the consents required by paragraph (b) of this Item must state: [Name of associated person] consents to cooperate in and comply with any request for testimony or the production of documents made by the Public Company Accounting Oversight Board in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002. [Name of associated person] understands and agrees that this consent is a condition of their continued employment by or other association with [name of applicant].

Note 3: For applicants that are foreign public accounting firms, the term "associated persons" as used in this Item means all accountants who are a proprietor, partner, principal, shareholder, officer, or manager of the applicant and who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Interpretation of Item 8.1 (a)

This legal opinion is based on the assumption that Item 8.1 (a) has to be interpreted in such a way that the applicant's consent to cooperate in and comply with any request for testimony or the production of documents made by the Board is intended to be binding upon the applicant in such a way that in case of any request the applicant does not have the opportunity to object to the request based on the reason that the actual request infringes German law. This understanding is based on the wording of Item 8.1 (a): "comply with any request for testimony or the production of documents". No exceptions are indicated here. Furthermore, we believe that there is no reason such exceptions were meant to be implied. Otherwise the Board's explanations made in PCAOB Release No. 2003-007 published May 6, 2003 that Rule 2105 of the Board shall apply as well to Item 8.1 would not be necessary.

Accordingly, this legal opinion deals only with questions relating to a situation where an applicant has to give this consent to comply with any future requests of the Board. It is not intended to deal with questions whether an actual request of the Board may infringe German law.

3 Conflicting German Law

3.1 Employment Law

Item 8.1 (a) is in potential conflict with German employment law as according to Art. 2 (1) German Constitution as interpreted by the Federal Employment Court; Sec. 134; 138 CC; Sec. 75; 80 WCA the employer may not consent to disclose employee files. Thus, the applicant will not be able to comply with all requests for the production of documents.

3.2 Data Protection Law

Item 8.1 (a) is in potential conflict with Sec. 4 (1), 4b (2) DPA law to the extent personal data are involved. This results from the fact that an applicant must comply with any request without being able to assess whether this is in accordance with data protection law. Furthermore, taking into consideration that statutory exceptions and measures for a sufficient data protection level in the US are not in place, compliance with this Item in the absence of a valid consent will constitute a conflict with data protection law.

3.3 Confidentiality Obligations

Item 8.1 (a) constitutes, first of all, a potential conflict with confidentiality obligations as stipulated by Sec. 43 (1) AO, Sec. 9 APAA, Sec. 323 (1), 333 German Commercial Code (*Handelsgesetzbuch- HGB*-), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB* -) as compliance with an actual request of the Board is only legal if the affected client gave his consent. Furthermore, as public accountants have a general duty to take precautions to prevent infringements of confidentiality obligations, this also can be considered as an actual conflict with confidentiality obligations as stipulated by Sec. 43 AO, Sec. 9 APAA, Sec. 323, 333 German Commercial Code (*Handelsgesetzbuch- HGB*-), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB* -).

3.4 Validity of obligation

As a consent of an applicant, at least from a German law perspective, would be qualified as binding contractual obligation to comply with any requests of the Board, and compliance with such requests may result in conflicts with German law or even may lead to criminal

offences by an applicant, this contractual obligation would be in conflict with Sec. 134, 138, 307 (2) CC and thus void and not enforceable.

3.5 Other professional duties

In the light of the before mentioned actual and potential conflicts with German law, compliance with Item 8.1 (a) would also lead to a conflict with the general duty of public accountants of honourable professional conduct as stipulated by Sec. 13 APAA.

4 Legal nature of consent according to Item 8.1 (a) and applicable law

In order to assess whether the consent required by the Board under this Item infringes German law, it, first of all, is necessary to assess what legal nature this consent has and what law is applicable to such a consent.

4.1 Legal nature of consent

When qualifying the legal nature of the consent requested under this Item, under German law there are several possibilities what legal nature the consent requested by the Board under this Item could have. Basically, the consent could be:

- an obligation under German public or administrative law;
- a non-binding declaration of the applicant with no specific legal nature; or
- a binding contractual obligation under German private law.

Regarding a qualification of the obligation under this Item as an obligation under German public or administrative law, it should be noted that similar obligations exist vis-à-vis the German Chamber of Public Accountants (*Wirtschaftsprüferkammer*). These obligations may be qualified, depending on the actual case, as an obligation under German public or administrative law as the German Chamber of Public Accountants (*Wirtschaftsprüferkammer*) is the statutory oversight body for public accountants and it performs public functions under state authorisation and supervision by the Federal Ministry of Economics and Labour. However, in our view this cannot apply to the request of the Board under this Item. First of all, an obligation to be qualified under German public law must relate to a German public or administrative authority. Foreign public authorities would not be accepted as having public authority in Germany. Secondly, the Board according to Sec. 101 (b) of the Sarbanes-Oxley Act of 2002 shall not be an agency or establishment of the United States government and no member or person employed by or agent for the Board shall be deemed to be an officer or employee or agent for the federal government. The Board rather shall be qualified as a non-profit corporation. Accordingly, the consent and the obligation contained in the consent under this Item cannot be qualified as an obligation subject to German public or administrative law.

Considering the content and the intent of this request, it is pretty obvious that the consent shall not be considered as a one-sided declaration of an applicant without any legal consequences.

As the Board, a non-profit organisation subject to the laws of the US, has to be qualified as a private body, and the applicant is a private body, i.e. either a company or an individual, and it is, by requesting the applicant to give such a consent intended to establish a binding obligation of the applicant, the applicant's statement under this Item would be qualified as an obligation subject to civil or private law from a German law perspective. Under German

civil law, a contractual obligation can be established even if it only contains obligations for one of the parties concluding such a contractual obligation without any consideration of the other party (*einseitig verpflichtender Vertrag*). Accordingly, the rules of German law regarding legal transactions (*Rechtsgeschäfte*) and contracts would apply.

4.2 Applicable venue and applicable law

4.2.1 Applicable venue

With respect to the question whether the Board can enforce the obligation to give testimony and produce documents vis-à-vis a German applicant there are two alternatives.

According to Sec. 106 (a) (1) of the Sarbanes-Oxley Act of 2002, controversies between applicants and the Board relating to the registration shall be subject to the jurisdiction of the courts of the United States. Thus, the Board could try an applicant before U.S. courts. However, the enforcement of such a judgement against an applicant in Germany would be subject to the normal way of enforcing civil law judgements. As there are no special agreements in place between Germany and the U.S. regarding an automatic recognition and enforcement of judgements of the other jurisdiction, the Board would have to seek recognition and enforcement of the US judgement by a German court.

One should note that, although a German court when recognizing a foreign judgement is generally not entitled to assess whether a foreign judgement is in line with German law, it is entitled according to Sec. 328 No.4 German Civil Procedures Act (*Zivilprozeßordnung - ZPO* -) to deny the recognition if recognition of such a judgment would lead to an infringement of the German ordre public. This would be the case if a judgement is in gross conflict with mandatory German law, in particular with constitutional rights of a plaintiff. As stated before, the rights affected by actual requests of the Board may relate to basic constitutional rights of employees or data subjects as the right of privacy is protected by the German Constitution. Furthermore, the right of public accountants to act in accordance with their professional obligations might as well be protected by the German Constitution. Thus, in case the Board wants to enforce a judgement of U.S. courts in Germany, it cannot be excluded that German court will deny the recognition and the enforcement of such a judgement if it is in conflict with German law.

As the jurisdiction of U.S. courts established by Sec. 106 (a) (1) of Sarbanes-Oxley Act of 2002 is not exclusive, the Board at its discretion could as well choose to directly enforce the obligations to give testimony or produce documents established by the consent under this Item before a German court. Based on the qualification of the consent requested under this Item as a legal contractual obligation subject to German private law, such an obligation would have to be enforced before a German civil court.

Regarding the actual enforcement of a judgement of U.S. or German courts, the same means of enforcements apply. If a respective judgement was rendered to either give testimony or produce documents, such a judgement could be enforced by first of all threatening and imposing fines upon the applicant if he does not comply with such judgement. If the applicant or any individual involved nevertheless resists to give testimony, imprisonment could be ordered. In case of a

request for the production of documents, German state officers could by force seize such documents.

4.2.2 Applicable law

The question, which law is applicable to the obligation set up by the consent given by an applicant under this Item, is subject to the respective conflict of law rules that the court in charge would apply. In case of a U.S. proceeding, it is likely that U.S. courts would consider an agreed submission to U.S. courts and U.S. law, especially given that the subject matter of the action would be an application by a German auditor to register with a U.S. regulatory body for the purpose of being permitted to submit audit reports to the Commission.

In case the Board wants to enforce this legal obligation before a German court, a German court would apply the German rules on conflicts, i.e. the rules on international private law as, at least from a German law perspective, the obligation of a German applicant established by the consent requested by the Board under this Item would be qualified as a private law contractual obligation and such an obligation is concluded between a German and a US entity.

Although, Sec. 106 (a) (1) of Sarbanes Oxley Act of 2002 contains explicit provisions on jurisdiction, they do not contain an explicit choice of U.S. law. As they cannot be interpreted as establishing the exclusive jurisdiction of U.S. courts, this furthermore would not necessarily be interpreted by a German court as implied choice of law either.

In the absence of an explicit or implied choice of law, the general principles of German private international law would apply. According to Art. 28 German Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch - EGBGB* -), the law of such country would be applicable in which the party having to fulfil the typical contractual obligations has its seat. As the obligation established by a consent under this Item from a German law perspective would be considered as a one-sided contractual obligation on the part of the applicant who has to give testimony or produce documents, German law would be applicable. However, it cannot be excluded that even a German court will decide that US law is applicable. This could be based on the notion that the before stated rule does not apply if all circumstances connected with a case show that the whole case is connected more closely with another country. Regarding the consents required by the Board under this Item, one could argue that this is just one part of the whole registration procedure with the Board and that at least considering the whole process and purpose of registration with Board is more closely linked to the US, i.e. US law would be applicable.

In any case, it should be noted that even if a German court would apply U.S. law (e.g. based on an implied choice of law clause), it has according to Art. 6 German Introductory Act to the Civil Code to assess whether such U.S. law would be an infringement of German ordre public. Again, this would be the case if U.S. law infringes mandatory German law, in particular constitutional rights of the parties. Whether this is the case is subject to a case-by-case analysis. It should be noted that an infringement of German ordre public will only be given in rare cases. A court would assess whether a German legislator would make a similar law to the US law in conflict with German law or whether he would not make such a law

based on the assumption that such a law would infringe basic and essential German principles that may not be waived. As explained before, all aspects raised herein relate to some extent to German constitutional rights of the parties involved, be it data protection law, confidentiality obligations or employment law. Each of these areas of law serves to protect the constitutional rights of individuals. Hence, this might be at least a strong indication that courts could consider that German ordre public is affected by this Item.

4.2.3 Conclusions

Whether German law applies, depends on a number of issues. First of all, the Board can choose either US courts or German courts as a venue. US courts most likely will apply US law. German courts more likely would apply German law, however, may also come to the conclusion that US law applies. In either case, even if a US court rendered a judgement against a German applicant, a German court at some stage would be involved and based on the principle of ordre public may apply to German law. Thus, we set out the basic principles of German law that may be infringed. Apart from that the question of applicable law relates only to civil law aspects, however not to the general application of employment law, data protection law or professional law of public accountants as far as public or administrative law aspects are concerned. With respect to these aspects German law applies anyway.

5 Employment Law

5.1 Possible conflicts with German employment law

While Item 8.1 (a) does provide for an obligation of the applicant only, the details of the obligation refer to the production of any document requested by the Board. This would include documents belonging to the employee files of the applicant or even to the whole employee files themselves and thus would conflict with German employment law.

5.2 Conflicts with relevant German employment law

German employment law recognizes the so-called personal files, defined as an employer's collection of any documents and data related to an employee, as files of a particular sensitive nature as those files could contain various private information on the employee. Consequently, the law provides that personal files have to be well protected and must be kept strictly confidential. Such rules are not laid down in statute but have been developed by the Federal Employment Court. The special protection of personal files comes in addition to the protection awarded to all collections of data by the Data Protection Act. The court has based its decisions regarding the strict confidentiality on the basic personal right following from Art. 2 (1) German Constitution. The court has expressly held that the employer may only grant access to third parties if the employee has consented to such access or if German law provides for a right to access, e.g. for tax authorities in case of tax audits. Further, the court has frequently stated that the employer is responsible to take the necessary precautions to ensure that the personal files are not disclosed to unauthorized persons.

As there is no German legal provision which entitles the Board to access the personal files and there is no general consent from the employees to such effect, the employer is not allowed to produce documents to the Board which belong to the personal files of an

employee. Consequently, the employer cannot provide the Board with a statement to comply with any request for the production of documents, as such statement would form an obligation as against the Board which would endanger the confidentiality of the personal files. Further, depending on the details of an individual case, such statement might be held to be void according to Sec. 134 CC or Sec. 138 CC as it would result in an obligation contrary to the legal requirement to keep the personal files confidential and to safeguard these files against any infringement of confidentiality.

The attempt to comply with this provision would as well trigger the works councils duties under Sec. 75 (2), 80 No. 1 WCA, which provide that the works council is legally obliged to safeguard the employees' general personal right and to ensure that all laws and regulations protecting the employees are kept in the enterprise. The works council would be entitled to negotiate with the employer and to eventually stop the employer interfering with the employees' personal right (for details please see under A.3.3, A.3.4 above).

5.3 Elimination of conflict by consent/waivers

It will not be possible to obtain a consent from each employee affected by the obligation imposed by Item 8.1 (a), i.e. providing all documents the Board asks for including documents for the employees personal files, as such consent would have to be given not only by the restricted number of employees defined in Note 3 to Item 8.1 on the notion of "associated person" for "foreign public accounting firm applicants", as "proprietor, partner, principle, shareholder, officer, or manager", but by the whole workforce of the applicant, as the duty to produce any document is not restricted. Such consent would be a general amendment of the employment terms and would be subject to the principle of equity and good faith. The principle of equity and good faith has to be interpreted in line with the basic rights of the German Constitution. The consent discussed would infringe the general personal right of the employee in a way which would be regarded as severe and probably unforeseeable in its content. The employee giving such consent will not know whether his employer will one day be asked to produce documents from the personal file which reveal details of his private life which should have remained confidential and accessible to the competent staff in the employers' personnel department only. Even if in cases where the employer can proof that the consent was given freely and in full knowledge about the consequences such consent would be held to be valid and enforceable, the employee could withdraw such consent any time.

Concerning the works council's involvement, it follows from both provisions cited above that the works council has no discretion in concluding agreements with the employer which contain the sanctioning of infringements of employee's personal rights.

6 Data Protection Law

If any information to be disclosed by either giving testimony or producing documents contains any personal data about any individual, German data protection law applies. For this purpose, it does, from a data protection point of view, make no difference whether information is disclosed by giving testimony or producing documents. It should be noted that personal data can relate to virtually any individual involved, be it employees of the applicant, other individuals on the part of an applicant, e.g. partners or shareholders, or any individuals on the part of the client, e.g. employees of the client or customers of the client.

To a request for information by the Board based on the consent to be given by an applicant under this Item, the general prohibition of processing of such personal data would apply unless one of the exceptions described above under A.4 is given. Whether or not such an exception applies or whether any potential conflict can be eliminated by obtaining the consent of the data subjects, is subject to a case by case analysis (as explained in A.4.4.2 above). Thus, it cannot be assessed now whether an actual request to give testimony or produce documents would infringe German data protection law. At least with respect to the fact that no means of ensuring a sufficient data protection level in the recipient country is in place (for details please see A.4.6), compliance with any requests of the Board would lead to a conflict with German data protection law in the absence of a valid consent of the data subjects.

Furthermore, one has to take into account the general principle of German data protection law that any collection, processing or use of personal data must be adequate, relevant and not excessive in relation to the purpose for which it is processed. The obligation to comply with any request of the Board does not give an applicant the opportunity to assess whether any of the statutory exceptions applies and whether and to what extent he is allowed to disclose the respective information. Thus, it is a fair statement to say that compliance with the obligation of an applicant set up by the consent requested by the Board under this Item will be an infringement of German data protection law if such a request involves personal data.

However, even if compliance with an actual request was in conflict with the German data protection law, the question arises whether the applicant by giving a consent requested by the Board under this Item already infringes German data protection law. The mere obligation to disclose personal data in the absence of an actual request to disclose such personal data by itself does not constitute an actual conflict with German data protection law, in particular the DPA, but a potential conflict.

A consent of the data subjects is no suitable means of eliminating these potential conflicts with data protection law. First of all, this, due to the unlimited scope of the possible requests of the Board under this Item, would mean to obtain a consent of any individual whose personal data are in possession of an applicant. Secondly, it is doubtful whether the requirements for a valid consent are given (see A.4.5.1 above), as it will not be possible to describe and inform the individual in detail about any transfer or his or her personal data to the Board. And thirdly, it should be noted that a consent principally may be revoked by a data subject without any reason with effect for the future. In case of such a revocation there would be no legal basis for a transfer to the Board and thus there always remains a potential risk.

7 Confidentiality Obligations

7.1 Disclosure of confidential information

As explained in detail under A.5, the confidentiality obligation of a German applicant first of all includes the obligation not to disclose any client information unless one of the exceptions apply or a client gave his consent. This corresponds to a right not to be obliged to give testimony. Thus, in case of an actual request by the Board based on the consent to be given by the applicant under this Item, a disclosure of information would be a breach of the confidentiality obligations of an applicant unless the client has consented. With respect to such consent, it should be noted that the request relates to any type of information

whatsoever. The request is not limited to information about an issuer or other companies related in any way to an issuer. The request of the Board could also relate to other clients that have no connection whatsoever with an issuer. In particular with respect to such clients, it is not realistic that such clients will give their consent to disclosure of information to the Board. Furthermore, such consent could be revoked anytime and, thus, there is no certainty that the applicant will be able to fufil its obligations under this Item without infringing German law, even if he, before given the declaration requested by the Board under this Item, has obtained the respective consents of all his clients.

However, similar to data protection law, although in case of an actual request, this might result in an infringement of the confidentiality obligations of an applicant, the obligation to act in accordance with such request is established by the consent of the applicant under this Item, by itself would not be considered as an actual conflict with confidentiality obligations in the before stated meaning, but as a potential conflict.

7.2 Obligation to take precautions

As described in further detail under A.5.2, Sec. 9 APAA provides that a public accountant shall take the appropriate measures to ensure that protected information shall not be disclosed to third parties who are not entitled to obtain such information. Thus, an applicant shall also actively prevent that such information is leaking out. First of all, this includes that a public accountant has to impose confidentiality obligations on all its employees. Furthermore, he is obliged to organize his enterprise in such a way that third parties do not have access to any information or documents stored at an applicant's offices. This includes the obligation to limit access to the offices or to the documents to authorized persons. Finally, a public accountant has the obligation to resist to a seizure of documents to the extent legally possible.

Given the legal nature of the obligation of an applicant to comply with requests of the Board under this Item and the possibilities of enforcement of such an obligation in Germany as explained under 4.1 above, it becomes obvious that any applicant would have to comply with any request of the Board without having the opportunity to asses whether in an actual case a disclosure of information would lead to an infringement of the confidentiality obligation or not. This certainly would qualify as a similar infringement of the confidentiality obligations as a failure to organize the enterprise of the applicant in such a way that the confidentiality obligations are gathered. This e.g. can be compared to a case where an applicant grants any third parties, whether authorized or not, access to his client files.

Thus, the obligation to comply with any request of the Board irrespective of any infringements of confidentiality obligations has to be considered as being an actual infringement of the confidentiality obligation.

8 Legal validity of an obligation containing potential conflicts with German law

As explained before, the obligation to disclose information under this Item or the actual requests made by the Board in accordance with the obligations contained in the consent under this Item are in potential or actual conflict with data protection law and confidentiality obligations. Taking furthermore into account that, at least from a German law perspective, the obligation established by the consent under this Item has to be qualified as a contractual civil law obligation, the question arises whether such an obligation would be valid at all under German law or whether it would be in conflict with German law. The

following statements are made under the assumption that German civil law applies to the obligation of an applicant. But even if that would not be the case, according to the applicable rules on conflicts of law described above under 4.2, the same aspects may still be relevant with respect to the application of the principle of German ordre public.

8.1 Invalidity of contractual obligations providing for infringements of German law intended to protect individuals (Sec. 134 CC)

According to Sec. 134 CC, any civil law obligations directed at the infringement of any laws aimed to protect individuals are void. It has to be noted that not each and every breach of German law that is part of such an obligation can also be considered as an infringement of a law protecting the rights of individuals in this meaning. This has to be decided on a case by case basis regarding the nature of the respective law that will be infringed.

Saying this, it has been widely recognized that in particular obligations to commit criminal offences may be qualified as laws protecting the rights of individuals in the meaning of Sec. 134 CC. Although there is no explicit case law regarding the consent requested by the Board under this Item, there is extensive case law of German civil courts stating that a criminal offence in the meaning of Sec. 203 German Criminal Code (*Strafgesetzbuch - StGB*), resulting from an infringement of confidentiality obligations will qualify as such law. The cases decided relate to an obligation to sell either a specific claims against an client or the whole business of lawyers, tax advisers, public accountants or medical doctors (which are all subject to very similar confidentiality obligations). E.g. the German Federal Supreme Court (BGHZ 116, 268) held that such an obligation in an agreement on the purchase of a business of a medical doctor could be void as this would include a transfer of client information unless the client has consented to such a transfer.

In our view an obligation of an applicant under this Item will basically have the same effect as an applicant in case of an actual request is not entitled to deny compliance with the request of the Board if no client consent was given.

The same arguments may apply with respect to potential infringements of data protection law. As stated before under 6, compliance with an actual request of the Board based on the consent given under this Item may result in an infringement of data protection law. Such infringements may either lead to administrative fines or even criminal offences according to Sec. 43, 44 DPA. Although, there is no case law yet on the question whether such a criminal offence would also be considered as a law protecting the rights of individuals in the meaning of Sec. 134 CC, this is a realistic scenario as the DPA is based on the constitutional rights of individuals regarding protection of their privacy.

Thus, it becomes clear that an obligation to comply with any request of the Board based on the consent given by an applicant under this Item is in conflict with German law as, at least from a German law perspective, such an obligation would be void and unenforceable.

8.2 Invalidity of immoral contracts (Sec. 138 CC)

Furthermore, any contract containing immoral obligations is void as well according to Sec. 138 CC. Thus, in cases when a contractual obligation is not already void according to Sec. 134 CC, such a contractual obligation nevertheless could be void according to this principle. This again has to be assessed on a case-by-case basis. This will not only include contractual obligations relating to an infringement of laws intended to protect individuals, but would also include infringements of other laws. In general, it has been acknowledged

that this might include infringements of professional duties even if they will not lead to the invalidity of a contract according to Sec. 134 CC.

8.3 Invalidity of the obligation based on the German law in general terms and conditions

Sec. 305 et. seq. CC contain limitations regarding the content of general terms and conditions if they are not fair terms. At least from a German law perspective, the obligation established by a consent of an applicant under this Item would be qualified as contractual relation between the Board and an applicant. The consent will furthermore be considered as general terms and conditions established by the Board as according to Note 1 of this Item the words of the consents required by the Board may not be changed in any way. Apart from that, the consent form established by the Board shall be used by each applicant, i.e. in an indefinite number of cases. Thus, this would be qualified as standard terms or general terms and conditions of the Board. As both, the Board and the applicant, will not be considered as being consumers or private persons acting not with respect to their professional obligations, different, less strict rules apply compared to such standard terms to be used vis-à-vis a consumer.

According to Sec. 307 CC, standard terms are void if they contain disadvantages for the other party (i.e. the applicant) which are not in line with the general principle to act in good faith. An action being not in good faith, inter alia, is given if the obligation is not in line with essential principles of the ruling statutory provisions usually to be applied to such an obligation.

Taking into account that the obligations set up by the consent of an applicant under this Item potentially infringe German employment law, data protection law and confidentiality obligations without giving an applicant the opportunity in case of an actual request by the Board to decide whether or not comply with such a request, this has to be considered as being unfair and not in good faith. This applies even more as compliance with such an obligation would expose an applicant to administrative or even criminal liability. It is likely that courts would held such a clause only be held valid if it has an option for the applicant, not to comply with an actual request of the Board if such an actual request was in conflict with German law.

The consequence of this infringement of the German law on general terms and conditions again would be that such a contractual obligation would be void.

8.4 Elimination of conflict

Although the conflict with German law stated before may not be eliminated by the consent or a waiver of individual parties, a conflict with German law could be eliminated by the Board by allowing a different wording for the consent under this Item, e.g. that the applicant will not be bound by his consent to the extent that compliance with such an obligation would infringe German law.

9 Other professional duties

Apart from specific professional obligations like the confidentiality obligation described under 7 above, any public accountant is subject to the general principle of honourable professional conduct (*Pflicht des berufswürdigen Verhaltens*). Accordingly, a public accountant shall refrain from any actions that may not be in line with his professional obligations. Some examples of such infringements of honourable professional conduct are listed in Sec. 13 APAA. As an obligation established by a consent of an applicant under

this Item potentially conflicts with confidentiality obligations and furthermore employment law and data protection law and such an obligation from civil law perspective would be void, it becomes clear that giving such a consent that causes the before stated conflicts with German law cannot be considered as being honourable professional conduct of a public accountant.

Thus, compliance with the request of the Board for consent of the applicant under this Item also is in conflict with this principle of German professional law governing public accountants.

G. Item 8.1 (b) of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

Item 8.1 Consent to Cooperate with the Board and Statement of Acceptance of Registration Condition

Furnish, as Exhibit 8.1, a statement, signed on behalf of the applicant by an authorised partner or officer of the applicant in accordance with Rule 2104, in the following form:

…

b. [Name of applicant] agrees to secure and enforce similar consents from each of its associated persons as a condition of their continued employment by or other associated with the firm.

…

Note 1: Other than the insertion of the name of the applicant in paragraphs (a), (b) and (c) of this Item, Exhibit 8.1 must be in the exact words contained in this instruction. The consents required by paragraph (b) of this Item must be in the words of Note 2 below and must be secured by the applicant not later than 45 days after submitting this application or, for persons who become associated persons of the firm subsequent to the submission of this application, at the time of the person's association with the firm. Consents required by paragraph (b) of this Item are not required to be furnished as an exhibit to this form.

Note 2: Other than the insertion of the name of the associated person, the consents required by paragraph (b) of this Item must state: [Name of associated person] consents to cooperate in and comply with any request for testimony or the production of documents made by the Public Company Accounting Oversight Board in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002. [Name of associated person] understands and agrees that this consent is a condition of their continued employment by or other association with [name of applicant].

Note 3: For applicants that are foreign public accounting firms, the term "associated persons" as used in this Item means all accountants who are a proprietor, partner, principal, shareholder, officer, or manager of the applicant and who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Interpretation of Item 8.1 (b)

For the purposes of this legal opinion we assume that Item 8.1 (b) has also to be interpreted in such a way that the applicant's obligation to agree to secure and enforce similar consents from each of its associated persons and the consents requested by the associated persons are intended to be binding upon the applicant and/or the associated persons in such a way that in case of any request, the applicant and/or the associated persons do not have the opportunity to object to the request based on a conflict with German law.

3 Conflicting German Law

3.1 Employment Law

Item 8.1 (b) is in conflict with German employment law following Art. 2 (1) German Constitution as interpreted by the Federal Employment Court (BAG AP No. 8, 14, 21 ad Sec. 611 CC Persönlichkeitsrecht); Sec. 134; 138; 242; 307 (1) CC; Sec. 2 (1); 23 (3); 75 (1); (2); 80 (1); 87 (1) WCA, and the applicant will not be able to secure and enforce the required statements from all relevant associated persons. It will not be possible to eliminate the conflict by obtaining consents or waivers.

3.2 Data Protection Law

A consent of the respective associated persons as requested by the Board causes the same potential conflicts with respect to Sec. 4 (1), 4b (2) DPA as the consent required from the applicant in relation to personal data of other individuals.

3.3 Confidentiality Obligations

A consent of an associated persons causes the same problems with respect to actual or potential conflicts with confidentiality obligations as stipulated by Sec. 43 (1) AO, Sec. 9 APAA, Sec. 323 (1), 333 German Commercial Code (*Handelsgesetzbuch- HGB-*), Sec. 203 German Penal Code (*Strafgesetzbuch - StGB -*) as a consent given by the applicant.

3.4 Legal validity

As this again would be an obligation that may lead to potential conflicts, such an obligation of the applicant to enforce the consents and the consent of the associated persons themselves would be considered as being in conflict with German law or even void.

3.5 Other professional duties

Again, compliance with this Item would not be in line with the general principle of honourable professional conduct both of the applicant and any associated person to the extent such an associated person is subject to the professional duties.

4 Applicable law

The statements made under F.4 apply respectively.

5 Employment Law

5.1 Possible conflicts with German employment law

Item 8.1(b) provides for a number of obligations which need to be looked at separately:

- The first obligation is that the specific employees as defined in Item 5.1 shall make statements similar to the statement of the applicant provided under Item 8.1(a). The statement shall further contain the employee's understanding that he agrees to make this consent a condition of the continued employment by or other association with the applicant.
- The second obligation is that the specific employees shall consent to cooperate in and to comply with any request for testimony made by the Board.
- The third obligation is that the specific employees shall consent to cooperate in and to comply with any request for the production of documents made by the Board.

5.2 Conflicts with relevant German employment law

Regarding the first obligation, the underlying legal concept is fundamentally different from the German employment law concept which is based on the contract and the principle that contracts are binding. The employer is not in a position to force its employees to agree to alterations of their contracts except in cases where the employer triggers a termination for alteration of the employment contract, which requires a justified cause and a legitimate, i.e. proportionate and reasonable, alteration of the contract (please see A.3.5.3 above for details). Furthermore, it is not possible to implement certain clauses in an employment contract which form a condition of the continued employment as such clauses are regarded as unreasonably impairing the employee.

Regarding the second aspect, it will not be possible to force an employee in Germany to agree to comply with any request for testimony made by a foreign authority. It is further questionable whether the statement of an employee to comply with any such request would be valid and enforceable.

As to the first issue, it needs to be discussed whether the implied duties of the employment relationship comprise the employee's general duty to give testimony on any issue connected with the employment. While such duty may be deemed to exist in certain circumstances, e.g. where the employer wants to bring claims for damages about which the employee is the sole witness, a number of restrictions to such duty would apply which relate to the interests of the employee, e.g. the right to refrain from any testimony which might cause the employee to initiate proceedings against himself or the employee's interest to his personal security under which he may object to travel to certain countries. As, therefore, already the obligation to provide testimony for the contract partner is restricted, the implied duty to generally give testimony for a third party unrelated to the employment contract is subject to additional restrictions, e.g. an employee forced to give testimony which might be detrimental for his employer and indirectly for his further employment could not be forced to do so as this would cause conflicting interests for the employee. Further, contractual duties do normally not last longer than the contract and will have to be expressly agreed if a post contractual duty shall be constituted. As a result it can be stated that no implied duty to render a statement pursuant Item 8.1 (b) exists. But also an expressly agreed clause to such effect - which would be deemed to be a general term of the contract and thus subject to the provisions of Sec. 305 et. seq. CC - would be regarded to unreasonably disadvantage the employee and would therefore be void, as the employee cannot foresee which testimony will have to be rendered and the wording of Item 8.1 (b) does not limit the duty to provide testimony to the term of the employment.

As to the second issue just raised in connection to the duty to provide testimony, the employee's statement pursuant Item 8.1 (b) would also be - at least partially - void and unenforceable, as it would not allow the employee to prevent his own and possibly conflicting interests and rights, such as the right to refrain from any testimony which might cause the employee to initiate proceedings against himself, the employee's interest to his personal security under which he may object to travel to certain countries or to expose himself to foreign judicial systems and procedures, or the employee's interest to avoid obligations which last longer that the term of the employment contract.

As to the third obligation, it must be stated that employees will not be obliged to agree in uncontrolled disclosure of all documents including their personal files and any documents which might endanger themselves or their employer to being prosecuted. As to the disclosure of the personal files the legal situation is as discussed under F.5.2 above. Concerning the other aspect that nobody can be contractually obliged to give information which might lead to prosecution of himself or his employer, it has just been explained in the context of the assessment of the obligation to follow any call for testimony that such agreement would be legally unenforceable and the employer would not be able to force its employees to agree to such terms.

5.3 Elimination of conflict by consents or waivers

As the obligation under Item 8.1 (b) rests with the special employees of the employer themselves, the question whether such consent or waiver would be possible has been already considered under 5.2 and E.5.3 above.

6 Data protection law

The statements made above under F.6 apply respectively.

7 Confidentiality obligations

The statements made above under F.7 apply respectively.

By such an enforceable obligation of an associated person there is no possibility for them or the applicant to deny any request of the Board based on infringements of the confidentiality obligations.

This furthermore also would be an actual infringement of the applicant's obligation to take precautions in order to avoid any disclosure of confidential information. Sec. 9 APAA explicitly provides that a public accountant has to impose confidentiality obligations on all its employees. Acting in accordance with the requirements of this Item, a public accountant would not comply with this obligation but do the opposite, i.e. impose an obligation on its associated persons not to comply with confidentiality obligations. Thus, this would be considered as an actual infringement of confidentiality obligations by the applicant.

8 Legal validity of obligations

The statements made above under F.8 apply, depending on a case-by-case analysis, respectively.

9 Other professional duties

The statements made above under F.9 apply respectively.

H. Item 8.1 (c) of Form 1 of the PCAOB Release No. 2003-007, dated May 6, 2003

1 Information Request

Item 8.1 Consent to Cooperate with the Board and Statement of Acceptance of Registration Condition

Furnish, as Exhibit 8.1, a statement, signed on behalf of the applicant by an authorised partner or officer of the applicant in accordance with Rule 2104, in the following form:

…

c. [Name of applicant] understands and agrees that cooperation and compliance, as described in the firm's consent in paragraph (a), and the securing and enforcement of such consents from its associated persons in accordance with paragraph (b), shall be a condition to the continuing effectiveness of the registration of the firm with the Public Company Accounting Oversight Board.

Note 1: Other than the insertion of the name of the applicant in paragraphs (a), (b) and (c) of this Item, Exhibit 8.1 must be in the exact words contained in this instruction. The consents required by paragraph (b) of this Item must be in the words of Note 2 below and must be secured by the applicant not later than 45 days after submitting this application or, for persons who become associated persons of the firm subsequent to the submission of this application, at the time of the person's association with the firm. Consents required by paragraph (b) of this Item are not required to be furnished as an exhibit to this form.

Note 2: Other than the insertion of the name of the associated person, the consents required by paragraph (b) of this Item must state: [Name of associated person] consents to cooperate in and comply with any request for testimony or the production of documents made by the Public Company Accounting Oversight Board in furtherance of its authority and responsibilities under the Sarbanes-Oxley Act of 2002. [Name of associated person] understands and agrees that this consent is a condition of their continued employment by or other association with [name of applicant].

Note 3: For applicants that are foreign public accounting firms, the term "associated persons" as used in this Item means all accountants who are a proprietor, partner, principal, shareholder, officer, or manager of the applicant and who provided at least ten hours of audit services for any issuer during the last calendar year.

2 Conflicting German Law

The statement of the applicant requested under this Item in our view does not contain any additional conflicts with German law apart from the conflicts explained under F and G

above. This statements of the applicant is a mere supplement to the statements to be made under Item 8.1 (a) and 8.1 (b).

Legal Opinion according to Rule 2105 (b) (2) (ii) of Public Company Accounting Oversight Board (Board) Release No. 2003-007, dated May 6, 2003, as approved by the Securities and Exchange Commission (Commission) by Release No. 34-48180 dated July 16, 2003 regarding conflicts of the request for information in Form 1 with German law

Annex **Cited German Law (English/German)**

Note: **Please be aware that the English versions of the German statutes and case law listed below are neither official English versions nor certified translations issued by the German legislator or courts, but merely common publicly available English translations of such statutes. We do not assume any responsibility for their accuracy or completeness. Only the German versions are binding.**

Both German statutes and German cases are listed in the alphabetical order of the Englisch names of the respective statutes or cases as used in the English version of the Legal Opinion.

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Cited German Law

1 Cited German Statutes

1.1 Accountants Ordinance - AO

Accountants Ordinance - AO	Wirtschaftsprüferordnung- WPO
§ 43 General Professional Duties	**§ 43 Allgemeine Berufspflichten**
(1) The Wirtschaftsprüfer [*Public Accountant*] has to exercise his profession in an independent, conscientious, confidential manner and on his own responsibility. In particular he must be impartial in reporting on examinations and expressing opinions.	(1) Der Wirtschaftsprüfer hat seinen Beruf unabhängig, gewissenhaft, verschwiegen und eigenverantwortlich auszuführen. Er hat sich insbesondere bei der Erstattung von Prüfungsberichten und Gutachten unparteiisch zu verhalten.
(2) The Wirtschaftsprüfer must abstain from all activities which are incompatible with his profession or the reputation of the profession. He has to be particularly conscious of the professional duties arising out of his entitlement to issue reports on statutory examinations. Also outside the exercise of his profession he has to carry himself in a manner so as to justify the confidence and esteem which is indispensable for the profession. He is obliged to extend his professional knowledge.	(2) Der Wirtschaftsprüfer hat sich jeder Tätigkeit zu enthalten, die mit seinem Beruf oder mit dem Ansehen des Berufs unvereinbar ist. Er hat sich der besonderen Berufspflichten bewußt zu sein, die ihm aus der Befugnis erwachsen, gesetzlich vorgeschriebene Bestätigungsvermerke zu erteilen. Er hat sich auch außerhalb der Berufstätigkeit des Vertrauens und der Achtung würdig zu erweisen, die der Beruf erfordert. Er ist verpflichtet, sich fortzubilden.
§ 57a Quality Assurance System	**§ 57a Qualitätskontrolle**
(1) The quality control system of *Wirtschaftsprüfer* in own practice and *Wirtschaftsprüfungsgesellschaften* performing statutory audit engagements has to be reviewed every three years. Upon application, the *Wirtschaftsprüferkammer* may grant exemption permits limited in time, in order to avoid cases of hardship. The exemption permit may be granted again.	(1) Wirtschaftsprüfer in eigener Praxis und Wirtschaftsprüfungsgesellschaften sind verpflichtet, sich im Abstand von drei Jahren einer Qualitätskontrolle zu unterziehen, wenn sie gesetzlich vorgeschriebene Abschlußprüfungen durchführen. Zur Vermeidung von Härtefällen kann die Wirtchaftsprüferkammer auf Antrag befristete Ausnahmegenehmigungen erteilen. Die Ausnahmegenehmigung kann wiederholt erteilt werden.
(2) The review serves to control the professional's compliance with the principles and measures of quality control in accordance with the laws and the by-laws of the Wirtschaftsprüfer*kammer* in general and	(2) Die Qualitätskontrolle dient der Überwachung, ob die Grundsätze und Maßnahmen zur Qualitätssicherung nach Maßgabe der gesetzlichen Vorschriften und der Berufssatzung insgesamt und bei der

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when performing specific engagements. It applies to audits as defined by Article 2, paragraph 1, where the professional seal is used.	Durchführung einzelner Aufträge eingehalten werden. Sie erstreckt sich auf betriebswirtschaftliche Prüfungen im Sinne von § 2 Abs. 1, bei denen das Siegel geführt wird.
(3) The review is carried out by a *Wirtschaftsprüfer* in own practice or *Wirtschaftsprüfungsgesellschaften* registered by the *Wirtschaftsprüferkammer* (reviewers for quality control). A *Wirtschaftsprüfer* has to be registered upon application if	(3) Die Qualitätskontrolle wird durch bei der Wirtschaftsprüferkammer registrierte Wirtschaftsprüfer in eigener Praxis oder Wirtschaftsprüfungsgesellschaften (Prüfer für Qualitätskontrolle) durchgeführt. Ein Wirtschaftsprüfer ist auf Antrag zu registrieren, wenn er
1. he has been officially appointed as *Wirtschaftsprüfer* for three years at least and has been active in the field of audit engagements ever since,	1. seit mindestens drei Jahren als Wirtschaftsprüfer bestellt und dabei im Bereich der Abschlußprüfung tätig gewesen ist;
2. he has knowledge of quality control systems,	2. über Kenntnisse in der Qualitätssicherung verfügt;
3. no disciplinary measures were taken by court against him for violating a duty in accordance with Article 43, paragraph 1 that would affect his aptitude for being a reviewer.	3. in den letzten fünf Jahren nicht berufsgerichtlich wegen der Verletzung einer Pflicht nach § 43 Abs. 1 verurteilt worden ist, die seine Eignung als Prüfer für Qualitätskontrolle ausschließt.
To be registered, a *Wirtschaftsprüfer* in own practice needs a valid certificate in accordance with paragraph 6 (3rd sentence). Upon application, a *Wirtschaftsprüfungsgesellschaft* has to be registered, if at least one member of its board of management, a manager, a partner with unlimited liability or another partner is registered in accordance with the 2nd sentence and the *Wirtschaftsprüfungsgesellschaft* meets the requirements according to the 3rd sentence. If a *Wirtschaftsprüfungsgesellschaft* is engaged with a review, the *Wirtschaftsprüfer* responsible for the review must - besides being registered in accordance with the 2nd sentence - belong to the circle defined in the 4th sentence or has to be a shareholder of the Wirtschaftsprüfungsgesellschaft.	Die Registrierung setzt für einen Wirtschaftsprüfer in eigener Praxis voraus, daß er über eine wirksame Bescheinigung nach Absatz 6 Satz 3 verfügt. Eine Wirtschaftsprüfungsgesellschaft ist auf Antrag zu registrieren, wenn mindestens ein Vorstandsmitglied, Geschäftsführer, persönlich haftender Gesellschafter oder Partner nach Satz 2 registriert ist und die Geselschaft die Voraussetzung nach Satz 3 erfüllt. Wird einer Wirtschaftsprüfungsgesellschaft der Auftrag zur Durchführung einer Qualitätskontrolle erteilt, so muß der für die Qualitätskontrolle verantwortliche Wirtschaftsprüfer entweder dem Personenkreis nach Satz 4 angehören oder Gesellschafter der Wirtschaftsprüfungsgesellschaft und nach Satz 2 registriert sein.
(4) A *Wirtschaftsprüfer* or a	(4) Ein Wirtschaftsprüfer oder eine

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Wirtschaftsprüfungsgesellschaft may not be a reviewer, if capital, financial or personal relationships exist with the Wirtschaftsprüfer or Wirtschaftsprüfungsgesellschaft to be reviewed. Apart from that, mutual reviews are excluded.	Wirtschaftsprüfungsgesellschaft darf nicht Prüfer für Qualitätskontrolle sein, wenn kapitalmäßige, finanzielle oder persönliche Bindungen zum zu prüfenden Wirtschaftsprüfer oder zur zu prüfenden Wirtschaftsprüfungsgesellschaft bestehen. Ferner sind wechselseitige Prüfungen ausgeschlossen.
(5) The reviewer has to summarise the results of the review in a report (reviewer's report). Apart from the description of subject, form and scope of the review engagement, the reviewer's report has to include a review opinion. If no material deficiencies in the system of quality control or any obstacles concerning the performance of the review werde found by the reviewer, he must confirm that the system of quality control implemented in the reviewed practice complies with the requirements set up by law and the by-laws of the *Wirtschaftsprüferkammer* and the quality control system implemented ensures for reasonable certainty a proper performance of audits as defined in Article 2, paragraph 1, where the professional seal is used. If material deficiencies in the system of quality control or obstacles concerning the performance of the review were found, the reviewer must qualify or refuse his opinion according to the 3rd sentence. He must give reasons for the qualification or refusal. In the case of a qualification due to material deficiencies found out in the system of quality assurance, the reviewer must recommend measures to eliminate the deficiencies.	(5) Der Prüfer für Qualitätskontrolle hat das Ergebnis der Qualitätskontrolle in einem Bericht (Qualitätskontrollbericht) zusammenzufassen. Der Qualitätskontrollbericht hat neben einer Beschreibung von Gegenstand, Art und Umfang der Prüfung auch eine Beurteilung des Prüfungsergebnisses zu enthalten. Sind vom Prüfer für Qualitätskontrolle keine wesentlichen Mängel im Qualitätssicherungssystem oder Prüfungshemmnisse festgestellt worden, hat er zu erklären, daß das in der Prüfungspraxis eingeführte Qualitätssicherungssystem im Einklang mit den gesetzlichen und satzungsmäßigen Anforderungen steht und mit hinreichender Sicherheit eine ordnungsgemäß Abwicklung von Prüfungsaufträgen nach § 2 Abs. 1, bei denen das Berufssiegel verwendet wird, gewährleistet. Sind wesentliche Mängel im Qualitätssicherungssysystem oder Prüfungshemmnisse festgestellt worden, so hat der Prüfer für Qualitätskontrolle seine Erklärung nach Satz 3 einzuschränken oder zu versagen. Die Einschränkung oder die Versagung sind zu begründen. Im Fall der Einschränkung aufgrund festgestellter wesentlicher Mängel im Qualitätssicherungssystem hat der Prüfer für Qualitätskontrolle Empfehlungen zur Beseitigung der Mängel zu geben.
(6) The reviewer is engaged by the *Wirtschaftsprüfer* in own practice or by the *Wirtschaftsprüfungsgesellschaft*. Upon completion of the review, the reviewer immediately submits a copy of the reviewer's report to the *Wirtschaftsprüferkammer*. After receipt of	(6) Der Prüfer für Qualitätskontrolle wird von dem Wirtschaftsprüfer in eigener Praxis oder der Wirtschaftsprüfungsgesellschaft beauftragt. Nach Abschluß der Prüfung leitet der Prüfer für Qualitätskontrolle eine Ausfertigung des Qualitätskontrollberichs der Wirtschaftsprüferkammer unverzüglich

Accountants Ordinance - AO	**Wirtschaftsprüferordnung- WPO**
the reviewer's report, the *Wirtschaftsprüferkammer* certifies the participation in a quality review to the *Wirtschaftsprüfer* in own practice or to the *Wirtschaftsprüfungsgesellschaft*. The certificate is limited to the date when the next review has to be carried out according to paragraph 1 (1st sentence). The certificate may not be granted, if the review was carried out violating paragraph 3 (1st and 5th sentence), or the review opinion according to paragraph 5 (3rd sentence) was refused.	zu. Nach Eingang des Qualitätskontrollberichts bescheinigt die Wirtschaftsprüferkammer dem Wirtschaftsprüfer in eigener Praxis oder der Wirtschaftsprüfungsgesellschaft die Teilnahme an der Qualitätskontrolle. Die Bescheinigung ist bis zu dem Zeitpunkt, zu dem die nächste Qualitätskontrolle nach Absatz 1 Satz 1 durchzuführen ist, zu befristen. Sie wird nicht erteilt, wenn die Qualitätskontrolle unter Verstoß gegen Absatz 3 Sätze 1 und 5 durchgeführt oder die Erklärung nach Absatz 5 Satz 3 versagt wurde.
(7) A review engagement can only be cancelled by an important reason. It is not considered to be an important reason if disagreements about the contents of the review report arise. The reviewer has to report on the results of his review so far and the reason for termination. In the case of a later review, the report according to the 3rd sentence must be submitted to the next reviewer by the *Wirtschaftsprüfer* in own practice or the *Wirtschaftsprüfungsgesellschaft*.	(7) Ein Auftrag zur Durchführung der Qualitätskontrolle kann nur aus wichtigem Grund gekündigt werden. Als wichtiger Grund ist es nicht anzusehen, wenn Meinungsverschiedenheiten über den Inhalt des Qualitätskontrollberichts bestehen. Der Prüfer für Qualitätskontrolle hat über das Ergebnis seiner bisherigen Prüfung und den Kündigungsgrund zu berichten. Der Bericht nach Satz 3 ist von dem Wirtschaftsprüfer in eigener Praxis oder der Wirtschaftsprüfungsgesellschaft im Falle einer späteren Qualitätskontrolle dem nächsten Prüfer für Qualitätskontrolle vorzulegen.
(8) The reviewer's report must be destroyed seven years after receipt by the *Wirtschaftsprüferkammer*. In case of a pending lawsuit concerning measures of the *Commission for Quality control*, the period determined in the 1st sentence will be extended until the judgement is res judicata.	(8) Der Qualitätskontrollbericht ist sieben Jahre nach Eingang in der Wirtschaftsprüferkammer zu vernichten. Im Falle eines anhängigen Rechtsstreits über Maßnahmen der Kommission für Qualitätskontrolle verlängert sich die in Satz 1 bestimmte Frist zur Rechtskraft des Urteils.
§ 57b Duty to Observe Secrecy and Liability	**§ 57b Verschwiegenheitspflicht und Verantwortlichkeit**
(1) The reviewer and his assistants, the members of the Commission on Quality Assurance (Article 57e), the members of the Public Oversight Board on Quality Assurance (Article 57f) and the employees	(1) Der Prüfer für Qualitätskontrolle und seine Gehilfen, die Mitglieder der Kommission für Qualitätskontrolle (§ 57e), die Mitglieder des Qualitätskontrollbeirats (§ 57f) und die Bediensteten der

Accountants Ordinance - AO	Wirtschaftsprüferordnung- WPO
of *Wirtschaftsprüferkammer* are obliged to maintain confidentiality regarding the matters known to them during the reviews even after completion of their activities.	Wirtschaftsprüferkammer sind, auch nach Beendigung ihrer Tätigkeit, verpflichtet, über die ihnen im Rahmen der Qualitätskontrolle bekannt gewordenen Angelegenheiten Verschwiegenheit zu bewahren.
(2) Article 64, paragraph 2 applies to the members of the Commission on Quality Assurance, the members of the Public Oversight Board on Quality Assurance and the employees of the *Wirtschaftsprüferkammer* accordingly. The presentation or delivery of ducments to courts or other authorities must be approved by the *Wirtschaftsprüferkammer*. In case of the 1st and 2nd sentences, approval is granted by the commission on Quality Assurance. It may only be granted if the reviewed *Wirtschaftsprüfer* or the reviewed *Wirtschaftsprüfungsgesellschaft* or the reviewer have been released by the defendant from their duty to observe secrecy.	(2) Für die Mitglieder der Kommission für Qualitätskontrolle, die Mitglieder des Qualitätskontrollbeirats und die Bediensteten er Wirtschaftsprüferkammer gilt § 64 Abs. 2 entsprechend. Der Genehmigung bedarf auch die Vorlegung oder Auslieferung von Schriftstücken durch die Wirtschaftsprüferkammer an Gerichte oder Behörden. Die Genehmigung erteilt in den Fällen der Sätze 1 und 2 die Kommission für Qualitätskontrolle. Sie kann nur erteilt werden, wenn der Beschuldigte den geprüften Wirtschaftsprüfer, die geprüfte Wirtschaftsprüfungsgesellschaft oder den Prüfer für Qualitätskontrolle von der Pflicht zur Verschwiegenheit entbunden hat.
(3) As far as it is required for duly performing a review engagement, the professional's duty to observe secrecy according to paragraph 1 of this Article, Article 43, paragraph 1 (1st sentence) and Article 64, paragraph 1 of this law and Article 323, paragraph 1 (1st sentence) of the Commercial Code as well as the duty to observe secrecy of those persons with whom the *Wirtschaftsprüfer* in own practice jointly exercises his profession is restrained.	(3) Soweit dies zur Durchführung der Qualitätskontrolle erforderlich ist, ist die Pflicht zur Verschwiegenheit nach Absatz 1, § 43 Abs. 1 Satz 1, § 64 Abs. 1 dieses Gesetzes und § 323 Abs. 1 Satz 1 des Handelsgesetzbuchs sowie die Pflicht zur Verschwiegenheit der Personen, die den Beruf gemeinsam mit dem Wirtschaftsprüfer in eigener Praxis ausüben, eingeschränkt.
(4) With the reservation stated in paragraph 3, Article 323 of the Commercial Code applies accordingly.	(4) § 323 des Handelsgesetzbuchs gilt vorbehaltlich des Absatzes 3 entsprechend.

1.2 Accountants' Professional Articles of Association - APAA

Accountants' Professional Articles of Association - APAA	Berufssatzung WP/vBP
§ 9 Confidentiality	**§ 9 Verschwiegenheit**
(1) WP/vBPs [*Public Accountants/Sworn Auditors*]are not permitted to reveal without	(1) WP/vBP dürfen Tatsachen und Umstände, die ihnen bei ihrer

Accountants' Professional Articles of Association - APAA	**Berufssatzung WP/vBP**
authorisation facts and circumstances which have been entrusted to them or which they became aware of the exercise of their profession.	Berufstätigkeit anvertraut oder bekannt werden, nicht unbefugt offenbaren.
(2) WP/vBPs have to take care that facts and circumstances within the meaning of Section 1 are not revealed to unauthorised persons. To this effect they have to take the appropriate precautions.	(2) WP/vBP haben dafür Sorge zu tragen, daß Tatsachen und Umstände im Sinne von Absatz 1 Unbefugten nicht bekannt werden. Sie haben entsprechende Vorkehrungen zu treffen.
(3) The duties in Sections 1 and 2 continue after the end of an engagement.	(3) Die Pflichten nach Absatz 1 und 2 bestehen nach Beendigung eines Auftragsverhältnisses fort.
§ 13 Dignified professional conduct	**§ 13 Berufswürdiges Verhalten**
(1) WP/vBPs have to express their views objectively.	(1) WP/vBP haben sich sachlich zu äußern.
(2) WP/vBPs are obliged to draw their clients' attention to infringements of law of which they have become aware in the performance of their duties.	(2) WP/vBP sind verpflichtet, ihre Auftraggeber auf Gesetzesverstöße, die sich bei Wahrnehmung ihrer Aufgaben festgestellt haben, aufmerksam zu machen.
(3) WP/vBPs are only permitted to have their names and/or qualifications used for publicity purposes by third parties if the product or service and the method of publicity is compatible with the reputation of the profession. The rules contained in part four remain unaffected.	(3) WP/vBP dürfen die Verwendung ihres Namens und/oder ihrer Qualifikation zu werblichen Zwecken Dritter nur zulassen, wenn die Werbung nach Produkt oder Dienstleistung und Durchführung mit dem Ansehen des Berufes vereinbar ist. Die Vorschriften des vierten Teils bleiben unberührt.

1.3 Act on Federal Central Register

Act on Federal Central Register	**Bundeszentralregistergesetz**
§ 30 Application	**§ 30 Antrag**
(1) Any person who has reached the age of 14 shall, upon application, be issued with a certificate revealing the contents of the Central Register concerning this person (conduct certificate). If the person concerned has a statutory representative, this representative is also entitled to make such application. If the person concerned	(1) Jeder Person, die das 14. Lebensjahr vollendet hat, wird auf Antrag ein Zeugnis über den sie betreffenden Inhalt des Zentralregisters erteilt (Führungszeugnis). Hat der Betroffene einen gesetzlichen Vertreter, so ist auch dieser antragsberechtigt. Ist der Betroffene geschäftsunfähig, so ist nur sein

Act on Federal Central Register	Bundeszentralregistergesetz
does not have legal capacity to conclude transactions, only the statutory representative shall be entitled to make such application.	gesetzlicher Vertreter antragsberechtigt.
(2) The application is to be made to the registration office. The applicant is to provide evidence of his identity and, if he is acting as statutory representative, his power of representation. The person concerned and his statutory representative cannot be represented by an authorised agent in making the application. The registration authority shall accept payment of the fee for the conduct certificate, retain two fifths thereof and pass on the rest to the Federal Treasury.	(2) Der Antrag ist bei der Meldebehörde zu stellen. Der Antragsteller hat seine Identität und, wenn er als gesetzlicher Vertreter handelt, seine Vertretungsmacht nachzuweisen. Der Betroffene und sein gesetzlicher Vertreter können sich bei der Antragstellung nicht durch einen Bevollmächtigten vertreten lassen. Die Meldebehörde nimmt die Gebühr für das Führungszeugnis entgegen, behält davon zwei Fünftel ein und führt den Restbetrag an die Bundeskasse ab.
(3) If the applicant lives outside the area of application of this law, he may submit his application to the registration authority directly. Paragraph 2, sentences 2 and 3 shall apply accordingly.	(3) Wohnt der Antragsteller außerhalb des Geltungsbereichs dieses Gesetzes, so kann er den Antrag unmittelbar bei der Registerbehörde stellen. Absatz 2 Satz 2 und 3 gilt entsprechend.
(4) It shall be inadmissible to send the conduct certificate to any person other than the applicant.	(4) Die Übersendung des Führungszeugnisses an eine andere Person als den Antragsteller ist nicht zulässig.
(5) If the conduct certificate is requested for submission to an authority, it shall be sent to that authority directly. The authority shall grant the applicant access to view the conduct certificate on request. If the conduct certificate contains entries, the applicant may demand that he send the conduct certificate for viewing purposes to a local court which he shall name. The registration authority shall inform the applicant of this possibility in cases where the application is submitted to the registration authority. The local court may only grant viewing access to the applicant personally. After viewing, the conduct certificate shall be returned to the authority or, if the applicant objects to this, the local court shall destroy the conduct certificate.	(5) Wird das Führungszeugnis zur Vorlage bei einer Behörde beantragt, so ist es der Behörde unmittelbar zu übersenden. Die Behörde hat dem Antragsteller auf Verlangen Einsicht in das Führungszeugnis zu gewähren. Der Antragsteller kann verlangen, daß das Führungszeugnis, wenn es Eintragungen enthält, zunächst an ein von ihm benanntes Amtsgericht zur Einsichtnahme durch ihn übersandt wird. Die Meldebehörde hat den Antragsteller in den Fällen, in denen der Antrag bei ihr gestellt wird, auf diese Möglichkeit hinzuweisen. Das Amtsgericht darf die Einsicht nur dem Antragsteller persönlich gewähren. Nach Einsichtnahme ist das Führungszeugnis an die Behörde weiterzuleiten oder, falls der Antragsteller dem widerspricht, vom Amtsgericht zu vernichten.

Act on Federal Central Register	Bundeszentralregistergesetz
(6) If the applicant lives outside the area of application of this law, he may demand that - if the conduct certificate contains entries - he send it for viewing purposes to an official representative of the Federal Republic of Germany which he shall name. Paragraph 5, sentence 5 and 6 shall apply accordingly to the official representative of the Federal Republic of Germany.	(6) Wohnt der Antragsteller außerhalb des Geltungsbereichs dieses Gesetzes, so kann er verlangen, daß das Führungszeugnis, wenn es Eintragungen enthält, zunächst an eine von ihm benannte amtliche Vertretung der Bundesrepublik Deutschland zur Einsichtnahme durch ihn übersandt wird. Absatz 5 Satz 5 und 6 gilt für die amtliche Vertretung der Bundesrepublik entsprechend.

1.4 Act on Financial Courts Proceedings

Act on Financial Courts Proceedings	Finanzgerichtsordnung
Sec. 120	**§ 120**
(1) The participants may view the court files and the files submitted to the court, and may have official copies, excerpts and transcripts issued by the court office at their expense. If the original court files have been transferred to an image carrier or other data carrier, sec. 299a of the Code of Civil Procedure shall apply accordingly.	(1) Die Beteiligten können die Gerichtsakten und die dem Gericht vorgelegten Akten einsehen und sich durch die Geschäftsstelle auf ihre Kosten Ausfertigungen, Auszüge und Abschriften erteilen lassen. Sind die Gerichtsakten zur Ersetzung der Urschrift auf einen Bild- oder anderen Datenträger übertragen worden, gilt § 299a der Zivilprozessordnung sinngemäß.
(2) There shall be neither submission nor transcriptive notification of any draft judgements, draft decisions or draft orders, of any preparatory work for the above or, moreover, of any written documents concerning voting or administrative penalties of the court.	(2) Die Entwürfe zu Urteilen, Beschlüssen und Verfügungen, die Arbeiten zu ihrer Vorbereitung, ferner die Schriftstücke, die Abstimmungen oder Ordnungsstrafen des Gerichts betreffen, werden weder vorgelegt noch abschriftlich mitgeteilt.

1.5 Act on Labour Law Proceedings

Act on Labour Law Proceedings	Arbeitsgerichtsgesetz
Sec. 46 Principle	**§ 46 Grundsatz**
(1) The judgement procedure shall be applied in the civil disputes described in sec. 2, paras. 1 to 4.	(1) Das Urteilsverfahren findet in den in § 2 Abs. 1 bis 4 bezeichneten bürgerlichen Rechtsstreitigkeiten Anwendung.
(2) The judgement procedure in the first	(2) Für das Urteilsverfahren des ersten

Act on Labour Law Proceedings	Arbeitsgerichtsgesetz
instance the provisions of the Code of Civil Procedure shall apply accordingly to the proceedings before the local courts, where this law provides for nothing else. The provisions on the earliest initial date for an oral hearing and the written preliminary proceedings (secs. 275 to 277 of the Code of Civil Procedure), on the simplified procedure (sec. 495a of the Code of Civil Procedure), on proceedings restricted to documentary evidence and proceedings based on bills of exchange (secs. 592 to 605a of the Code of Civil Procedure), on decisions without an oral hearing (sec. 128, para. 2 of the Code of Civil Procedure) and on the postponement of dates during the period from 1 July to 31 August (sec. 227, para. 3, sentence 1 of the Code of Civil Procedure) shall not be applicable. Sec. 127, para. 2 of the Code of Civil Procedure shall be applicable with the proviso that where disputes on the protection of vested rights are concerned, immediate appeal shall be admissible irrespective of the value in dispute.	Rechtszugs gelten die Vorschriften der Zivilprozeßordnung über das Verfahren vor den Amtsgerichten entsprechend, soweit dieses Gesetz nichts anderes bestimmt. Die Vorschriften über den frühen ersten Termin zur mündlichen Verhandlung und das schriftliche Vorverfahren (§§ 275 bis 277 der Zivilprozeßordnung), über das vereinfachte Verfahren (§ 495a der Zivilprozeßordnung), über den Urkunden- und Wechselprozeß (§§ 592 bis 605a der Zivilprozeßordnung), über die Entscheidung ohne mündliche Verhandlung (§ 128 Abs. 2 der Zivilprozeßordnung) und über die Verlegung von Terminen in der Zeit vom 1. Juli bis 31. August (§ 227 Abs. 3 Satz 1 der Zivilprozeßordnung) finden keine Anwendung. § 127 Abs. 2 der Zivilprozessordnung findet mit der Maßgabe Anwendung, daß die sofortige Beschwerde bei Bestandsschutzstreitigkeiten unabhängig von dem Streitwert zulässig ist.

1.6 Act on Social Courts Proceedings

Act on Social Courts Proceedings	Sozialgerichtsordnung
Sec. 120	**§ 120**
(1) The participants shall have the right to view files where this has not been forbidden by the authority sending the files.	(1) Die Beteiligten haben das Recht der Einsicht in die Akten, soweit die übersendende Behörde dieses nicht ausschließt.
(2) The participants may have transcripts issued by the court office at their expense. If the files have been transferred to an image carrier or other data carrier, sec. 299a of the Code of Civil Procedure shall apply accordingly. No costs shall be charged for the dispatch of files where, pursuant to sec. 197a, the Court Costs Act does not apply.	(2) Die Beteiligten können sich durch die Geschäftsstelle auf ihre Kosten Abschriften erteilen lassen. Sind die Akten zur Ersetzung der Urschrift auf einen Bild- oder anderen Datenträger übertragen worden, gilt § 299a der Zivilprozeßordnung entsprechend. Für die Versendung von Akten werden Kosten nicht erhoben, sofern nicht nach § 197a das Gerichtskostengesetz gilt.

Act on Social Courts Proceedings	Sozialgerichtsordnung
(3) The presiding judge may, for specific reasons, refuse to grant or may restrict access to view the files or part of the files, and may refuse to allow or restrict the production or issuing of excerpts and transcripts. The refusal or restriction of access to view the files may be brought before the court; the court's decision shall be final.	(3) Der Vorsitzende kann aus besonderen Gründen die Einsicht in die Akten oder in Aktenteile sowie die Fertigung oder Erteilung von Auszügen und Abschriften versagen oder beschränken. Gegen die Versagung oder die Beschränkung der Akteneinsicht kann das Gericht angerufen werden; es entscheidet endgültig.
(4) There shall be neither submission nor transcriptive notification of any draft judgements, draft decisions or draft orders, of any preparatory work for the above, or of any written documents concerning voting.	(4) Die Entwürfe zu Urteilen, Beschlüssen und Verfügungen, die zu ihrer Vorbereitung angefertigten Arbeiten sowie die Schriftstücke, welche Abstimmungen betreffen, werden weder vorgelegt noch abschriftlich mitgeteilt.

1.7 Civil Code - CC

Civil Code - CC	Bürgerliches Gesetzbuch - BGB
§ 134 Statutory Prohibition	**§ 134 Gesetzliches Verbot**
A legal transaction which violates a statutory prohibition is void, unless a contrary intention appears from the statute.	Ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt, ist nichtig, wenn sich nicht aus dem Gesetz ein anderes ergibt.
§ 138 Legal transaction against public policy; usury	**§ 138 Sittenwidriges Rechtsgeschäft; Wucher**
(1) A legal transaction which is against public policy is void.	(1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.
(2) A legal transaction by which a person exploiting the need, inexperience, lack of sound judgement or substantial lack of will power of another, causes to be promised or granted to himself or to a third party in exchange for a performance, pecuniary advantages which are in obvious disproportion to the performance is also void.	(2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Mißverhältnis zu der Leistung stehen.

Civil Code - CC	Bürgerliches Gesetzbuch - BGB
§ 242 Performance according to good faith	**§ 242 Leistung nach Treu und Glauben**
The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.	Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.
§ 305 Incorporation of standard business terms into the contract	**§ 305 Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag**
(1) Standard business terms are all contractual terms pre-established for a multitude of contracts which one party to the contract (the user) presents to the other party upon the conclusion of the contract. It is irrelevant whether the provisions appear as a separate part of a contract or are included in the contractual document itself, how extensive they are, what script is used for them, or what form the contract takes. Contractual terms do not constitute standard business terms where they have been individually negotiated between the parties.	(1) Allgemeine Geschäftsbedingungen sind alle für eine Vielzahl von Verträgen vorformulierten Vertragsbedingungen, die eine Vertragspartei (Verwender) der anderen Vertragspartei bei Abschluß eines Vertrages stellt. Gleichgültig ist, ob die Bestimmungen einen äußerlich gesonderten Bestandteil des Vertrags bilden oder in die Vertragsurkunde selbst aufgenommen werden, welchen Umfang sie haben, in welcher Schriftart sie verfasst sind und welche Form der Vertrag hat. Allgemeine Geschäftsbedingungen liegen nicht vor, soweit die Vertragsbedingungen zwischen den Vertragsparteien im einzelnen ausgehandelt sind.
(2) Standard business terms are incorporated into the contract only if, during the conclusion of the contract, the user	(2) Allgemeine Geschäftsbedingungen werden nur dann Bestandteil eines Vertrags, wenn der Verwender bei Vertragsschluß
1. expressly draws the other party's attention to them, or if, on account of the way in which the contract is concluded, an express reference to them is unreasonably difficult, he draws his attention to them by means of a clearly visible sign at the place where the contract is concluded and	1. die andere Vertragspartei ausdrücklich oder, wenn ein ausdrücklicher Hinweis wegen der Art des Vertragsschlusses nur unter unverhältnismäßigen Schwierigkeiten möglich ist, durch deutlich sichtbaren Aushang am Ort des Vertragsschlusses auf sie hinweist und
2. gives the other party, in a reasonable manner that also appropriately takes account of any physical handicap of the other party discernible by the user, the possibility of gaining knowledge of their content,	2. der anderen Vertragspartei die Möglichkeit verschafft, in zumutbarer Weise, die auch eine für den Verwender erkennbare körperliche Behinderung der anderen Vertragspartei angemessen berücksichtigt, von ihrem Inhalt Kenntnis zu nehmen,
and if the other party agrees that they are	und wenn die andere Vertragspartei mit ihrer

Civil Code - CC	Bürgerliches Gesetzbuch - BGB
to apply.	Geltung einverstanden ist.
(3) Subject to observance of the requirements set out in subsection (2) above, the parties may agree in advance that particular standard business terms will apply to a particular type of legal transaction.	(3) Die Vertragsparteien können für eine bestimmte Art von Rechtsgeschäften die Geltung bestimmter Allgemeiner Geschäftsbedingungen unter Beachtung der in Absatz 2 bezeichneten Erfordernisse im Voraus vereinbaren.
§ 307 Review of subject-matter	**§ 307 Inhaltskontrolle**
(1) Provisions in standard business terms are invalid if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage. An unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible.	(1) Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen. Eine unangemessene Benachteiligung kann sich auch daraus ergeben, daß die Bestimmung nicht klar und verständlich ist.
(2) In case of doubt, an unreasonable disadvantage is assumed if a provision	(2) Eine unangemessene Benachteiligung ist im Zweifel anzunehmen, wenn eine Bestimmung
1. cannot be reconciled with essential basic principles of the statutory rule from which it deviates, or	1. mit wesentlichen Grundgedanken der gesetzlichen Regelung, von der abgewichen wird, nicht zu vereinbaren ist, oder
2. restricts essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved.	2. wesentliche Rechte oder Pflichten, die sich aus der Natur des Vertrags ergeben, so einschränkt, daß die Erreichung des Vertragszwecks gefährdet ist.
(3) Subsections (1) and (2) above, and §§ 308 and 309 apply only to provision in standard business terms by means of which provision derogating from legal rules or provisions supplementing those rules are agreed. Other provisions may be invalid under subsection (1), sentence 2, above, in conjunction with subsection (1), sentence 1, above.	(3) Die Absätze 1 und 2 sowie die §§ 308 und 309 gelten nur für Bestimmungen in Allgemeinen Geschäftsbedingungen, durch die von Rechtsvorschriften abweichende oder diese ergänzende Regelungen vereinbart werden. Andere Bestimmungen können nach Absatz 1 Satz 2 in Verbindung mit Absatz 1 Satz 1 unwirksam sein.
§ 311 Obligations created by legal transaction and similar obligations	**§ 311 Rechtsgeschäftliche und rechtsgeschäftsähnliche**

Civil Code - CC	Bürgerliches Gesetzbuch - BGB
	Schuldverhältnisse
(1) Unless otherwise provided by statute, a contract between the parties is necessary in order to create an obligation by legal transaction or to alter the content of an obligation.	(1) Zur Begründung eines Schuldverhältnisses durch Rechtsgeschäft sowie zur Änderung des Inhalts eines Schuldverhältnisses ist ein Vertrag zwischen den Beteiligten erforderlich, soweit nicht das Gesetz ein anderes vorschreibt.
(2) An obligation with duties in accordance with § 241 (2) also arises as a result of	(2) Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 entsteht auch durch
1. entry into contractual negotiations,	1. die Aufnahme von Vertragsverhandlungen,
2. preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his rights, his legally protected interest or other interests or entrusts them to that party, or	2. die Anbahnung eines Vertrags, bei welcher der eine Teil im Hinblick auf eine etwaige rechtsgeschäftliche Beziehung dem anderen Teil die Möglichkeit zur Einwirkung auf seine Rechte, Rechtsgüter und Interessen gewährt oder ihm diese anvertraut, oder
3. similar business contact.	3. ähnliche geschäftliche Kontakte.
(3) An obligation with duties in accordance with § 241 (2) may also arise towards persons who are not intended to be parties to the contract. Such an obligation arises in particular if the third party by enlisting a particularly high degree of reliance materially influences the contractual negotiations or the conclusion of the contract.	(3) Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 kann auch zu Personen entstehen, die nicht selbst Vertragspartei werden sollen. Ein solches Schuldverhältnis entsteht insbesondere, wenn der Dritte in besonderem Maße Vertrauen für sich in Anspruch nimmt und dadurch die Vertragsverhandlungen oder den Vertragsschluß erheblich beeinflusst.
§ 611 Essence of contract of services	**§ 611 Vertragstypische Pflichten beim Dienstvertrag**
(1) By the contract for service, the person who promises service is bound to perform the service promised, and the other party is bond to pay the remuneration agreed upon.	(1) Durch den Dienstvertrag wird derjenige, welcher Dienste zusagt, zur Leistung der versprochenen Dienste, der andere Teil zur Gewährung der vereinbarten Vergütung verpflichtet.
(2) Service of any kind may be the object of the contract for service.	(2) Gegenstand des Dienstvertrages können Dienste jeder Art sein.
§ 823 Duty to compensate for damage	**§ 823 Schadensersatzpflicht**
(1) A person who, wilfully or negligently,	(1) Wer vorsätzlich oder fahrlässig das

Civil Code - CC	Bürgerliches Gesetzbuch - BGB
unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.	Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.
(2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault.	(2) Die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt. Ist nach dem Inhalt des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Verschuldens ein.

1.8 Civil Procedure Act

Civil Procedure Act	Zivilprozeßordnung - ZPO
§ 299 Inspection of case file, copies	**§ 299 Akteneinsicht, Abschriften**
(1) The parties may inspect the court files and have the registry to prepare for them duplicates, extracts and copies.	(1) Die Parteien können die Prozeßakten einsehen und sich aus ihnen durch die Geschäftsstelle Ausfertigungen, Auszüge und Abschriften erteilen lassen.
(2) The presiding judge of the court may only permit inspection of the case file by a third party without the consent of the parties if a justified legal interest is shown.	(2) Dritten Personen kann der Vorstand des Gerichts ohne Einwilligung der Parteien die Einsicht der Akten nur gestatten, wenn ein rechtliches Interesse glaubhaft gemacht wird.
(3) If the court files are presented as electronic documents, inspection of the files is limited to print-outs. The print-outs shall only be prepared by the registry.	(3) Soweit die Prozessakten als elektronische Dokumente vorliegen, ist die Akteneinsicht auf Ausdrucke beschränkt. Die Ausdrucke sind von der Geschäftsstelle zu fertigen.
(4) Draft of judgments, decisions and dispositions, materials delivered for their preparation, as well as the documents which concern voting, shall not be presented or notified in writing.	(4) Die Entwürfe zu Urteilen, Beschlüssen und Verfügungen, die zu ihrer Vorbereitung gelieferten Arbeiten sowie die Schriftstücke, die Abstimmungen betreffen, werden weder vorgelegt noch abschriftlich mitgeteilt.
§ 328 Recognition of Foreign Judgements	**§ 328 Anerkennung ausländischer Urteile**
(1) The recognition of a foreign judgement	(1) Die Anerkennung des Urteils eines

Civil Procedure Act	**Zivilprozeßordnung - ZPO**
is excluded:	ausländischen Gerichts ist ausgeschlossen:
1. if the courts of the State to which the foreign court belongs are not competent according to German Law;	1. wenn die Gerichte des Staates, dem das ausländische Gericht angehört, nach den deutschen Gesetzen nicht zuständig sind;
2. if the defendant who has not participated in the proceedings and raises this plea has not been served with the written pleadings initiating the proceedings in the regular way or in a timely manner, so that he was not in a position to defend himself;	2. wenn dem Beklaten, der sich auf das Verfahren nicht eingelassen hat und sich hierauf beruft, das Verfahren einleitende Schritftstück nicht ordnungsgemäß oder nicht so rechtzeitig zugestellt worden ist, daß er sich verteidigen konnte;
3. if the judgement is inconsistant with a judgement issued here or with an earlier foreign judgement subject to recognition or if the proceedings on which it is based are in consistance with an earlier proceeding here which has become filed to a court here;	3. wenn das Urteil mit einem hier erlassenen oder einem anzuerkennenden früheren ausländischen Urteil oder wenn das ihm zugrunde liegende Verfahren mit einem früher hier rechtshängig gewordenen Verfahren unvereinbar ist;
4. if the recognition of the judgement would give rise to a result which is manifestly incompatible with the basic principles of German law, especially when the recognition would be inconsistant with the Constitution;	4. wenn die Anerkennung des Urteils zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist, insbesondere wenn die Anerkennung mit den Grundrechten unvereinbar ist;
5. if reciprocity is not assured.	5. wenn die Gegenseitigkeit nicht verbürgt ist.
(2) The provision of number 5 does not bother recognition of the judgement if the judgement concerns the claim other than a monetary claim and under German law no jurisdiction was established in Germany or if it concerns an affililation matter (§ 640) or a life partnership matter in the meaning of § 661 para. 1 no. 1 and 2.	(2) Die Vorschrift der Nummer 5 steht der Anerkennung des Urteils nicht entgegen, wenn das Urteil einen nichtvermögensrechtlichen Anspruch betrifft und nach den deutschen Gesetzen ein Gerichtsstand im Inland nicht begründet war oder wenn es sich um eine Kindschaftssache (§ 640) oder um eine Lebenspartnerschaftsache im Sinne des § 661 Abs. 1 Nr. 1 und 2 handelt.
§ 383 Refusal to testify	**§ 383 Zeugnisverweigerung aus persönlichen Gründen**
(1) The following are entitled to refuse to	(1) Zur Verweigerung des Zeugnisses sind

Civil Procedure Act	**Zivilprozeßordnung - ZPO**
testify:	berechtigt:
1. the person engaged to be married to a party;	1. der Verlobte einer Partei;
2. the spouse of a party, also when the marriage no longer exists;	2. der Ehegatte einer Partei, auch wenn die Ehe nicht mehr besteht;
2a. the living partner of a party, also when the life partnership no longer exists.	2a. der Lebenspartner einer Partei, auch wenn die Lebenspartnerschaft nicht mehr besteht;
3. those who are or were related in the direct line to a party or related by marraige, collaterally related to the third degree;	3. diejenigen, die mit einer Partei in gerader Linie verwandt oder verschwägert, in der Seitenlinie bis zum dritten Grad verwandt oder bis zum zweiten Grad verschwägert sind oder waren;
4. clergymen with respect to matters entrusted to them in the exercise of their pastoral duties;	4. Geistliche in Ansehung desjenigen, was ihnen bei der Ausübung der Seelsorge anvertraut ist;
5. persons who collaborate in the preparation, production or distribution of periodicals or broadcasts in their professional capacity, or did so in the past, concerning the person of the editor, contributor or source of contribution with regard to contributions and documents, as well as concerning information related to them with regard to their activities, insofar as it deals with contributions, documents and information for the editorial part;	5. Personen, die bei der Vorbereitung, Herstellung oder Verbreitung von periodischen Druckwerken oder Rundfunksendungen berufsmäßig mitwirken oder mitgewirkt haben, über die Person des Verfassers, Einsenders oder Gewährsmanns von Beiträgen und Unterlagen sowie über die ihnen im Hinblick auf ihre Tätigkeit gemachten Mitteilungen, soweit es sich um Beiträge, Unterlagen und Mitteilungen für den redaktionellen Teil handelt;
6. persons to whom matters are entrusted by virtue of their office, profession or trade, which are to be kept secret due to their nature or by law, with respect to the facts to which the duty of secrecy pertains.	6. Personen, denen kraft ihres Amtes, Standes oder Gewerbes Tatsachen anvertraut sind, deren Geheimhaltung durch ihre Natur oder durch gesetzliche Vorschrift geboten ist, in betreff der Tatsachen, auf welche die Verpflichtung zur Verschwiegenheit sich bezieht.
(2) The persons indicated in nos. 2 and 3 above shall be informed of their right to refuse to testify before they are examined.	(2) Die unter Nummern 1 bis 3 bezeichneten Personen sind vor der Vernehmung über ihr Recht zur Verweigerung des Zeugnisses zu belehren.
The examination of persons indicated in nos. 4 and 6 above shall, also when	(3) Die Vernehmung der unter Nummern 4 bis 6 bezeichneten Personen ist, auch wenn

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testifying is not refused, not be directed to facts with regard to which it is apparent that evidence cannot be given without the violation of the duty of secrecy.	das Zeugnis nicht verweigert wird, auf Tatsachen nicht zu richten, in Ansehung welcher erhellt, daß ohne Verletzung der Verpflichtung zur Verschwiegenheit ein Zeugnis nicht abgelegt werden kann.

1.9 Commercial Code

Commercial Code	Handelsgesetzbuch - HGB
§ 323 The auditor's responsibilities	**§ 323 Verantwortlichkeit des Abschlußprüfers**
(1) The auditor, his assistants and the legal representatives of an auditing firm assisting in the examination are obligated to make a conscientious and impartial examination and to maintain confidentiality; § 57 b of the Certified Accountants Code shall not be affected. They may not exploit without authorisation business secrets learned in their work. Whoever intentionally or negligently violates his duties is obligated to compensate the company for the damages incurred, and, if a related enterprise is damaged, that one as well. If there is more than one person, they are liable as joint and several debtors.	(1) Der Abschlußprüfer, seine Gehilfen und die bei der Prüfung mitwirkenden gesetzlichen Vertreter einer Prüfungsgesellschaft sind zur gewissenhaften und unparteiischen Prüfung und zur Verschwiegenheit verpflichtet; § 57 b der Wirtschaftsprüferordnung bleibt unberührt. Sie dürfen nicht unbefugt Geschäfts- und Betriebsgeheimnisse verwerten, die sie bei ihrer Tätigkeit erfahren haben. Wer vorsätzlich oder fahrlässig seine Pflichten verletzt, ist der Kapitalgesellschaft und, wenn ein verbundenes Unternehmen geschädigt worden ist, auch diesem zum Ersatz des daraus entstehenden Schadens verpflichtet. Mehrere Personen haften als Gesamtschuldner.
(2) The liability for damages of persons who have acted negligently is limited to one million EUR per examination. Where a stock corporation whose shares are admitted to trading on the official market is audited, the liability for damages of persons who have acted negligently is limited, deviating from sentence 1, to four million EUR per examination. This also applies if several persons participated in the examination or several acts giving rise to liability for damages were committed, and this is so without regard to whether other participants acted intentionally.	(2) Die Ersatzpflicht von Personen, die fahrlässig gehandelt haben, beschränkt sich auf eine Million Euro für eine Prüfung. Bei Prüfung einer Aktiengesellschaft, deren Aktien zum Handel im amtlichen Markt zugelassen sind, beschränkt sich die Ersatzpflicht von Personen, die fahrlässig gehandelt haben, abweichend von Satz 1 auf vier Millionen Euro für eine Prüfung. Dies gilt auch, wenn an der Prüfung mehrere Personen beteiligt gewesen oder mehrere zum Ersatz verpflichtende Handlungen begangen worden sind, und ohne Rücksicht darauf, ob andere Beteiligte vorsätzlich gehandelt haben.

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(3) If an auditing firm is the auditor, the obligation to maintain confidentiality also exists vis-à-vis the auditing supervisory board and the members of the firm's supervisory board.	(3) Die Verpflichtung zur Verschwiegenheit besteht, wenn eine Prüfungsgesellschaft Abschlußprüfer ist, auch gegenüber dem Aufsichtsrat und den Mitgliedern des Aufsichtsrats der Prüfungsgesellschaft.
(4) The liability for damages pursuant to these regulations may be neither excluded nor limited by contract.	(4) Die Ersatzpflicht nach diesen Vorschriften kann durch Vertrag weder ausgeschlossen noch beschränkt werden.
(5) The claims based on these regulations are subject to a five-year statute of limitations.	(5) Die Ansprüche aus diesen Vorschriften verjähren in fünf Jahren.
§ 325 Disclosure	**§ 325 Offenlegung**
(1) The legal representatives of corporations must file at the Commercial Register of the corporation's domicile the annual financial statements with the certification of the financial statements or the notation as to refusal without undue delay after their presentation to the shareholders, but at the latest prior to the expiration of the twelfth month of the fiscal year following the close of the fiscal year. At the same time, the management report, report of the supervisory board and, to the extent that the proposal for the use of the results and the resolution as to its use are not apparent from the filed annual financial statements, the proposal for the use of the results and the resolution as to their use, specifying the annual surplus or annual deficit as well as the statement required under § 161 of the Stock Corporation Act *[Aktiengesetz]*, shall be filed; limited liability companies need not make disclosures as to use of the results if such disclosures can serve to determine profit shares of natural persons who are shareholders. The legal representatives shall announce in the Federal Gazette without undue delay after filing the records designated in sentence 1 at which Commercial Register and under which number these records have been filed. If in order to meet the time limit set in sentence 1 the annual financial statements	(1) Die gesetzlichen Vertreter von Kapitalgesellschaften haben den Jahresabschluß unverzüglich nach seiner Vorlage an die Gesellschafter, jedoch spätestens vor Ablauf des zwölften Monats des dem Abschlußstichtag nachfolgenden Geschäftsjahrs, mit dem Bestätigungsvermerk oder dem Vermerk über dessen Versagung zum Handelsregister des Sitzes der Kapitalgesellschaft einzureichen; gleichzeitig sind der Lagebericht, der Bericht des Aufsichtsrats und, soweit sich der Vorschlag für die Verwendung des Ergebnisses und der Beschluß über seine Verwendung aus dem eingereichten Jahreabschluß nicht ergeben, der Vorschlag für die Verwendung des Ergebnisses und der Beschluß über seine Verwendung unter Angabe des Jahresüberschusses oder Jahrefehlbetrags sowie die nach § 161 des Aktiengesetzes vorgeschriebene Erklärung einzureichen; Angaben über die Ergebnisverwendung brauchen von Gesellschaften mit beschränkter Haftung nicht gemacht zu werden, wenn sich anhand dieser Angaben die Gewinnanteile von natürlichen Personen feststellen lassen, die Gesellschafter sind. Die gesetzlichen Vertreter haben unverzüglich nach der Einreichung der in Satz 1 bezeichneten Unterlagen im Bundesanzeiger bekanntzumachen, bei

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and management report are filed without the other records, then the report and proposal shall be filed without undue delay after their availability, the resolutions after the adoption and the notation after its issuance. If the annual financial statements are changed after subsequent examination or determinations, then that change shall also be filed pursuant to sentence 1.	welchem Handelsregister und unter welcher Nummer diese Unterlagen eingereicht worden sind. Werden zur Wahrung der Frist nach Satz 1 der Jahresabschluß und der Lagebericht ohne die anderen Unterlagen eingereicht, so sind der Bericht und der Vorschlag nach ihrem Vorliegen, die Beschlüsse nach der Beschlußfassung und der Vermerk nach der Erteilung unverzüglich einzureichen; wird der Jahresabschluß bei nachträglicher Prüfung oder Feststellung geändert, so ist auch die Änderung nach Satz 1 einzureichen.
(2) Subsection 1 shall be applied to large corporations (§ 267 Subsection 3), subject to the provison that the records designated in Subsection 1 shall first be published in the Federal Gazette and the publication shall be filed at the Commercial Register at the corporation's domicile with the enclosure of the designated records. The publication pursuant to Subsection 1 sentence 2 shall be omitted. The list of share ownership (§ 287) need not be published in the Federal Gazette.	(2) Absatz 1 ist auf große Kapitalgesellschaften (§ 267 Abs. 3) mit der Maßgabe anzuwenden, daß die in Absatz 1 bezeichneten Unterlagen zunächst im Bundesanzeiger bekanntzumachen sind und die Bekanntmachung unter Beifügung der bezeichneten Unterlagen zum Handelsregister des Sitzes der Kapitalgesellschaft einzureichen ist; die Bekanntmachung nach Absatz 1 Satz 2 entfällt. Die Aufstellung des Anteilsbesitzes (§ 287) braucht nicht im Bundesanzeiger bekannt gemacht zu werden.
(3) The legal representatives of a corporation which must prepare consolidated financial statements must publish the consolidated financial statements, along with the certification of the financial statements or the notation as to its refusal, and the consolidated management report as well as the report of the supervisory board *[Aufsichtsrat]* in the Federal Gazette without undue delay after their presentation to the shareholders, but at the latest prior to the expiration of the twelfth month of the fiscal year following the close of the fiscal year of the consolidated financial statements and shall file the publication at the Commercial Register at the corporation's domicile with the enclosure of the designated records. If the reporting of the supervisory board regarding the consolidated financial statements and the consolidated	(3) Die gesetzlichen Vertreter einer Kapitalgesellschaft, die einen Konzernabschluß aufzustellen hat, haben den Konzernabschluß unverzüglich nach seiner Vorlage an die Gesellschafter, jedoch spätestens vor Ablauf des zwölften Monats des dem Konzernabschlußstichtag nachfolgenden Geschäftsjahrs, mit dem Bestätigungsvermerk oder dem Vermerk über dessen Versagung und den Konzernlagebericht sowie den Bericht des Aufsichtsrats im Bundesanzeiger bekanntzumachen und die Bekanntmachung unter Beifügung der bezeichneten Unterlagen zum Handelsregister des Sitzes der Kapitalgesellschaft einzureichen. Ist die Berichterstattung des Aufsichtsrats über Konzernabschluß und Konzernlagebericht in einem nach Absatz 2 Satz 1 erste Halbsatz in Verbindung mit Absatz 1 Satz 1 zweiter Halbsatz offen gelegten Bericht des

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management report is contained in a report published pursuant to Subsection 2 sentence 1 first half-sentence in connection with Subsection 1 sentence 2 second half-sentence, then the publication of the report under sentence 1 can be replaced by a reference to the earlier or concurrent publication pursuant to Subsection 2 sentence 1 first half-sentence. The list of share ownership (§ 313 Subsection 4) need not be published in the Federal Gazette. Subsection 1 sentence 3 shall apply analogously.	Aufsichtsrats enthalten, so kann die Bekanntmachung des Berichts nach Satz 1 durch einen Hinweis auf die frühere oder gleichzeitige Bekanntmachung nach Absatz 2 Satz 1 erster Halbsatz ersetzt werden. Die Aufstellung des Anteilsbesitzes (§ 313 Abs. 4) braucht nicht im Bundesanzeiger bekannt gemacht zu werden. Absatz 1 Satz 3 ist entsprechend anzuwenden.
(4) In applying Subsections 2 and 3, the time of the filing of the records in the Federal Gazette governs the observance of the time period pursuant to Subsection 1 sentence 1 and Subsection 3 sentence 1.	(4) Bei Anwendung der Absätze 2 und 3 ist für die Wahrung der Fristen nach Absatz 1 Satz 1 und Absatz 3 Satz 1 der Zeitpunkt der Einreichung der Unterlagen beim Bundesanzeiger maßgebend.
(5) The company's obligations pursuant to law or the articles of association to differently publish, file or make accessible to persons the annual financial statements, management report, consolidated financial statements or the consolidated management report remain unaffected.	(5) Auf Gesetz, Gesellschaftsvertrag oder Satzung beruhende Pflichten der Gesellschaft, den Jahresabschluß, Lagebericht, Konzernabschluß oder Konzernlagebericht in anderer Weise bekanntzumachen, einzureichen oder Personen zugänglich zu machen, bleiben unberührt.
§ 333 Violation of the duty of confidentiality	**§ 333 Verletzung der Geheimhaltungspflicht**
(1) A term of imprisonment of up to one year or a monetary fine shall be imposed on anyone who without authorisation discloses a secret of the corporation, a subsidiary (§ 290 Subsections 1 and 2), a jointly run enterprise (§ 310) or an associated enterprise (§ 311), especially a trade or business secret that became known to him in his capacity as an auditor or auditor's assistant while examining the annual financial statements or the consolidated financial statements.	(1) Mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe wird bestraft, wer ein Geheimnis der Kapitalgesellschaft, eines Tochterunternehmens (§ 290 Abs. 1, 2), eines gemeinsam geführten Unternehmens (§ 310) oder eines assoziierten Unternehmens (§ 311), namentlich ein Betriebs- oder Geschäftsgeheimnis, das ihm in seiner Eigenschaft als Abschlußprüfer oder Gehilfe eines Abschlußprüfers bei Prüfung des Jahresabschlusses oder des Konzernabschlusses bekannt geworden ist, unbefugt offenbart.
(2) If the perpetrator acts for pay or with the intent to enrich himself or another or to	(2) Handelt der Täter gegen Entgelt oder in der Absicht, sich oder einen anderen zu

Commercial Code	Handelsgesetzbuch - HGB
harm another, then the punishment shall be a term of imprisonment of up to two years or a monetary fine. The same punishment shall be imposed on anyone who without authorisation exploits a secret in the way described in Subsection 1, especially a trade or business secret that became known to him under the conditions described in Subsection 1.	bereichern oder einen anderen zu schädigen, so ist die Strafe Freiheitsstrafe bis zu zwei Jahren oder Geldstrafe. Ebenso wird bestraft, wer ein Geheimnis der in Absatz 1 bezeichneten Art, namentlich ein Betriebs- oder Geschäftsgeheimnis, das ihm unter den Voraussetzungen des Absatzes 1 bekannt geworden ist, unbefugt verwertet.
(3) The action will only be prosecuted upon the application of the corporation.	(3) Die Tat wird nur auf Antrag der Kapitalgesellschaft verfolgt.

1.10 Criminal Proceedings Act

Criminal Proceedings Act	Strafprozeßordnung - StPO
§ 53 Right to refuse testimony on professional grounds	**§ 53 [Zeugnisverweigerungsrecht aus beruflichen Gründen]**
(1) The following persons may also refuse to testify	(1) Zur Verweigerung des Zeugnisses sind ferner berechtigt
1. clergymen, concerning the information that was entrusted to them or became known to them in their capacity as spiritual advisers;	1. Geistliche über das, was ihnen in ihrer Eigenschaft als Seelsorger anvertraut worden oder bekannt geworden ist;
2. defense counsel of the accused, concerning the information that was entrusted to them or became known to them in this capacity;	2. Verteidiger des Beschuldigten über das, was ihnen in dieser Eigenschaft anvertraut worden oder bekannt geworden ist;
3. attorneys-at-law, patent attorneys, notaries, auditors, sworn certified accountants, tax consultants and tax representatives, doctors, dentists, psychological psychotherapists, psychotherapists specialising in the treatment of children and juveniles, pharmacists and midwives, concerning information entrusted to them or which became known to them in their professional capacity;	3. Rechtsanwälte, Patentanwälte, Notare, Wirtschaftsprüfer, vereidigte Buchprüfer, Steuerberater und Steuerbevollmächtigte, Ärzte, Zahnärzte, Psychologische Psychotherapeuten, Kinder- und Jugendlichenpsychotherapeuten, Apotheker und Hebammen über das, was ihnen in dieser Eigenschaft anvertraut worden oder bekannt geworden ist, Rechtsanwälte stehen dabei sonstige Mitglieder einer Rechtsanwaltskammer gleich;
3a. members or representatives of a recognized counselling agency pursuant to Sections 3 and 8 of the	3a. Mitglieder oder Beauftragte einer anerkannten Beratungsstelle nach den §§ 3 und 8 des

Criminal Proceedings Act	Strafprozeßordnung - StPO
Act on Pregnancies in Conflict Situations, concerning the information that was entrusted to them or became known to them in this capacity;	Schwangerschaftskonfliktgesetzes über das, was ihnen in dieser Eigenschaft anvertraut worden oder bekannt geworden ist;
3b. drugs dependency counsellors in a counselling agency recognized or set up by an authority, a body, institution or foundation under public law, concerning the information that was entrusted to them or became known to them in this capacity;	3b. Berater für Fragen der Betäubungsmittelabhängigkeit in einer Beratungsstelle, die eine Behörde oder eine Körperschaft, Anstalt oder Stiftung des öffentlichen Rechts anerkannt oder bei sich eingerichtet hat, über das, was ihnen in dieser Eigenschaft anvertraut worden oder bekannt geworden ist;
4. members of the Federal Parliament, of a Land Parliament or a second chamber, concerning persons who confided to them facts in their capacity as members of these bodies, or to whom they confided facts in this particular capacity, as well as the facts themselves;	4. Mitglieder des Bundestages, eines Landtages oder einer zweiten Kammer über Personen, die ihnen in ihrer Eigenschaft als Mitglieder dieser Organe oder denen sie in dieser Eigenschaft Tatsachen anvertraut haben sowie über diese Tatsachens selbst;
5. individuals who are or were professionally involved in the preparation, production or dissemination of periodically printed materials, radio or visual broadcasts or information and communication services intended to inform or build opinions.	5. Personen, die bei der Vorbereitung, Herstellung oder Verbreitung von Druckwerken, Rundfunksendungen, Filmberichten oder der Unterrichtung oder Meinungsbildung dienenden Informations- und Kommunikationsdiensten berufsmäßig mitwirken oder mitgewirkt haben.
The persons stated in sentence 1 no. 5 may refuse to give testimony on the author or submitter of contributions or documents or on other informants, as well as on the notifications given with regard to their activities, on their contents and well as on the contents of materials which they have compiled themselves and the subject of occupational observations. This shall only apply where it concerns contributions, documents, notifications and materials for editorial purposes or for editorially processed information and communication services.	Die in Satz 1 Nr. 5 genannten Personen dürften das Zeugnis verweigern über die Person des Verfassers oder Einsenders von Beiträgen und Unterlagen oder des sonstigen Informanten sowie über die ihnen im Hinblick auf ihre Tätigkeit gemachten Mitteilungen, über deren Inhalt sowie über den Inhalt selbst erarbeiteter Materialien und den Gegenstand berufsbezogener Wahrnehmungen. Dies gilt nur, soweit es sich um Beiträge, Unterlagen, Mitteilungen und Materialien für den redaktionellen Teil oder redaktionell aufbereitete Informations- und Kommunikationsdienste handelt.
(2) The persons named in paragraph 1, sentence 1, nos. 2 to 3b may not refuse to testify if they have been released from	(2) Die in Absatz 1 Satz 1 Nr. 2 bis 3b Genannten dürfen das Zeugnis nicht verweigern, wenn sie von der Verpflichtung

Criminal Proceedings Act	**Strafprozeßordnung - StPO**
their obligation of secrecy. The entitlement of the persons named in paragraph 1, sentence 1, no. 5 to refuse to testify on the contents of materials produced by them and on the subject of corresponding observations shall expire if the statement is intended to clarify a crime or if the subject of the investigation is	zur Verschwiegenheit entbunden sind. Die Berechtigung zur Zeugnisverweigerung der in Absatz 1 Satz 1 Nr. 5 Genannten über den Inhalt selbst erarbeiteter Materialien und den Gegenstand entsprechender Wahrnehmungen entfällt, wenn die Aussage zur Aufklärung eines Verbrechens beitragen soll oder wenn Gegenstand der Untersuchung
1. an offence of treasonably endangering the peace and of endangering the democratic constitutional state, or of treason and of endangering external security (secs. 80a, 85, 87, 88, 95, also in connection with sec. 97b, secs. 97a, 98 to 100a of the Criminal Code),	1. eine Straftat des Friedensverrats und der Gefährdung des demokratischen Rechtsstaats oder des Landesverrats und der Gefährdung des äußeren Sicherheit (§§ 80a, 85, 87, 88, 95, auch in Verbindung mit § 97b, §§ 97a, 98 bis 100a des Strafgesetzbuches),
2. a sexual offence pursuant to secs. 174 to 176, 179 of the Criminal Code or	2. eine Straftat gegen die sexuelle Selbstbestimmung nach den §§ 174 bis 176, 179 des Strafgesetzbuches oder
3. money laundering, concealment of illicitly obtained assets pursuant to sec. 261, paras. 1 to 4 of the Criminal Act	3. eine Geldwäsche, eine Verschleierung unrechtmäßig erlangter Vermögenswerte nach § 261 Abs. 1 bis 4 des Strafgesetzbuches
and if the investigatioon of the case or the determination of the whereabouts of the accused would otherwise be futile or significantly more difficult. In these cases, however, the witness may also refuse to testify where such testimony would lead to the disclosure of the identity of the author or submitter of contributions and documents or of the identity of other informants, or would lead to the disclosure of information, or the contents thereof, supplied to the witness in respect of his or her activities pursuant to paragraph 1, sentence 1, no. 5.	ist und die Erforschung des Sachverhalts oder die Ermittlung des Aufenthaltsortes des Beschuldigten auf andere Weise aussichtslos oder wesentlich erschwert wäre. Der Zeuge kann jedoch auch in diesen Fällen die Aussage verweigern, soweit sie zur Offenbarung der Person des Verfassers oder Einsenders von Beiträgen und Unterlagen oder des sonstigen Informanten oder der ihm im Hinblick auf seine Tätigkeit nach Absatz 1 Satz 1 Nr. 5 gemachten Mitteilungen oder deren Inhalts führen würde.
§ 97 Objects not subject to seizure	**§ 97 [Der Beschlagnahme nicht unterliegende Gegenstände]**
(1) The following objects shall not be subject to seizure:	(1) Der Beschlagnahme unterliegen nicht
1. written communications between the	1. schriftliche Mitteilungen zwischen dem

Criminal Proceedings Act	Strafprozeßordnung - StPO
accused and the persons who, according to Section 52 or Section 53 subsection (1), numbers 1 to 3b, may refuse to testify,	Beschuldigten und den Personen, die nach § 52 oder § 53 Abs. 1 Satz 1 Nr. 1 bis 3b das Zeugnis verweigern dürfen;
2. notes by persons specified in Section 53 subsection (1), numbers 1 to 3b, concerning confidential information entrusted to them by the accused or concerning other circumstances covered by the right of refusal to testify,	2. Aufzeichnungen, welche die in § 53 Abs. 1 Satz 1 Nr. 1 bis 3b Genannten über die ihnen vom Beschuldigten anvertrauten Mitteilungen oder über andere Umstände gemacht haben, auf die sich das Zeugnisverweigerungsrecht erstreckt;
3. other objects, including the findings of medical examinations, covered by the right of the persons specified in Section 53 subsection (1), numbers 1 to 3b, of refusal to testify.	3. andere Gegenstände einschließlich der ärztlichen Untersuchungsbefunde, auf die sich das Zeugnisverweigerungsrecht der in § 53 Abs. 1 Satz 1 Nr. 1 bis 3b Genannten erstreckt.
(2) These restrictions shall apply only if these objects are in the custody of a person entitled to refuse to testify. Objects covered by the right of physicians, dentists, psychological psychotherapists, psychotherapists specialising in the treatment of children and juveniles, pharmacists and midwives to refuse to testify shall also not be subject to seizure if they are in the custody of a hospital, nor are objects to which the right of the person to refuse to testify mentioned in Section 53 subsection (1), numbers 3a and 3b, extends if they are in the custody of the counselling agency referred to in that provision. The restrictions of seizure shall not apply if the persons entitled to refuse to testify are suspected of incitement or accessoryship, obstruction of justice or handling stolen goods or where the objects concerned have been obtained by a criminal offense or have been used or are intended for use in perpetrating a criminal offense or where they emanate from a criminal offense.	(2) Diese Beschränkungen gelten nur, wenn die Gegenstände im Gewahrsam der zur Verweigerung des Zeugnisses Berechtigten sind. Der Beschlagnahme unterliegen auch nicht Gegenstände, auf die sich das Zeugnisverweigerungsrecht der Ärzte, Zahnärzte, Psychologischen Psychotherapeuten, Kinder- und Jugendlichenpsychotherapeuten, Apotheker und Hebammen erstreckt, wenn sie im Gewahrsam einer Krankenanstalt sind, sowie Gegenstände, auf die sich das Zeugnisverweigerungsrecht der in § 53 Abs. 1 Satz 1 Nr. 3a und 3b genannten Personen erstreckt, wenn sie im Gewahrsam der in dieser Vorschrift bezeichneten Beratungsstelle sind. Die Beschränkungen der Beschlagnahme gelten nicht, wenn die zur Verweigerung des Zeugnisses Berechtigten einer Teilnahme oder einer Begünstigung, Strafvereitelung oder Hehlerei verdächtig sind oder wenn es sich um Gegenstände handelt, die durch eine Straftat hervorgebracht oder zur Begehung einer Straftat gebraucht oder bestimmt sind oder die aus einer Straftat herrühren.
(3) The seizure of documents shall be inadmissible, insofar as they are covered by the right of Members of the Federal Parliament, or a Land Parliament or	(3) Soweit das Zeugnisverweigerungsrecht der Mitglieder des Bundestages, eines Landtages oder einer zweiten Kammer reicht (§ 53 Abs. 1 Satz 1 Nr. 4), ist die

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second chamber (Section 53 subsection (1), number 4) to refuse to testify.	Beschlagnahme von Schriftstücken unzulässig.
(4) Subsections (1) to (3) shall apply mutatis mutandis to the case where persons mentioned in Section 53 a may refuse to testify.	(4) Die Absätze 1 bis 3 sind entsprechend anzuwenden, soweit die in § 53a Genannten das Zeugnis verweigern dürfen.
(5) The seizure of documents, audio, visual and data recording media, illustrations and other images in the custody of persons referred to in Section 53 subsection (1), number 5, or of the editorial office, the publishing house, the printing works or the broadcasting company shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify. The third sentence of subsection (2) shall apply mutatis muntandis; however, the seizure in these cases shall only be admissible if it is, with respect to the basic rights of Article 5 (1) sentence 2 of the German constitution, not unproportionally in relation to the importance of the case and if any research of the facts of the case or the investigation of the whereabouts of the perpetrator by other means are impossible or materially complicated.	(5) Soweit das Zeugnisverweigerungsrecht der in § 53 Abs. 1 Satz 1 Nr. 5 genannten Personen reicht, ist die Beschlagnahme von Schriftstücken, Ton-, Bild- und Datenträgern, Abbildungen und anderen Darstellungen, die sich im Gewahrsam dieser Personen oder der Redaktion, des Verlages, der Druckerei oder der Rundfunkanstalt befinden, unzulässig. Absatz 2 Satz 3 gilt entsprechend; die Beschlagnahme ist jedoch auch in diesen Fällen nur zulässig, wenn sie unter Berücksichtigung der Grundrechte aus Artikel 5 Abs. 1 Satz 2 des Grundgesetzes nicht außer Verhältnis zur Bedeutung der Sache steht und die Erforschung des Sachverhaltes oder die Ermittlung des Aufenthaltsortes des Täters auf andere Weise aussichtslos oder wesentlich erschwert wäre.
§ 406 e Inspection of files	**§ 406 e [Akteneinsicht]**
(1) An attorney-at-law may inspect for the aggrieved person the files which are available to the court or, if public charges were preferred, would have to be submitted to it, and may inspect officially impounded pieces of evidence, if he shows a legitimate interest. In the cases mentioned in Section 395 such legitimate interest need not be shown.	(1) Für den Verletzten kann ein Rechtsanwalt die Akten, die dem Gericht vorliegen oder diesem im Falle der Erhebung der öffentlichen Klage vorzulegen wären, einsehen sowie amtlich verwahrte Beweisstücke besichtigen, soweit er hierfür ein berechtigtes Interesse darlegt. In den in § 395 genannten Fällen bedarf es der Darlegung eines berechtigten Interesses nicht.
(2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation appears to be jeopardized or if the	(2) Die Einsicht in die Akten ist zu versagen, soweit überwiegende schutzwürdige Interessen des Beschuldigten oder anderer Personen entgegenstehen. Sie kann versagt werden, soweit der Untersuchungszweck gefährdet erscheint oder durch sie das

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proceedings would be considerably delayed thereby.	Verfahren erheblich verzögert würde.
(3) Upon application and unless important reasons constitute an obstacle, the attorney-at-aw may be handed the files, but not the pieces of evidence, to take to his office or private premises.	(3) Auf Antrag können dem Rechtsanwalt, soweit nicht wichtige Gründe entgegenstehen, die Akten mit Ausnahme der Beweisstücke in seine Geschäftsräume oder seine Wohnung mitgegeben werden. Die Entscheidung ist nicht anfechtbar.
(4) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings, or otherwise the presiding judge of the court seized of the case. If the public prosecution office refuses inspection of the files, a court decision pursuant to Section 161a subsection (3), second to fourth sentences, may be applied for; the presiding judge's decision shall be incontestable. These decisions will not contain any reasons if by a disclosure of such reasons the purpose of the investigation might be endangered.	(4) Über die Gewährung der Akteneinsicht entscheidet im vorbereitenden Verfahren und nach rechtskräftigem Abschluß des Verfahrens die Staatsanwaltschaft, im übrigen der Vorsitzende des mit der Sache befaßten Gerichts. Gegen die Entscheidung der Staatsanwaltschaft nach Satz 1 kann gerichtliche Entscheidung nach Maßgabe des § 161a Abs. 3 Satz 2 bis 4 beantragt werden. Die Entscheidung des Vorsitzenden ist unanfechtbar. Diese Entscheidungen werden nicht mit Gründen versehen, soweit durch deren Offenlegung der Untersuchungszweck gefährdet werden könnte.
(5) Under the conditions in subsection (1) the aggrieved person may be given information and copies from the files; subsection (2) and (4), and Section 478 subsection (1), third and fourth sentence, shall apply mutatis mutandis.	(5) Unter den Voraussetzungen des Absatzes 1 können dem Verletzten Auskünfte und Abschriften aus den Akten erteilt werden; die Absätze 2 und 4 sowie § 478 Abs. 1 Satz 3 und 4 gelten entsprechend.
(6) Section 477 subsection (5) shall apply accordingly.	(6) § 477 Abs. 5 gilt entsprechend.

1.11 Data Protection Act - DPA

Data Protection Act - DPA	Bundesdatenschutzgesetz - BDSG
§ 1 Purpose and scope	**§ 1 Zweck und Anwendungsbereich des Gesetzes**
(1) The purpose of this Act is to protect the individual against his right to privacy being impaired through the handling of his personal data.	(1) Zweck dieses Gesetzes ist es, den Einzelnen davor zu schützen, dass er durch den Umgang mit seinen personenbezogenen Daten in seinem Persönlichkeitsrecht beeinträchtigt wird.

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(2) This Act shall apply to the collection, processing and use of personal data by	(2) Dieses Gesetz gilt für die Erhebung, Verarbeitung und Nutzung personenbezogener Daten durch
1. public bodies of the Federation,	1. öffentliche Stellen des Bundes,
2. public bodies of the Länder in so far as data protection is not governed by Land legislation and in so far as they	2. öffentliche Stellen der Länder, soweit der Datenschutz nicht durch Landesgesetz geregelt ist und soweit sie
a) execute federal law or,	a) Bundesrecht ausführen oder
b) act as bodies of the judicature and are not dealing with administrative matters.	b) als Organe der Rechtspflege tätig werden und es sich nicht um Verwaltungsangelegenheiten handelt,
3. non-public bodies, where they process, use or collect the data by means of or for data processing systems or where they process, use or collect the data in or from or for non-automated filing systems, unless the collection, processing or use of the data is solely for personal or domestic activities.	3. nicht-öffentliche Stellen, soweit sie die Daten unter Einsatz von Datenverarbeitungsanlagen verarbeiten, nutzen oder dafür erheben oder die Daten in oder aus nicht automatisierten Dateien verarbeiten, nutzen oder dafür erheben, es sei denn, die Erhebung, Verarbeitung oder Nutzung der Daten erfolgt ausschließlich für persönliche oder familiäre Tätigkeiten.
(3) In so far as other legal provisions of the Federation are applicable to personal data, including their publication, such provisions shall take precedence over the provisions of this Act. This shall not affect the duty to observe the legal obligation of maintaining secrecy, or professional or special official confidentiality not based on legal provisions.	(3) Soweit andere Rechtsvorschriften des Bundes auf personenbezogene Daten einschließlich deren Veröffentlichung anzuwenden sind, gehen sie den Vorschriften dieses Gesetzes vor. Die Verpflichtung zur Wahrung gesetzlicher Geheimhaltungspflichten oder von Berufs- oder besonderen Amtsgeheimnissen, die nicht auf gesetzlichen Vorschriften beruhen, bleibt unberührt.
(4) The provisions of this Act shall take precedence over those of the Administrative Procedures Act in so far as personal data are processed in ascertaining the facts.	(4) Die Vorschriften dieses Gesetzes gehen denen des Verwaltungsverfahrensgesetzes vor, soweit bei der Ermittlung des Sachverhalts personenbezogene Daten verarbeitet werden.
(5) This Act shall have no application where a data controller located in another Member State of the European Union or in another contracting state to the Agreement on the European Economic Area collects, processes or	(5) Dieses Gesetz findet keine Anwendung, sofern eine in einem anderen Mitgliedstaat der Europäischen Union oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum belegene verantwortliche Stelle personenbezogene

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uses personal data in Germany, unless this is carried out by a German branch. This Act shall apply where a data controller which is not located in a Member State of the European Union or in another contracting state to the Agreement on the European Economic Area collects, processes or uses personal data in Germany. Where this Act requires the data controller to be named, particulars shall also be required of its representative based in Germany. The previous two sentences shall not apply where data media are used only for the purpose of transit through Germany. The first sentence of §38, paragraph (1), is unaffected.	Daten im Inland erhebt, verarbeitet oder nutzt, es sei denn, dies erfolgt durch eine Niederlassung im Inland. Dieses Gesetz findet Anwendung, sofern eine verantwortliche Stelle, die nicht in einem Mitgliedstaat der Europäischen Union oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum belegen ist, personenbezogene Daten im Inland erhebt, verarbeitet oder nutzt. Soweit die verantwortliche Stelle nach diesem Gesetz zu nennen ist, sind auch Angaben über im Inland ansässige Vertreter zu machen. Die Sätze 2 und 3 gelten nicht, sofern Datenträger nur zum Zweck des Transits durch das Inland eingesetzt werden. § 38 Abs. 1 Satz 1 bleibt unberührt.
§ 2 Public and private bodies	**§ 2 Öffentliche und nicht-öffentliche Stellen**
(1) "Public bodies of the Federation" means the authorities, the bodies of the judicature and other public-law institutions of the Federation, of the federal corporations, establishments and foundations under public law as well as of their associations irrespective of their legal structure. The enterprises established by law out of the Special Fund of the German Federal Postal Administration are to be considered as public bodies, as long as they have an exclusive right according to the Postal Administration Law.	(1) Öffentliche Stellen des Bundes sind die Behörden, die Organe der Rechtspflege und andere öffentlich-rechtlich organisierte Einrichtungen des Bundes, der bundesunmittelbaren Körperschaften, Anstalten und Stiftungen des öffentlichen Rechts sowie deren Vereinigungen ungeachtet ihrer Rechtsform. Als öffentliche Stellen gelten die aus dem Sondervermögen Deutsche Bundespost durch Gesetz hervorgegangenen Unternehmen, solange ihnen ein ausschließliches Recht nach dem Postgesetz zusteht
(2) "Public bodies of the Länder" means the authorities, the bodies of the judicature and other public law institutions of a Land, of a municipality, an association of municipalities or other legal persons under public law subject to Land supervision as well as of their associations irrespective of their legal structure.	(2) Öffentliche Stellen der Länder sind die Behörden, die Organe der Rechtspflege und andere öffentlich-rechtlich organisierte Einrichtungen eines Landes, einer Gemeinde, eines Gemeindeverbandes und sonstiger der Aufsicht des Landes unterstehender juristischer Personen des öffentlichen Rechts sowie deren Vereinigungen ungeachtet ihrer Rechtsform.
(3) Private-law associations of public bodies of the Federation and the Länder performing public administration duties	(3) Vereinigungen des privaten Rechts von öffentlichen Stellen des Bundes und der Länder, die Aufgaben der öffentlichen

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shall be regarded as public bodies of the Federation, irrespective of private shareholdings, if	Verwaltung wahrnehmen, gelten ungeachtet der Beteiligung nicht-öffentlicher Stellen als öffentliche Stellen des Bundes, wenn
1. they operate beyond the territory of a Land or	1. sie über den Bereich eines Landes hinaus tätig werden oder
2. the Federation possesses the absolute majority of shares or votes.	2. dem Bund die absolute Mehrheit der Anteile gehört oder die absolute Mehrheit der Stimmen zusteht.
Otherwise they shall be regarded as public bodies of the Länder.	Andernfalls gelten sie als öffentliche Stellen der Länder.
(4) "Private bodies" means natural or legal persons, companies and other private law associations in so far as they are not covered by paragraphs 1 to 3 above. To the extent that a private body performs sovereign public administration duties, it shall be treated as a public body for the purposes of this Act.	(4) Nicht-öffentliche Stellen sind natürliche und juristische Personen, Gesellschaften und andere Personenvereinigungen des privaten Rechts, soweit sie nicht unter die Absätze 1 bis 3 fallen. Nimmt eine nicht-öffentliche Stelle hoheitliche Aufgaben der öffentlichen Verwaltung wahr, ist sie insoweit öffentliche Stelle im Sinne dieses Gesetzes.
§ 3 Further definitions	**§ 3 Weitere Begriffsbestimmungen**
(1) "Personal data" means any information concerning the personal or material circumstances of an identified or identifiable individual (the data subject).	(1) Personenbezogene Daten sind Einzelangaben über persönliche oder sachliche Verhältnisse einer bestimmten oder bestimmbaren natürlichen Person (Betroffener).
(2) "Automatic processing" means the collection, processing or use of personal data by means of data-processing equipment. A non-automated filing system is any non-automated set of personal data which is uniformly structured and can be accessed and evaluated according to specified characteristics.	(2) Automatisierte Verarbeitung ist die Erhebung, Verarbeitung oder Nutzung personenbezogener Daten unter Einsatz von Datenverarbeitungsanlagen. Eine nicht automatisierte Datei ist jede nicht automatisierte Sammlung personenbezogener Daten, die gleichartig aufgebaut ist und nach bestimmten Merkmalen zugänglich ist und ausgewertet werden kann.
(3) "Collection" means the acquisition of data on the data subject.	(3) Erheben ist das Beschaffen von Daten über den Betroffenen.
(4) "Processing" means the storage, modification, transfer, blocking and erasure of personal data. In particular cases, irrespective of the procedures applied:	(4) Verarbeiten ist das Speichern, Verändern, Übermitteln, Sperren und Löschen personenbezogener Daten. Im Einzelnen ist, ungeachtet der dabei angewendeten Verfahren:
1. "storage" means the entry, recording	1. Speichern das Erfassen, Aufnehmen

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or preservation of personal data on a storage medium so that they can be processed or used again,	oder Aufbewahren personenbezogener Daten auf einem Datenträger zum Zwecke ihrer weiteren Verarbeitung oder Nutzung,
2. "modification" means the alteration of the substance of stored personal data,	2. Verändern das inhaltliche Umgestalten gespeicherter personenbezogener Daten,
3. "transfer" means the disclosure to a third party of personal data stored or obtained by means of data processing either	3. Übermitteln das Bekanntgeben gespeicherter oder durch Datenverarbeitung gewonnener personenbezogener Daten an einen Dritten in der Weise, dass
a) through transmission of the data to the third party or	a) die Daten an den Dritten weitergegeben werden oder
b) through the third party inspecting or retrieving data held ready for inspection or retrieval,	b) der Dritte zur Einsicht oder zum Abruf bereitgehaltene Daten einsieht oder abruft,
4. "blocking" means labelling stored personal data so as to restrict their further processing or use,	4. Sperren das Kennzeichnen gespeicherter personenbezogener Daten, um ihre weitere Verarbeitung oder Nutzung einzuschränken,
5. "erasure" means the deletion of stored personal data.	5. Löschen das Unkenntlichmachen gespeicherter personenbezogener Daten.
(5) "Use" means any utilization of personal data other than processing.	(5) Nutzen ist jede Verwendung personenbezogener Daten, soweit es sich nicht um Verarbeitung handelt.
(6) "Depersonalization" means the modification of personal data so that the information concerning personal or material circumstances can no longer or only with a disproportionate amount of time, expense and labour be attributed to an identified or identifiable individual.	(6) Anonymisieren ist das Verändern personenbezogener Daten derart, dass die Einzelangaben über persönliche oder sachliche Verhältnisse nicht mehr oder nur mit einem unverhältnismäßig großen Aufwand an Zeit, Kosten und Arbeitskraft einer bestimmten oder bestimmbaren natürlichen Person zugeordnet werden können.
(6a) "Pseudonymisation" means the replacement of the name and other identifying attributes with a code with a view to making it impossible or significantly more difficult to identify the data subject.	(6a) Pseudonymisieren ist das Ersetzen des Namens und anderer Identifikationsmerkmale durch ein Kennzeichen zu dem Zweck, die Bestimmung des Betroffenen auszuschließen oder wesentlich zu erschweren.
(7) "Data controller" means any person	(7) Verantwortliche Stelle ist jede Person oder

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or body which collects, processes or uses personal data for itself or which engages others to do so on its behalf.	Stelle, die personenbezogene Daten für sich selbst erhebt, verarbeitet oder nutzt oder dies durch andere im Auftrag vornehmen lässt.
(8) "Recipient" means any person or body which receives data. "Third party" means any person or body other than the data controller. Third party does not include the data subject or persons and bodies in another Member State of the European Union or in another contracting state to the Agreement on the European Economic Area which collect, process or use data on behalf of others.	(8) Empfänger ist jede Person oder Stelle, die Daten erhält. Dritter ist jede Person oder Stelle außerhalb der verantwortlichen Stelle. Dritte sind nicht der Betroffene sowie Personen und Stellen, die im Inland, in einem anderen Mitgliedstaat der Europäischen Union oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum personenbezogene Daten im Auftrag erheben, verarbeiten oder nutzen.
(9) "Special categories of personal data" means data on racial and ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sexual life.	(9) Besondere Arten personenbezogener Daten sind Angaben über die rassische und ethnische Herkunft, politische Meinungen, religiöse oder philosophische Überzeugungen, Gewerkschaftszugehörigkeit, Gesundheit oder Sexualleben.
(10) "Mobile personal recording and processing media" are data media,	(10) Mobile personenbezogene Speicher- und Verarbeitungsmedien sind Datenträger,
1. which are supplied to the data subject,	1. die an den Betroffenen ausgegeben werden,
2. on which personal data can be automatically processed, other than mere recording, by the supplying body or by another body and	2. auf denen personenbezogene Daten über die Speicherung hinaus durch die ausgebende oder eine andere Stelle automatisiert verarbeitet werden können und
3. where the data subject can influence this processing only by using the medium.	3. bei denen der Betroffene diese Verarbeitung nur durch den Gebrauch des Mediums beeinflussen kann.
§ 4 Lawfulness of data collection, processing and use	**§ 4 Zulässigkeit der Datenerhebung, -verarbeitung und -nutzung**
(1) The collection, processing and use of personal data shall be lawful only if this Act or another legal provision permits or prescribes them or if the data subject has consented.	(1) Die Erhebung, Verarbeitung und Nutzung personenbezogener Daten sind nur zulässig, soweit dieses Gesetz oder eine andere Rechtsvorschrift dies erlaubt oder anordnet oder der Betroffene eingewilligt hat.
(2) Personal data shall be collected from the data subject. They may be collected	(2) Personenbezogene Daten sind beim Betroffenen zu erheben. Ohne seine Mitwirkung dürfen sie nur erhoben werden,

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without his participation only if	wenn
1. a statutory provision so provides or requires or	1. eine Rechtsvorschrift dies vorsieht oder zwingend voraussetzt oder
2.a) the administrative task to be fulfilled by its nature or purpose makes collection from other persons or bodies necessary or	2.a) die zu erfüllende Verwaltungsaufgabe ihrer Art nach oder der Geschäftszweck eine Erhebung bei anderen Personen oder Stellen erforderlich macht oder
b) collection from the data subject would entail disproportionate effort and there are no grounds for believing that overriding legitimate interests of the data subject would be prejudiced.	b) die Erhebung beim Betroffenen einen unverhältnismäßigen Aufwand erfordern würde und keine Anhaltspunkte dafür bestehen, dass überwiegende schutzwürdige Interessen des Betroffenen beeinträchtigt werden.
(3) If personal data are collected from the data subject he shall be informed by the data controller, unless he has already received the information by some other means, of	(3) Werden personenbezogene Daten beim Betroffenen erhoben, so ist er, sofern er nicht bereits auf andere Weise Kenntnis erlangt hat, von der verantwortlichen Stelle über
1. the identity of the data controller,	1. die Identität der verantwortlichen Stelle,
2. the purposes of the collection, processing or use and	2. die Zweckbestimmungen der Erhebung, Verarbeitung oder Nutzung und
3. the categories of recipients only where in the particular circumstances the data subject cannot be assumed to know of such disclosure.	3. die Kategorien von Empfängern nur, soweit der Betroffene nach den Umständen des Einzelfalles nicht mit der Übermittlung an diese rechnen muss,
If personal data are collected from a data subject on the basis of a statutory provision which requires the information to be furnished or if the furnishing of the information is a prerequisite for obtaining some benefit under the law, then the data subject shall be so advised or, if that is not the case, he shall be advised that provision of data is voluntary. Where necessary in the circumstances of the particular case or at his request he shall be informed of the statutory provision and of the consequences of refusing to provide the data.	zu unterrichten. Werden personenbezogene Daten beim Betroffenen aufgrund einer Rechtsvorschrift erhoben, die zur Auskunft verpflichtet, oder ist die Erteilung der Auskunft Voraussetzung für die Gewährung von Rechtsvorteilen, so ist der Betroffene hierauf, sonst auf die Freiwilligkeit seiner Angaben hinzuweisen. Soweit nach den Umständen des Einzelfalles erforderlich oder auf Verlangen, ist er über die Rechtsvorschrift und über die Folgen der Verweigerung von Angaben aufzuklären.
§ 4b Transfer of personal data abroad and to supranational and inter-state	**§ 4b Übermittlung personenbezogener Daten ins Ausland sowie an über- oder**

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bodies	**zwischenstaatliche Stellen**
(1) The transfer of personal data to bodies	(1) Für die Übermittlung personenbezogener Daten an Stellen
1. in other Member States of the European Union,	1. in anderen Mitgliedstaaten der Europäischen Union,
2. in other contracting states to the Agreement on the European Economic Area or	2. in anderen Vertragsstaaten des Abkommens über den Europäischen Wirtschaftsraum oder
3. within the institutions and bodies of the European Communities	3. der Organe und Einrichtungen der Europäischen Gemeinschaften
shall be governed by § 15, paragraph (1), § 16, paragraph (1) and §§ 28 to 30 in accordance with the laws and agreements applicable to such transfer, provided the transfer takes place in connection with activities which fall wholly or partly within the scope of the law of the European Communities.	gelten § 15 Abs. 1, § 16 Abs. 1 und §§ 28 bis 30 nach Maßgabe der für diese Übermittlung geltenden Gesetze und Vereinbarungen, soweit die Übermittlung im Rahmen von Tätigkeiten erfolgt, die ganz oder teilweise in den Anwendungsbereich des Rechts der Europäischen Gemeinschaften fallen.
(2) The transfer of personal data to the bodies referred to in paragraph (1), which does not take place in connection with activities which fall wholly or partly within the scope of the law of the European Communities, and to other foreign or supranational or inter-state bodies shall be governed by paragraph (1) *mutatis mutandi*. No transfer shall take place where the data subject has a legitimate interest in opposing transfer, especially where the bodies referred to in paragraph (1) do not offer an adequate level of data protection. The previous sentence shall not apply where the transfer is necessary for the discharge of a Federal public body's own duties on urgent grounds of security or for the performance of multilateral or bilateral obligations in the area of crisis management or conflict prevention or for humanitarian measures.	(2) Für die Übermittlung personenbezogener Daten an Stellen nach Absatz 1, die nicht im Rahmen von Tätigkeiten erfolgt, die ganz oder teilweise in den Anwendungsbereich des Rechts der Europäischen Gemeinschaften fallen, sowie an sonstige ausländische oder über- oder zwischenstaatliche Stellen gilt Absatz 1 entsprechend. Die Übermittlung unterbleibt, soweit der Betroffene ein schutzwürdiges Interesse an dem Ausschluss der Übermittlung hat, insbesondere wenn bei den in Satz 1 genannten Stellen ein angemessenes Datenschutzniveau nicht gewährleistet ist. Satz 2 gilt nicht, wenn die Übermittlung zur Erfüllung eigener Aufgaben einer öffentlichen Stelle des Bundes aus zwingenden Gründen der Verteidigung oder der Erfüllung über- oder zwischenstaatlicher Verpflichtungen auf dem Gebiet der Krisenbewältigung oder Konfliktverhinderung oder für humanitäre Maßnahmen erforderlich ist.
(3) The adequacy of the level of protection shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data	(3) Die Angemessenheit des Schutzniveaus wird unter Berücksichtigung aller Umstände beurteilt, die bei einer Datenübermittlung oder einer Kategorie von Datenübermittlungen von

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transfer operations; particular consideration can be given to the nature of the data, the purpose and duration of the proposed processing operation, the country of origin and country of final destination, the rules of law, applicable to the recipient and the professional rules and security measures applicable to him.	Bedeutung sind; insbesondere können die Art der Daten, die Zweckbestimmung, die Dauer der geplanten Verarbeitung, das Herkunfts- und das Endbestimmungsland, die für den betreffenden Empfänger geltenden Rechtsnormen sowie die für ihn geltenden Standesregeln und Sicherheitsmaßnahmen herangezogen werden.
(4) In the cases referred to in the second subparagraph of § 16, paragraph (1), the transferring body shall notify the data subject of the fact that his data have been transferred. The foregoing shall not apply if it can be expected that the data subject will obtain the information by some other means or if the notification would endanger public security or would otherwise be prejudicial to the Federal Republic or to a Land.	(4) In den Fällen des § 16 Abs. 1 Nr. 2 unterrichtet die übermittelnde Stelle den Betroffenen von der Übermittlung seiner Daten. Dies gilt nicht, wenn damit zu rechnen ist, dass er davon auf andere Weise Kenntnis erlangt, oder wenn die Unterrichtung die öffentliche Sicherheit gefährden oder sonst dem Wohl des Bundes oder eines Landes Nachteile bereiten würde.
(5) Responsibility for the lawfulness of a transfer shall be borne by the transferring body.	(5) Die Verantwortung für die Zulässigkeit der Übermittlung trägt die übermittelnde Stelle.
(6) The body to which the data are transferred shall be notified of the purpose for which the data are being transferred.	(6) Die Stelle, an die die Daten übermittelt werden, ist auf den Zweck hinzuweisen, zu dessen Erfüllung die Daten übermittelt werden.
§ 4c Exceptions	**§ 4c Ausnahmen**
(1) In connection with activities which fall wholly or partly within the scope of the law of the European Communities, the transfer of personal data to bodies other than those referred to in § 4b, paragraph (1), shall be lawful, even where the level of data protection offered is not adequate, if	(1) Im Rahmen von Tätigkeiten, die ganz oder teilweise in den Anwendungsbereich des Rechts der Europäischen Gemeinschaften fallen, ist eine Übermittlung personenbezogener Daten an andere als die in § 4b Abs. 1 genannten Stellen, auch wenn bei ihnen ein angemessenes Datenschutzniveau nicht gewährleistet ist, zulässig, sofern
1. the data subject has given his consent,	1. der Betroffene seine Einwilligung gegeben hat,
2. the transfer is necessary for the performance of a contract between the data subject and the data controller or for the implementation of pre-contractual measures which have been arranged at the data	2. die Übermittlung für die Erfüllung eines Vertrags zwischen dem Betroffenen und der verantwortlichen Stelle oder zur Durchführung von vorvertraglichen Maßnahmen, die auf Veranlassung des Betroffenen getroffen worden sind,

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subject's behest,	erforderlich ist,
3. the transfer is necessary for the formation or performance of a contract which has been or is to be entered into in the data subject's interest by the data controller with a third party,	3. die Übermittlung zum Abschluss oder zur Erfüllung eines Vertrags erforderlich ist, der im Interesse des Betroffenen von der verantwortlichen Stelle mit einem Dritten geschlossen wurde oder geschlossen werden soll,
4. the transfer is necessary on important public interest grounds or for the establishment, exercise or defence of legal claims,	4. die Übermittlung für die Wahrung eines wichtigen öffentlichen Interesses oder zur Geltendmachung, Ausübung oder Verteidigung von Rechtsansprüchen vor Gericht erforderlich ist,
5. the transfer is necessary in order to protect vital interests of the data subject or	5. die Übermittlung für die Wahrung lebenswichtiger Interessen des Betroffenen erforderlich ist oder
6. the transfer is made from a register which is intended to provide information to the public and is open to inspection either by the public in general or by all those who can demonstrate a legitimate interest, provided that the conditions laid down by law are met in the particular case.	6. die Übermittlung aus einem Register erfolgt, das zur Information der Öffentlichkeit bestimmt ist und entweder der gesamten Öffentlichkeit oder allen Personen, die ein berechtigtes Interesse nachweisen können, zur Einsichtnahme offen steht, soweit die gesetzlichen Voraussetzungen im Einzelfall gegeben sind.
The body to whom the data are transferred shall be advised that the data transferred may be processed or used only for the purpose for which they were transferred.	Die Stelle, an die die Daten übermittelt werden, ist darauf hinzuweisen, dass die übermittelten Daten nur zu dem Zweck verarbeitet oder genutzt werden dürfen, zu dessen Erfüllung sie übermittelt werden.
(2) Without prejudice to the first sentence of paragraph (1), the competent supervisory authority may authorize individual transfer operations or particular sets of transfer operations whereby personal data are transferred to bodies other than those referred to in § 4b, paragraph (1), if the data controller shows adequate safeguards with respect to the protection of privacy and the exercise of the associated rights; the safeguards may consist in particular of contract clauses or binding rules of an enterprise. In the case of post and telecommunications organizations, the	(2) Unbeschadet des Absatzes 1 Satz 1 kann die zuständige Aufsichtsbehörde einzelne Übermittlungen oder bestimmte Arten von Übermittlungen personenbezogener Daten an andere als die in § 4b Abs. 1 genannten Stellen genehmigen, wenn die verantwortliche Stelle ausreichende Garantien hinsichtlich des Schutzes des Persönlichkeitsrechts und der Ausübung der damit verbundenen Rechte vorweist; die Garantien können sich insbesondere aus Vertragsklauseln oder verbindlichen Unternehmensregelungen ergeben. Bei den Post- und Telekommunikationsunternehmen ist der Bundesbeauftragte für den

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Federal Data Protection Commissioner shall be competent. Where the transfer is to be made by public bodies, these bodies shall assess whether the conditions described in the first sentence of this paragraph are satisfied.	Datenschutz zuständig. Sofern die Übermittlung durch öffentliche Stellen erfolgen soll, nehmen diese die Prüfung nach Satz 1 vor.
(3) The Länder shall notify the Federal Government of decisions taken pursuant to the first sentence of paragraph (2).	(3) Die Länder teilen dem Bund die nach Absatz 2 Satz 1 ergangenen Entscheidungen mit.
§ 11 Collection, processing or use of personal data by an agent	**§ 11 Erhebung, Verarbeitung oder Nutzung personenbezogener Daten im Auftrag**
(1) Where other bodies are commissioned to collect, process or use personal data, responsibility for compliance with the provisions of this Act and with other data protection provisions shall rest with the principal. The rights referred to in sections 6, 7 and 8 of this Act shall be asserted vis-à-vis the principal.	(1) Werden personenbezogene Daten im Auftrag durch andere Stellen erhoben, verarbeitet oder genutzt, ist der Auftraggeber für die Einhaltung der Vorschriften dieses Gesetzes und anderer Vorschriften über den Datenschutz verantwortlich. Die in den §§ 6, 7 und 8 genannten Rechte sind ihm gegenüber geltend zu machen.
(2) The agent shall be carefully selected, with particular regard for the suitability of the technical and organizational measures taken by him. The commission shall be given in writing, specifying the data collection, processing and use of the data, the technical and organizational measures and any subcommissions. In the case of public bodies, the commission may be given by the supervisory authority. The principal must satisfy himself that the agent's technical and organizational measures are complied with.	(2) Der Auftragnehmer ist unter besonderer Berücksichtigung der Eignung der von ihm getroffenen technischen und organisatorischen Maßnahmen sorgfältig auszuwählen. Der Auftrag ist schriftlich zu erteilen, wobei die Datenerhebung, -verarbeitung oder -nutzung, die technischen und organisatorischen Maßnahmen und etwaige Unterauftragsverhältnisse festzulegen sind. Er kann bei öffentlichen Stellen auch durch die Fachaufsichtsbehörde erteilt werden. Der Auftraggeber hat sich von der Einhaltung der beim Auftragnehmer getroffenen technischen und organisatorischen Maßnahmen zu überzeugen.
(3) The agent may collect, process or use the data only as instructed by the principal. If he thinks that an instruction of the principal infringes this Act or other data protection provisions, he shall point this out to the principal without delay.	(3) Der Auftragnehmer darf die Daten nur im Rahmen der Weisungen des Auftraggebers erheben, verarbeiten oder nutzen. Ist er der Ansicht, daß eine Weisung des Auftraggebers gegen dieses Gesetz oder andere Vorschriften über den Datenschutz verstößt, hat er den Auftraggeber unverzüglich darauf hinzuweisen.

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(4) For the agent the only applicable provisions other than those of sections 5, 9, 43 (1), (3) and (4) as well as sections 44 (1), Nos. 2, 5, 6 and 7 and (2) of this Act shall be the provisions on data protection control or supervision, namely for	(4) Für den Auftragnehmer gelten neben den §§ 5, 9, 43 Abs. 1 Nr.. 2, 10 und 11, Abs. 2 Nr. 1 bis 3 und Abs. 3 sowie § 44 nur die Vorschriften über die Datenschutzkontrolle oder die Aufsicht, und zwar für
1.a) public bodies,	1.a) öffentliche Stellen,
b) private bodies where the public sector possesses the majority of shares or votes and where the principal is a public body, sections 18, 24 to 26 of this Act or the relevant data protection laws of the Länder,	b) nicht-öffentliche Stellen, bei denen der öffentlichen Hand die Mehrheit der Anteile gehört oder die Mehrheit der Stimmen zusteht und der Auftraggeber eine öffentliche Stelle ist, die §§ 18, 24 bis 26 oder die entsprechenden Vorschriften der Datenschutzgesetze der Länder,
2. other private bodies in so far as they are commissioned to collect, process or use personal data in the normal course of business as service enterprises, sections 4f, 4g and 38 of this Act.	2. die übrigen nicht-öffentlichen Stellen, soweit sie personenbezogene Daten im Auftrag als Dienstleistungsunternehmen geschäftsmäßig erheben, verarbeiten oder nutzen, die §§ 4f, 4g und 38.
(5) Paragraphs (1) to (4) shall apply *mutatis mutandi* where the testing or maintenance of automated procedures or data-processing systems is carried out by other bodies and the possibility of personal data being accessed cannot be ruled out.	(5) Die Absätze 1 bis 4 gelten entsprechend, wenn die Prüfung oder Wartung automatisierter Verfahren oder von Datenverarbeitungsanlagen durch andere Stellen im Auftrag vorgenommen wird und dabei ein Zugriff auf personenbezogene Daten nicht ausgeschlossen werden kann.
§ 28 Collection, processing and use of data for one's own purposes	**§ 28 Datenerhebung, -verarbeitung und -nutzung für eigene Zwecke**
(1) The collection, storage, modification or communication of personal data or their use as a means of fulfilling one's own business purposes shall be admissible	(1) Das Erheben, Speichern, Verändern oder Übermitteln personenbezogener Daten oder ihre Nutzung als Mittel für die Erfüllung eigener Geschäftszwecke ist zulässig,
1. for the purposes of a contract or a quasi contractual fiduciary relationship with the data subject,	1. wenn es der Zweckbestimmung eines Vertragsverhältnisses oder vertragsähnlichen Vertrauensverhältnisses mit dem Betroffenen dient,
2. in so far as this is necessary to safeguard justified interests of the data controller and there is no	2. soweit es zur Wahrung berechtigter Interessen der verantwortlichen Stelle erforderlich ist und kein Grund zu der

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reason to assume that the data subject has an overriding legitimate interest in his data being excluded from processing or use, or	Annahme besteht, dass das schutzwürdige Interesse des Betroffenen an dem Ausschluss der Verarbeitung oder Nutzung überwiegt, oder
3. if the data are generally accessible or if the data controller can lawfully publish them, unless the data subject's legitimate interest in precluding processing or use clearly outweighs the justified interest of the data controller.	3. wenn die Daten allgemein zugänglich sind oder die verantwortliche Stelle sie veröffentlichen dürfte, es sei denn, dass das schutzwürdige Interesse des Betroffenen an dem Ausschluss der Verarbeitung oder Nutzung gegenüber dem berechtigten Interesse der verantwortlichen Stelle offensichtlich überwiegt.
In the collection of personal data the purposes for which the data are to be processed or used shall be recorded specifically.	Bei der Erhebung personenbezogener Daten sind die Zwecke, für die die Daten verarbeitet oder genutzt werden sollen, konkret festzulegen.
(2) They may be disclosed or used for a different purpose only subject to the conditions set forth in subparagraphs 2 and 3 of the first sentence of paragraph (1).	(2) Für einen anderen Zweck dürfen sie nur unter den Voraussetzungen des Absatzes 1 Satz 1 Nr. 2 und 3 übermittelt oder genutzt werden.
(3) Disclosure or use for another purpose shall also be lawful:	(3) Die Übermittlung oder Nutzung für einen anderen Zweck ist auch zulässig:
1. where it is necessary to protect the legitimate interests of a third party or	1. soweit es zur Wahrung berechtigter Interessen eines Dritten oder
2. where it is necessary to avert threats to national or public security or for the investigation of crime, or	2. zur Abwehr von Gefahren für die staatliche und öffentliche Sicherheit sowie zur Verfolgung von Straftaten erforderlich ist, oder
3. for purposes of marketing, market research and opinion polling, in relation to data in list form or otherwise combined data on members of a category of persons and restricted to	3. für Zwecke der Werbung, der Markt- und Meinungsforschung, wenn es sich um listenmäßig oder sonst zusammengefasste Daten über Angehörige einer Personengruppe handelt, die sich auf
a) whether or not the data subject belongs to that category of persons,	a) eine Angabe über die Zugehörigkeit des Betroffenen zu dieser Personengruppe,
b) occupation, trade or business,	b) Berufs-, Branchen- oder Geschäftsbezeichnung,
c) name,	c) Namen,

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d) title,	d) Titel,
e) academic degrees	e) akademische Grade,
f) address and	f) Anschrift und
g) year of birth	g) Geburtsjahr
and there are no grounds for believing that the data subject has a legitimate interest in precluding the disclosure or use or	beschränken und kein Grund zu der Annahme besteht, dass der Betroffene ein schutzwürdiges Interesse an dem Ausschluss der Übermittlung oder Nutzung hat, oder
4. it is necessary in the interest of a research institution for carrying out scientific research and the scientific interest in carrying out the research project substantially outweighs the data subject's interest in precluding the change of purpose and the object of the research could not be achieved by other means without unreasonable effort or at all.	4. wenn es im Interesse einer Forschungseinrichtung zur Durchführung wissenschaftlicher Forschung erforderlich ist, das wissenschaftliche Interesse an der Durchführung des Forschungsvorhabens das Interesse des Betroffenen an dem Ausschluss der Zweckänderung erheblich überwiegt und der Zweck der Forschung auf andere Weise nicht oder nur mit unverhältnismäßigem Aufwand erreicht werden kann.
In the cases covered by subparagraph 3, there shall be a presumption that such an interest exists where in accordance with the stated object of a contractual agreement or a quasi-contractual relationship of trust, stored data are disclosed relating to	In den Fällen des Satzes 1 Nr. 3 ist anzunehmen, dass dieses Interesse besteht, wenn im Rahmen der Zweckbestimmung eines Vertragsverhältnisses oder vertragsähnlichen Vertrauensverhältnisses gespeicherte Daten übermittelt werden sollen, die sich
1. criminal offences,	1. auf strafbare Handlungen,
2. administrative offences and	2. auf Ordnungswidrigkeiten sowie
3. in the case of disclosure by an employer, relating to employment relationships.	3. bei Übermittlung durch den Arbeitgeber auf arbeitsrechtliche Rechtsverhältnisse beziehen.
(4) If the data subject objects vis-à-vis the data controller to the use or communication of his data for purposes of advertising or of market or opinion research, use or communication for such purposes shall be inadmissible. Upon being approached for the purposes of marketing or market research or opinion polling, the data subject shall be	(4) Widerspricht der Betroffene bei der verantwortlichen Stelle der Nutzung oder Übermittlung seiner Daten für Zwecke der Werbung oder der Markt- oder Meinungsforschung, ist eine Nutzung oder Übermittlung für diese Zwecke unzulässig. Der Betroffene ist bei der Ansprache zum Zweck der Werbung oder der Markt- oder Meinungsforschung über die verantwortliche

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informed of the identity of the data controller and of his right of objection referred to in the previous sentence; if the party making the approach is using data which are held by a body unknown to him, that party shall also ensure that the data subject can find out the origin of the data. Where the data subject objects vis-à-vis the third party to whom the data are disclosed under paragraph (3) above to processing or use for purposes of advertising or of market or opinion research, the recipient shall block the data for such purposes.	Stelle sowie über das Widerspruchsrecht nach Satz 1 zu unterrichten; soweit der Ansprechende personenbezogene Daten des Betroffenen nutzt, die bei einer ihm nicht bekannten Stelle gespeichert sind, hat er auch sicherzustellen, dass der Betroffene Kenntnis über die Herkunft der Daten erhalten kann. Widerspricht der Betroffene bei dem Dritten, dem die Daten nach Absatz 3 übermittelt werden, der Verarbeitung oder Nutzung für Zwecke der Werbung oder der Markt- oder Meinungsforschung, hat dieser die Daten für diese Zwecke zu sperren.
(5) The third party to whom the data were disclosed may process or use them only for the purpose for which they were communicated to him. Processing or use for other purposes by non-public bodies shall be admissible only if the requirements of paragraphs (2) and (3) above are met; and by public bodies only subject to the requirements of § 14, paragraph (2). The communicating body shall point this out to him.	(5) Der Dritte, dem die Daten übermittelt worden sind, darf diese nur für den Zweck verarbeiten oder nutzen, zu dessen Erfüllung sie ihm übermittelt werden. Eine Verarbeitung oder Nutzung für andere Zwecke ist nichtöffentlichen Stellen nur unter den Voraussetzungen der Absätze 2 und 3 und öffentlichen Stellen nur unter den Voraussetzungen des § 14 Abs. 2 erlaubt. Die übermittelnde Stelle hat ihn darauf hinzuweisen.
(6) The collection, processing or use of special categories of personal data (§ 3, paragraph (9)) for a party's own business purposes shall be lawful, where the data subject has not given consent in accordance with § 4a, paragraph (3), if	(6) Das Erheben, Verarbeiten und Nutzen von besonderen Arten personenbezogener Daten (§ 3 Abs. 9) für eigene Geschäftszwecke ist zulässig, soweit nicht der Betroffene nach Maßgabe des § 4a Abs. 3 eingewilligt hat, wenn
1. it is necessary in order to safeguard vital interests of the data subject or of a third party where the data subject is physically or legally incapable of giving his consent,	1. dies zum Schutz lebenswichtiger Interessen des Betroffenen oder eines Dritten erforderlich ist, sofern der Betroffene aus physischen oder rechtlichen Gründen außerstande ist, seine Einwilligung zu geben,
2. the data in question has manifestly been placed in the public domain by the data subject,	2. es sich um Daten handelt, die der Betroffene offenkundig öffentlich gemacht hat,
3. it is necessary for the establishment, exercise or defense of legal claims and there are no grounds for believing that the data subject has an overriding legitimate interest in	3. dies zur Geltendmachung, Ausübung oder Verteidigung rechtlicher Ansprüche erforderlich ist und kein Grund zu der Annahme besteht, dass das schutzwürdige Interesse des Betroffenen

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excluding the collection, processing or use, or	an dem Ausschluss der Erhebung, Verarbeitung oder Nutzung überwiegt, oder
4. it is necessary for conducting scientific research and the scientific interest in carrying out the research project substantially outweighs the data subject's interest in precluding collection and the purpose of the research could not be achieved by other means without unreasonable effort or at all.	4. dies zur Durchführung wissenschaftlicher Forschung erforderlich ist, das wissenschaftliche Interesse an der Durchführung des Forschungsvorhabens das Interesse des Betroffenen an dem Ausschluss der Erhebung, Verarbeitung und Nutzung erheblich überwiegt und der Zweck der Forschung auf andere Weise nicht oder nur mit unverhältnismäßigem Aufwand erreicht werden kann.
(7) The collection of special categories of personal data (§ 3, paragraph (9)) shall also be lawful if necessary for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional or by another person subject to an equivalent obligation of secrecy. The processing and use of data for the purposes specified in the previous sentence shall be in accordance with the secrecy obligations by which the persons referred to in the previous sentence are bound. If for a purpose specified in the first sentence hereof data on the health of individuals are collected, processed or used by members of a profession not referred to in § 203, paragraphs (1) and (3) of the Penal Code involving the diagnosis, curing or alleviation of diseases or the manufacture or distribution of medicines, this shall be lawful only subject to the conditions under it would be lawful for a doctor.	(7) Das Erheben von besonderen Arten personenbezogener Daten (§ 3 Abs. 9) ist ferner zulässig, wenn dies zum Zweck der Gesundheitsvorsorge, der medizinischen Diagnostik, der Gesundheitsversorgung oder Behandlung oder für die Verwaltung von Gesundheitsdiensten erforderlich ist und die Verarbeitung dieser Daten durch ärztliches Personal oder durch sonstige Personen erfolgt, die einer entsprechenden Geheimhaltungspflicht unterliegen. Die Verarbeitung und Nutzung von Daten zu den in Satz 1 genannten Zwecken richtet sich nach den für die in Satz 1 genannten Personen geltenden Geheimhaltungspflichten. Werden zu einem in Satz 1 genannten Zweck Daten über die Gesundheit von Personen durch Angehörige eines anderen als in § 203 Abs. 1 und 3 des Strafgesetzbuchs genannten Berufes, dessen Ausübung die Feststellung, Heilung oder Linderung von Krankheiten oder die Herstellung oder den Vertrieb von Hilfsmitteln mit sich bringt, erhoben, verarbeitet oder genutzt, ist dies nur unter den Voraussetzungen zulässig, unter denen ein Arzt selbst hierzu befugt wäre.
(8) The special categories of personal data (§ 3, paragraph (9)) may be disclosed or used for another purpose only subject to the conditions set out in paragraph (6), subparagraphs 1 to 4, or the first sentence of paragraph (7).	(8) Für einen anderen Zweck dürren die besonderen Arten personenbezogener Daten (§ 3 Abs. 9) nur unter den Voraussetzungen des Absatzes 6 Nr. 1 bis 4 oder des Absatzes 7 Satz 1 übermittelt oder genutzt werden. Eine Übermittlung oder Nutzung ist auch

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Disclosure or use shall also be lawful if it is necessary to avert substantial threats to national or public security or for the investigation of major crime.	zulässig, wenn dies zur Abwehr von erheblichen Gefahren für die staatliche und öffentliche Sicherheit sowie zur Verfolgung von Straftaten von erheblicher Bedeutung erforderlich ist.
(9) Organizations of a non-profit nature with a political, philosophical, religious or trade-union aim may collect, process use special categories of personal data (§ 3, paragraph (9)) if it is necessary for the organization's activity. The foregoing applies only to the personal data of their members or of persons who have regular contact with them in connection with their purposes. The disclosure of these personal data to individuals or bodies outside the organization shall be lawful only subject to the conditions of § 4a, paragraph (3). Paragraph (3), subparagraph 2 shall apply *mutatis mutandi*.	(9) Organisationen, die politisch, philosophisch, religiös oder gewerkschaftlich ausgerichtet sind und keinen Erwerbszweck verfolgen, dürfen besondere Arten personenbezogener Daten (§ 3 Abs. 9) erheben, verarbeiten oder nutzen, soweit dies für die Tätigkeit der Organisation erforderlich ist. Dies gilt nur für personenbezogene Daten ihrer Mitglieder oder von Personen, die im Zusammenhang mit deren Tätigkeitszweck regelmäßig Kontakte mit ihr unterhalten. Die Übermittlung dieser personenbezogenen Daten an Personen oder Stellen außerhalb der Organisation ist nur unter den Voraussetzungen des § 4a Abs. 3 zulässig. Absatz 3 Nr. 2 gilt entsprechend.
§ 29 Collection and recording of data in the course of business with a view to disclosure	**§ 29 Geschäftsmäßige Datenerhebung und -speicherung zum Zweck der Übermittlung**
(1) The collection, storage or modification of personal data in the normal course of business for the purpose of communication, in particular if this is for purposes of marketing, information services, commercial address lists or market research and opinion polling, shall be admissible if	(1) Das geschäftsmäßige Erheben, Speichern oder Verändern personenbezogener Daten zum Zweck der Übermittlung, insbesondere wenn dies der Werbung, der Tätigkeit von Auskunfteien, dem Adresshandel oder der Markt und Meinungsforschung dient, ist zulässig, wenn
1. there is no reason to assume that the data subject has a legitimate interest in his data being excluded from collection, storage or modification or	1. kein Grund zu der Annahme besteht, dass der Betroffene ein schutzwürdiges Interesse an dem Ausschluss der Erhebung, Speicherung oder Veränderung hat, oder
2. the data can be taken from generally accessible sources or the data controller would be entitled to publish them, unless the data subject clearly has an overriding legitimate interest in his data being excluded from collection, use or	2. die Daten aus allgemein zugänglichen Quellen entnommen werden können oder die verantwortliche Stelle sie veröffentlichen dürfte, es sei denn, dass das schutzwürdige Interesse des Betroffenen an dem Ausschluss der Erhebung, Speicherung oder

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processing.	Veränderung offensichtlich überwiegt.
The second sentence of section 28 (1) of this Act shall apply.	§ 28 Abs. 1 Satz 2 ist anzuwenden.
(2) Communication in connection with the purposes referred to in paragraph (1) shall be admissible if	(2) Die Übermittlung im Rahmen der Zwecke nach Absatz 1 ist zulässig, wenn
1.a) the third party to whom the data are disclosed credibly proves a justified interest in knowledge of the data or	1.a) der Dritte, dem die Daten übermittelt werden, ein berechtigtes Interesse an ihrer Kenntnis glaubhaft dargelegt hat oder
b) the data pursuant to section 28 (3), subparagraph 3 of this Act have been compiled in lists or otherwise combined and are to be communicated for purposes of advertising or of market or opinion research and	b) es sich um listenmäßig oder sonst zusammengefasste Daten nach § 28 Abs. 3 Nr. 3 handelt, die für Zwecke der Werbung oder der Markt- oder Meinungsforschung übermittelt werden sollen, und
2. there is no reason to assume that the data subject has a legitimate interest in his data being excluded from communication.	2. kein Grund zu der Annahme besteht, dass der Betroffene ein schutzwürdiges Interesse an dem Ausschluss der Übermittlung hat.
The second sentence of section 28 (3) of this Act shall apply *mutatis mutandis*. In the case of communication under No. 1 (a) above, the reasons for the existence of a justified interest and the means of credibly presenting them shall be recorded by the communicating body. In the case of communication through automated retrieval, such recording shall be required of the third party to whom the data are disclosed.	§ 28 Abs. 3 Satz 2 gilt entsprechend. Bei der Übermittlung nach Nummer 1 Buchstabe a sind die Gründe für das Vorliegen eines berechtigten Interesses und die Art und Weise ihrer glaubhaften Darlegung von der übermittelnden Stelle aufzuzeichnen. Bei der Übermittlung im automatisierten Abrufverfahren obliegt die Aufzeichnungspflicht dem Dritten, dem die Daten übermittelt werden.
(3) The recording of personal data in electronic or printed directories of addresses, telephone numbers, businesses and the like must not take place if the data subject's wishes to the contrary are apparent from the electronic or printed directory or register on which they are based. The recipient of the data must ensure that annotations from electronic or printed directories or registers are included when being	(3) Die Aufnahme personenbezogener Daten in elektronische oder gedruckte Adress-, Telefon-, Branchen oder vergleichbare Verzeichnisse hat zu unterbleiben, wenn der entgegenstehende Wille des Betroffenen aus dem zugrunde liegenden elektronischen oder gedruckten Verzeichnis oder Register ersichtlich ist. Der Empfänger der Daten hat sicherzustellen, dass Kennzeichnungen aus elektronischen oder gedruckten Verzeichnissen oder Registern bei der Übernahme in Verzeichnisse oder Register

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incorporated into directories or registers.	übernommen werden.
(4) Section 28 (4) and (5) of this Act shall apply to the processing or use of communicated data.	(4) Für die Verarbeitung oder Nutzung der übermittelten Daten gilt § 28 Abs. 4 und 5.
(5) § 28, paragraphs (8) to (9) shall apply *mutatis mutandi.*	(5) § 28 Abs. 6 bis 9 gilt entsprechend.
§ 30 Collection and keeping of data in the course of business with a view to disclosure in anonymized form	**§ 30 Geschäftsmäßige Datenerhebung und -speicherung zum Zweck der Übermittlung in anonymisierter Form**
(1) If personal data are collected and stored in the normal course of business in order to communicate them in anonymized form, the characteristics enabling information concerning personal or material circumstances to be attributed to an identified or identifiable individual shall be stored separately. Such characteristics may be combined with the information only where necessary for storage or scientific purposes.	(1) Werden personenbezogene Daten geschäftsmäßig erhoben und gespeichert, um sie in anonymisierter Form zu übermitteln, sind die Merkmale gesondert zu speichern, mit denen Einzelangaben über persönliche oder sachliche Verhältnisse einer bestimmten oder bestimmbaren natürlichen Person zugeordnet werden können. Diese Merkmale dürfen mit den Einzelangaben nur zusammengeführt werden, soweit dies für die Erfüllung des Zwecks der Speicherung oder zu wissenschaftlichen Zwecken erforderlich ist.
(2) The modification of personal data shall be admissible if	(2) Die Veränderung personenbezogener Daten ist zulässig, wenn
1. there is no reason to assume that the data subject has a legitimate interest in his data being excluded from modification or	1. kein Grund zu der Annahme besteht, dass der Betroffene ein schutzwürdiges Interesse an dem Ausschluss der Veränderung hat, oder
2. the data can be taken from generally accessible sources or the data controller would be entitled to publish them, unless the data subject clearly has an overriding legitimate interest in his data being excluded from modification.	2. die Daten aus allgemein zugänglichen Quellen entnommen werden können oder die verantwortliche Stelle sie veröffentlichen dürfte, soweit nicht das schutzwürdige Interesse des Betroffenen an dem Ausschluss der Veränderung offensichtlich überwiegt.
(3) Personal data shall be erased if their storage is inadmissible.	(3) Die personenbezogenen Daten sind zu löschen, wenn ihre Speicherung unzulässig ist.
(4) § 29 shall not apply.	(4) § 29 gilt nicht.
(5) § 28, paragraphs (6) to (9) shall apply *mutatis mutandi.*	(5) § 28 Abs. 6 bis 9 gilt entsprechend.
§ 35 Correction, erasure and blocking	**§ 35 Berichtigung, Löschung und**

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of data	**Sperrung von Daten**
(1) *Incorrect* personal data shall be corrected.	(1) Personenbezogene Daten sind zu berichtigen, wenn sie unrichtig sind.
(2) Apart from the cases mentioned in paragraph 3, *Nos.* 1 and 2, below personal data may be erased at any time. They shall be erased if	(2) Personenbezogene Daten können außer in den Fällen des Absatzes 3 Nr. 1 und 2 jederzeit gelöscht werden. Personenbezogene Daten sind zu löschen, wenn
1. their storage is inadmissible,	1. ihre Speicherung unzulässig ist,
2. the data concerns racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sexual life, criminal or administrative offences and the data controller cannot prove that they are correct,	2. es sich um Daten über die rassische oder ethnische Herkunft, politische Meinungen, religiöse oder philosophische Überzeugungen oder die Gewerkschaftszugehörigkeit, über Gesundheit oder das Sexualleben, strafbare Handlungen oder Ordnungswidrigkeiten handelt und ihre Richtigkeit von der verantwortlichen Stelle nicht bewiesen werden kann,
3. they are processed for one's own purposes, as soon as knowledge of them is no longer needed for fulfilling the purpose for which they are stored, or	3. sie für eigene Zwecke verarbeitet werden, sobald ihre Kenntnis für die Erfüllung des Zwecks der Speicherung nicht mehr erforderlich ist, oder
4. they are processed in the course of business for the purpose of disclosure and a review at the end of the fourth calendar year after their first being recorded shows that their further retention is not necessary.	4. sie geschäftsmäßig zum Zweck der Übermittlung verarbeitet werden und eine Prüfung jeweils am Ende des vierten Kalenderjahres beginnend mit ihrer erstmaligen Speicherung ergibt, dass eine längerwährende Speicherung nicht erforderlich ist.
(3) Instead of erasure, personal data shall be blocked in so far as	(3) An die Stelle einer Löschung tritt eine Sperrung, soweit
1. in the case of paragraph 2, No. 3 above, preservation periods prescribed by law, statutes or contracts rule out any erasure,	1. im Fall des Absatzes 2 Nr. 3 einer Löschung gesetzliche, satzungsmäßige oder vertragliche Aufbewahrungsfristen entgegenstehen,
2. there is reason to assume that erasure would impair legitimate interests of the data subject or	2. Grund zu der Annahme besteht, dass durch eine Löschung schutzwürdige Interessen des Betroffenen beeinträchtigt würden, oder
3. erasure is not possible or is only	3. eine Löschung wegen der besonderen

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possible with disproportionate effort due to the specific type of storage.	Art der Speicherung nicht oder nur mit unverhältnismäßig hohem Aufwand möglich ist.
(4) Personal data shall also be blocked if the data subject disputes that they are correct and it cannot be ascertained whether they are correct or incorrect.	(4) Personenbezogene Daten sind ferner zu sperren, soweit ihre Richtigkeit vom Betroffenen bestritten wird und sich weder die Richtigkeit noch die Unrichtigkeit feststellen läßt.
(5) Personal data may not be collected, processed or used for automated processing or processing in non-automated filing systems if the data subject objects to the data controller and it is found upon inquiry that the data subject's legitimate interest by reason of his particular personal situation outweighs the data controller's interest in the collection, processing or use. The previous sentence shall not apply if the collection, processing or use is required by a mandatory provision of law.	(5) Personenbezogene Daten dürfen nicht für eine automatisierte Verarbeitung oder Verarbeitung in nicht automatisierten Dateien erhoben, verarbeitet oder genutzt werden, soweit der Betroffene dieser bei der verantwortlichen Stelle widerspricht und eine Prüfung ergibt, dass das schutzwürdige Interesse des Betroffenen wegen seiner besonderen persönlichen Situation das Interesse der verantwortlichen Stelle an dieser Erhebung, Verarbeitung oder Nutzung überwiegt. Satz 1 gilt nicht, wenn eine Rechtsvorschrift zur Erhebung, Verarbeitung oder Nutzung verpflichtet.
(6) Where they are stored in the normal course of business for the purpose of communication, personal data which are incorrect or whose correctness is disputed need not be corrected, blocked or erased except in the cases mentioned in paragraph 2, No. 2 above, if they are taken from generally accessible sources and are stored for documentation purposes. At the request of the data subject, his counterstatement shall be added to the data for the duration of their storage. The data may not be communicated without this counterstatement.	(6) Personenbezogene Daten, die unrichtig sind oder deren Richtigkeit bestritten wird, müssen bei der geschäftsmäßigen Datenspeicherung zum Zweck der Übermittlung außer in den Fällen des Absatzes 2 Nr. 2 nicht berichtigt, gesperrt oder gelöscht werden, wenn sie aus allgemein zugänglichen Quellen entnommen und zu Dokumentationszwecken gespeichert sind. Auf Verlangen des Betroffenen ist diesen Daten für die Dauer der Speicherung seine Gegendarstellung beizufügen. Die Daten dürfen nicht ohne diese Gegendarstellung übermittelt werden.
(7) If this does not require disproportionate effort and legitimate interests of the data subject do not stand in the way, the correction of incorrect data, the blocking of disputed data and the erasure or blocking of data due to inadmissible storage shall be notified to the bodies to which these data are transmitted for storage within the	(7) Von der Berichtigung unrichtiger Daten, der Sperrung bestrittener Daten sowie der Löschung oder Sperrung wegen Unzulässigkeit der Speicherung sind die Stellen zu verständigen, denen im Rahmen einer Datenübermittlung diese Daten zur Speicherung weitergegeben werden, wenn dies keinen unverhältnismäßigen Aufwand erfordert und schutzwürdige Interessen des

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framework of data communication.	Betroffenen nicht entgegenstehen.
(8) Blocked data may be communicated or used without the consent of the data subject only if	(8) Gesperrte Daten dürfen ohne Einwilligung des Betroffenen nur übermittelt oder genutzt werden, wenn
1. this is indispensable for scientific purposes, for use as evidence or for other reasons in the overriding interests of the data controller or a third party and	1. es zu wissenschaftlichen Zwecken, zur Behebung einer bestehenden Beweisnot oder aus sonstigen im überwiegenden Interesse der verantwortlichen Stelle oder eines Dritten liegenden Gründen unerlässlich ist und
2. communication or use of the data for this purpose would be admissible if they were not blocked.	2. die Daten hierfür übermittelt oder genutzt werden dürften, wenn sie nicht gesperrt wären.
§ 43 Administrative offenses	**§ 43 Bußgeldvorschriften**
(1) An administrative offense is committed by anyone who, whether intentionally or through negligence,	(1) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig
1. contrary to § 4d, paragraph (1), and, as the case may be, in conjunction with § 4e, second sentence, fails to register or to do so within the prescribed time limit or fails, when registering, to provide the required particulars or to provide correct or complete particulars,	1. entgegen § 4d Abs. 1, auch in Verbindung mit § 4e Satz 2, eine Meldung nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig macht,
2. contrary to § 4f, paragraph (1), first or second sentence, and, as the case may be, in conjunction with the third and sixth sentences, fails to appoint a data protection officer either in the prescribed manner or within the prescribed time limit or at all,	2. entgegen § 4f Abs. 1 Satz 1 oder 2, jeweils auch in Verbindung mit Satz 3 und 6, einen Beauftragten für den Datenschutz nicht, nicht in der vorgeschriebenen Weise oder nicht rechtzeitig bestellt,
3. contrary to § 28, paragraph (4), second sentence, fails to inform the data subject within the prescribed time limit, or in due form, or at all, or fails to satisfy himself that the data subject has acquired the knowledge otherwise,	3. entgegen § 28 Abs. 4 Satz 2 den Betroffenen nicht, nicht richtig oder nicht rechtzeitig unterrichtet oder nicht sicherstellt, dass der Betroffene Kenntnis erhalten kann,
4. contrary to § 28, paragraph (5), second sentence, discloses or uses	4. entgegen § 28 Abs. 5 Satz 2 personenbezogene Daten übermittelt

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personal data,	oder nutzt,
5. contrary to the third or fourth sentence of § 29, paragraph (2), fails to record the reasons specified therein or the means of credibly presenting them,	5. entgegen § 29 Abs. 2 Satz 3 oder 4 die dort bezeichneten Gründe oder die Art und Weise ihrer glaubhaften Darlegung nicht aufzeichnet,
6. contrary to § 29, paragraph (3), first sentence, records personal data in electronic or printed directories of addresses, telephone numbers, businesses and the like,	6. entgegen § 29 Abs. 3 Satz 1 personenbezogene Daten in elektronische oder gedruckte Adress-, Rufnummern-, Branchen- oder vergleichbare Verzeichnisse aufnimmt,
7. contrary to § 29, paragraph (3), second sentence, fails to ensure the inclusion of markings,	7. entgegen § 29 Abs. 3 Satz 2 die Übernahme von Kennzeichnungen nicht sicherstellt,
8. contrary to § 33, paragraph (1), fails to notify the data subject correctly, or completely, or at all,	8. entgegen § 33 Abs. 1 den Betroffenen nicht, nicht richtig oder nicht vollständig benachrichtigt,
9. contrary to § 35, paragraph (6), third sentence, discloses data without a counter-statement,	9. entgegen § 35 Abs. 6 Satz 3 Daten ohne Gegendarstellung übermittelt,
10. contrary to § 38, paragraph (3), first sentence, or paragraph (4), first sentence, fails to provide information or fails to do so correctly, completely or within the prescribed time limit or refuses to permit a measure or	10. entgegen § 38 Abs. 3 Satz 1 oder Abs. 4 Satz 1 eine Auskunft nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig erteilt oder eine Maßnahme nicht duldet oder
11. fails to comply with an enforcement notice issued pursuant to § 38 (5), first sentence.	11. einer vollziehbaren Anordnung nach § 38 Abs. 5 Satz 1 zuwiderhandelt.
(2) An administrative offense is committed by anyone who, whether intentionally or through negligence,	(2) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig
1. without authorization collects or processes personal data which are not generally accessible,	1. unbefugt personenbezogene Daten, die nicht allgemein zugänglich sind, erhebt oder verarbeitet,
2. without authorization makes available for retrieval by automated processes personal data which are not generally accessible,	2. unbefugt personenbezogene Daten, die nicht allgemein zugänglich sind, zum Abruf mittels automatisierten Verfahrens bereithält,
3. without authorization retrieves personal data which are not	3. unbefugt personenbezogene Daten, die nicht allgemein zugänglich sind, abruft

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generally accessible or obtains such data for himself or for another from automated processing operations or from non-automated filing systems,	oder sich oder einem anderen aus automatisierten Verarbeitungen oder nicht automatisierten Dateien verschafft,
4. by misrepresentation procures the disclosure of personal data which are not generally accessible,	4. die Übermittlung von personenbezogenen Daten, die nicht allgemein zugänglich sind, durch unrichtige Angaben erschleicht,
5. contrary to § 16, paragraph (4), first sentence, § 28, paragraph (5), first sentence, and, as the case may be, in conjunction with § 29, paragraph (4), § 39, paragraph (1), first sentence or § 40, paragraph (1), uses the disclosed data for other purposes by passing them on to a third party, or	5. entgegen § 16 Abs. 4 Satz 1, § 28 Abs. 5 Satz 1, auch in Verbindung mit § 29 Abs. 4, § 39 Abs. 1 Satz 1 oder § 40 Abs. 1, die übermittelten Daten für andere Zwecke nutzt, indem er sie an Dritte weitergibt, oder
6. contrary to § 30, paragraph (1), second sentence, combines the features referred to in § 30, paragraph (1), first sentence or, contrary to § 40, paragraph (2), third sentence, the features referred to in § 40, paragraph (2), second sentence, with the individual particulars.	6. entgegen § 30 Abs. 1 Satz 2 die in § 30 Abs. 1 Satz 1 bezeichneten Merkmale oder entgegen § 40 Abs. 2 Satz 3 die in § 40 Abs. 2 Satz 2 bezeichneten Merkmale mit den Einzelangaben zusammenführt.
(3) An administrative offense under paragraph (1) is punishable by a fine of up to fifty thousand deutschemarks and an administrative offense under paragraph (2) is punishable by a fine of up to five hundred thousand deutschemarks.	(3) Die Ordnungswidrigkeit kann im Fall des Absatzes 1 mit einer Geldbuße bis zu fünfundzwanzigtausend Euro, in den Fällen des Absatzes 2 mit einer Geldbuße bis zu zweihundertfünfzigtausend Euro geahndet werden.
§ 44 Criminal offenses	**§ 44 Strafvorschriften**
(1) It is an offense punishable by up to two years imprisonment or a fine to commit a deliberate act contrary to § 43, paragraph (2), with a view to enriching oneself or another or with a view to harming another.	(1) Wer eine in § 43 Abs. 2 bezeichnete vorsätzliche Handlung gegen Entgelt oder in der Absicht, sich oder einen anderen zu bereichern oder einen anderen zu schädigen, begeht, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft.
(2) Such acts shall be prosecuted only on foot of a complaint. A complaint may be brought by the data subject, the data controller, the Federal Data Protection	(2) Die Tat wird nur auf Antrag verfolgt. Antragsberechtigt sind der Betroffene, die verantwortliche Stelle, der Bundesbeauftragte für den Datenschutz und die

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Commissioner or the supervisory authority.	Aufsichtsbehörde.

1.12 Employment Protection Act

Protection Against Unfair Dismissal Act	Kündigungsschutzgesetz
§ 2 Dismissal with Option of Modified Conditions of Employment	**§ 2 Änderungskündigung**
Where the employer terminates the employment relationship and, in connection with the dismissal, offers the employee continued employment under modified working conditions, the employee may accept this offer subject to the proviso that the modified working conditions are not socially unjustified (§1 para. (2) sent. 1 to 3, para. (3) sent. 1 and 2). The employee must declare this proviso to the employer within the dismissal notice period, at the latest, however, within three weeks after having been given notice of dismissal.	Kündigt der Arbeitgeber das Arbeitsverhältnis und bietet er dem Arbeitnehmer im Zusammenhang mit der Kündigung die Fortsetzung des Arbeitsverhältnisses zu geänderten Arbeitsbedingungen an, so kann der Arbeitnehmer dieses Angebot unter dem Vorbehalt annehmen, daß die Änderung der Arbeitsbedingungen nicht sozial ungerechtfertigt ist (§ 1 Abs. 2 Satz 1 bis 3, Abs. 3 Satz 1 und 2). Diesen Vorbehalt muß der Arbeitnehmer dem Arbeitgeber innerhalb der Kündigungsfrist, spätestens jedoch innerhalb von drei Wochen nach Zugang der Kündigung erklären.

1.13 European Convention for the Protection of Human Rights

European Convention for the Protection of Human Rights	Europäische Menschenrechtskonvention
Article 6 Right to a Fair Trial	**Artikel 6 Recht auf ein faires Verfahren**
(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where	(1) Jede Person hat ein Recht darauf, daß über Streitigkeiten in bezug auf ihre zivilrechtlichen Ansprüche und Verpflichtungen oder über eine gegen sie erhobene strafrechtliche Anklage von einem unabhängigen und unparteiischen, auf Gesetz beruhenden Gericht in einem fairen Verfahren, öffentlich und innerhalb angemessener Frist verhandelt wird. Das Urteil muß öffentlich verkündet werden; Presse und Öffentlichkeit können jedoch während des ganzen oder eines Teiles des Verfahrens ausgeschlossen werden, wenn dies im Interesse der Moral, der öffentlichen Ordnung oder der nationalen Sicherheit in

European Convention for the Protection of Human Rights	**Europäische Menschenrechtskonvention**
publicity would prejudice the interests of justice.	einer demokratischen Gesellschaft liegt, wenn die Interessen von Jugendlichen oder der Schutz des Privatlebens der Prozeßparteien es verlangen oder - soweit das Gericht es für unbedingt erforderlich hält - wenn unter besonderen Umständen eine öffentliche Verhandlung die Interessen der Rechtspflege beeinträchtigen würde.
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.	(2) Jede Person, die einer Straftat angeklagt ist, gilt bis zum gesetzlichen Beweis ihrer Schuld als unschuldig.
(3) Everyone charged with a criminal offence has the following minimum rights:	(3) Jede angeklagte Person hat mindestens folgende Rechte:
1. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;	1. innerhalb möglichst kurzer Frist in einer ihr verständlichen Sprache in allen Einzelheiten über Art und Grund der gegen sie erhobenen Beschuldigung unterrichtet zu werden;
2. to have adequate time and facilities for the preparation of his defence;	2. ausreichende Zeit und Gelegenheit zur Vorbereitung ihrer Verteidigung zu haben;
3. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;	3. sich selbst zu verteidigen, sich durch einen Verteidiger ihrer Wahl verteidigen zu lassen oder, falls ihr die Mittel zur Bezahlung fehlen, unentgeltlich den Beistand eines Verteidiger zu erhalten, wenn dies im Interesse der Rechtspflege erforderlich ist;
4. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;	4. Fragen an Belastungszeugen zu stellen oder stellen zu lassen und die Ladung und Vernehmung von Entlastungszeugen unter denselben Bedingungen zu erwirken, wie sie für Belastungszeugen gelten;
5. to have free assistance of an interpreter if he cannot understand or speak the language used in court.	5. unentgeltliche Unterstützung durch einen Dolmetscher zu erhalten, wenn sie die Verhandlungssprache des Gerichts nicht versteht oder spricht.

1.14 General Tax Act

General Tax Act	Abgabenordnung
Sec. 385 Validity of Rules of Procedure	**§ 385 Geltung von Verfahrensvorschriften**
(1) Where nothing else is specified in the following provisions, criminal proceedings for tax offences shall be subject to the general laws on the criminal procedure, namely the Criminal Code, the Judicature Act and the Juvenile Court Act.	(1) Für das Strafverfahren wegen Steuerstraftaten gelten, soweit die folgenden Vorschriften nichts anderes bestimmen, die allgemeinen Gesetze über das Strafverfahren, namentlich die Strafprozessordnung, das Gerichtsverfassungsgesetz und das Jugendgerichtsgesetz.
(2) With the exception of sec. 386 para. 2 and secs. 399 to 401, the provisions of this section applicable to tax offences shall be correspondingly applicable in the event of a suspected offence which, through the fraudulent misrepresentation of fiscally relevant circumstances, is directed at the fiscal authorities or at any other authorities for the purpose of obtaining pecuniary benefit and does not infringe any criminal law relating to tax offences.	(2) Die für Steuerstraftaten geltenden Vorschriften dieses Abschnitts, mit Ausnahme des § 386 Abs. 2 sowie der §§ 399 bis 401, sind bei dem Verdacht einer Straftat, die unter Vorspiegelung eines steuerlich erheblichen Sachverhalts gegenüber der Finanzbehörde oder einer anderen Behörde auf die Erlangung von Vermögensvorteilen gerichtet ist und kein Steuerstrafgesetz verletzt, entsprechend anzuwenden.

1.15 German Constitution

German Constitution	Grundgesetz - GG
Article 1 Human dignity	**Artikel 1 Schutz der Menschenwürde**
(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.	(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.	(2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.
(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.	(3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.
Article 2 Personal freedoms	**Artikel 2 Freie Entfaltung der Persönlichkeit, Recht auf Leben, körperliche Unversehrtheit, Freiheit der Person**

German Constitution	**Grundgesetz - GG**
(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.	(1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.
(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.	(2) Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden.
Article 3 Equality before the law	**Artikel 3 Gleichheit vor dem Gesetz**
(1) All persons shall be equal before the law.	(1) Alle Menschen sind vor dem Gesetz gleich.
(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.	(2) Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin.
(3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.	(3) Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.
Article 9 Freedom of association	**Artikel 9 Vereinigungsfreiheit**
(1) All Germans shall have the right to form corporations and other associations.	(1) Alle Deutschen haben das Recht, Vereine und Gesellschaften zu bilden.
(2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited.	(2) Vereinigungen, deren Zwecke oder deren Tätigkeit den Strafgesetzen zuwiderlaufen oder die sich gegen die verfassungsmäßige Ordnung oder gegen den Gedanken der Völkerverständigung richten, sind verboten.
(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek	(3) Das Recht, zur Wahrung und Förderung der Arbeits- und Wirtschaftsbedingungen Vereinigungen zu bilden, ist für jedermann und für alle Berufe gewährleistet. Abreden, die dieses Recht einschränken oder zu

German Constitution	Grundgesetz - GG
to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.	behindern suchen, sind nichtig, hierauf gerichtete Maßnahmen sind rechtswidrig. Maßnahmen nach den Artikeln 12a, 35 Abs. 2 und 3, Artikel 87a Abs. 4 und Artikel 91 dürfen sich nicht gegen Arbeitskämpfe richten, die zur Wahrung und Förderung der Arbeits- und Wirtschaftsbedingungen von Vereinigungen im Sinne des Satzes 1 geführt werden.
Article 12 Occupational freedom; prohibition of forced labor	**Artikel 12 Berufsfreiheit**
(1) All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.	(1) Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder auf Grund eines Gesetzes geregelt werden.
(2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.	(2) Niemand darf zu einer bestimmten Arbeit gezwungen werden, außer im Rahmen einer herkömmlichen allgemeinen, für alle gleichen öffentlichen Dienstleistungspflicht.
(3) Forced labor may be imposed only on persons deprived of their liberty by the judgment of a court.	(3) Zwangsarbeit ist nur bei einer gerichtlich angeordneten Freiheitsentziehung zulässig.
Article 14 Property, inheritance, expropriation	**Artikel 14 Eigentum, Erbrecht und Enteignung**
(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.	(1) Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.
(2) Property entails obligations. Its use shall also serve the public good.	(2) Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.
(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by	(3) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist

German Constitution	Grundgesetz - GG
establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.	unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.
Article 15 Socialisation	**Artikel 15 Sozialisierung**
Land, natural resources, and means of production may for the purpose of socialization be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation. With respect to such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply mutatis mutandis.	Grund und Boden, Naturschätze und Produktionsmittel können zum Zwecke der Vergesellschaftung durch ein Gesetz, das Art und Ausmaß der Entschädigung regelt, in Gemeineigentum oder in andere Formen der Gemeinwirtschaft überführt werden. Für die Entschädigung gilt Artikel 14 Abs. 3 Satz 3 und 4 entsprechend.

1.16 German Industrial Code

German Industrial Code	Gewerbeordnung - GewO
Sec. 105 Freedom to formulate employment agreements	**§ 105 Freie Gestaltung des Arbeitsvertrages**
Employers and employees shall be free to agree on the conclusion, contents and form of the employment agreement where this is not opposed by any compulsory legal provisions, by terms of the respective collective wage agreement or by any individual works agreement. Where the contractual conditions are of the essence, proof of these conditions shall be subject to the provisions of the Proof of Essential Terms of Employment Act.	Arbeitgeber und Arbeitnehmer können Abschluß, Inhalt und Form des Arbeitsvertrages frei vereinbaren, soweit nicht zwingende gesetzliche Vorschriften, Bestimmungen eines anwendbaren Tarifvertrages oder einer Betriebsvereinbarung entgegenstehen. Soweit die Vertragsbedingungen wesentlich sind, richtet sich ihr Nachweis nach den Bestimmungen des Nachweisgesetzes.

1.17 Introductory Act to Civil Code

Introductory Act to Civil Code	Einführungsgesetz zum Bürgerlichen Gesetzbuch - EGBBG
Art. 6 Public Order	**Art. 6 Öffentliche Ordnung (ordre public)**
A legal rule of another state shall not be	Eine Rechtsnorm eines anderen Staates ist

Introductory Act to Civil Code	**Einführungsgesetz zum Bürgerlichen Gesetzbuch - EGBBG**
applied if its application would give rise to a result which is manifestly inconsistent with the fundamental principles of German law. It is especially unapplicable if its application is inconsistent with civil rights.	nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist. Sie ist insbesondere nicht anzuwenden, wenn die Anwendung mit den Grundrechten unvereinbar ist.
Art. 28 Applicable law in the absence of choice of law	**Art. 28 Mangels Rechtswahl anzuwendendes Recht**
(1) Insofar as the law applicable to the contract has not been agreed upon as provided in Art. 27, the contract is governed by the law of the state with which it shows the closest connections. If, however, a part of the contract is separable from the remainder of the contract and this part shows a closer connection with another state, the law of the other state may be made applicable to it by way of exception.	(1) Soweit das auf den Vertrag anzuwendende Recht nicht nach Artikel 27 vereinbart worden ist, unterliegt der Vertrag dem Recht des Staates, mit dem er die engsten Verbindungen aufweist. Läßt sich jedoch ein Teil des Vertrages von dem Rest des Vertrages trennen und weist dieser Teil eine engere Verbindung mit einem anderen Staat auf, so kann auf ihn ausnahmsweise das Recht dieses Staates angewandt werden.
(2) It is presumed that the contract shows the closest connection with the state in which the party, which is required to make the specific performance, had his usual residence at the conclusion of the contract or, if a company, an association or a juristic person is concerned, it had therein its head office. If, however, the contract was made in the exercise of a professional or vocational activity of such party, it will be presumed that it shows the closest connection with the state in which he has his head office or in which, if the performance is to be made by another office than the head office, that other office is located. This subarticle shall not apply if the specific performance cannot be determined.	(2) Es wird vermutet, daß der Vertrag die engsten Verbindungen mit dem Staat aufweist, in dem die Partei, welche die charakteristische Leistung zu erbringen hat, im Zeitpunkt des Vertragsabschlusses ihren gewöhnlichen Aufenthalt oder, wenn es sich um eine Gesellschaft, einen Verein oder eine juristische Person handelt, ihre Hauptverwaltung hat. Ist der Vertrag jedoch in Ausübung einer beruflichen oder gewerblichen Tätigkeit dieser Partei geschlossen worden, so wird vermutet, daß er die engsten Verbindungen zu dem Staat aufweist, in dem sich deren Hauptniederlassung befindet oder in dem, wenn die Leistung nach dem Vertrag von einer anderen als der Hauptniederlassung zu erbringen ist, sich die andere Niederlassung befindet. Dieser Absatz ist nicht anzuwenden, wenn sich die charakteristische Leistung nicht bestimmen läßt.
(3) Insofar as the subject matter of the	(3) Soweit der Vertrag ein dingliches Recht

Introductory Act to Civil Code	Einführungsgesetz zum Bürgerlichen Gesetzbuch - EGBBG
contract is a real right in a plot of land or the right of use of a plot of land, it is presumed that it shows the closest connection to the state in which the plot of land is located.	an einem Grundstück oder ein Recht zur Nutzung eines Grundstücks zum Gegenstand hat, wird vermutet, daß er die engsten Verbindungen zu dem Staat aufweist, in dem das Grundstück belegen ist.
(4) As regards contracts for the carriage of goods, it is presumed that they show the closest connection with the state in which the carrier has its principal office at the time of conclusion of the contract, insofar as also the place of shipping, the place of unloading or the main office of the sender is located in this state. As regards the applicability of this subarticle, also charter parties for a single trip and other contracts, the main subject matter of which is the carriage of goods, are deemed as contracts for the carriage of goods.	(4) Bei Güterbeförderungsverträgen wird vermutet, daß sie mit dem Staat die engsten Verbindungen aufweisen, in dem der Beförderer im Zeitpunkt des Vertragsabschlusses seine Hauptniederlassung hat, sofern sich in diesem Staat auch der Verladeort oder der Entladeort oder die Hauptniederlassung des Absenders befindet. Als Güterbeförderungsverträge gelten für die Anwendungen dieses Absatzes auch Charterverträge für eine einzige Reise und andere Verträge, die in der Hauptsache der Güterbeförderung dienen.
(5) The presumptions contained in subarticles (2), (3) and (4) are not valid when it is indicated by the entirety of circumstances that the contract shows closer connections with another state.	(5) Die Vermutungen nach den Absätzen (2), (3), und (4) gelten nicht, wenn sich aus der Gesamtheit der Umstände ergibt, daß der Vertrag engere Verbindungen mit einem anderen Staat aufweist.

1.18 Penal Code

Penal Code	Strafgesetzbuch - StGB
§ 203 Violation of private secrets	**§ 203 Verletzung von Privatgeheimnissen**
(1) Whoever, without authorization, discloses a secret of another, in particular, a secret which belongs to the realm of personal privacy or a business or trade secret, which was confided to, or otherwise made known to him in his capacity as a:	(1) Wer unbefugt ein fremdes Geheimnis, namentlich ein zum persönlichen Lebensbereich gehörendes Geheimnis oder ein Betriebs- oder Geschäftsgeheimnis, offenbart, das ihm als
1. physician, dentist, veterinarian, pharmacist or member of another healing profession which requires state-regulated education for engaging in the profession or to use the professional designation;	1. Arzt, Zahnarzt, Tierarzt, Apotheker oder Angehörigen eines anderen Heilberufs, der für die Berufsausübung oder die Führung der Berufsbezeichnung eine staatlich geregelte Ausbildung erfordert,
2. professional psychologist with a final	2. Berufspsychologen mit staatlich

Penal Code	Strafgesetzbuch - StGB
scientific examination recognized by the State;	anerkannter wissenschaftlicher Abschlußprüfung,
3. lawyer, patent attorney, notary, defense counsel in a statutorily regulated proceeding, certified public accountant, sworn auditor, tax consultant, tax agent, or organ or member of an organ of a law, patent law, accounting, auditing or tax consulting firm;	3. Rechtsanwalt, Patentanwalt, Notar, Verteidiger in einem gesetzlich geordneten Verfahren, Wirtschaftsprüfer, vereidigtem Buchprüfer, Steuerberater, Steuerbevollmächtigten oder Organ oder Mitglied eines Organs einer Rechtsanwalts-, Patentanwalts-, Wirtschaftsprüfungs-, Buchprüfungs- oder Steuerberatungsgesellschaft,
4. marriage, family, upbringing or youth counselor as well as counselor in matters of addiction at a counseling agency which is recognized by a public authority or body, institution or foundation under public law;	4. Ehe-, Familien-, Erziehungs- oder Jugendberater sowie Berater für Suchtfragen in einer Beratungsstelle, die von einer Behörde oder Körperschaft, Anstalt oder Stiftung des öffentlichen Rechts anerkannt ist.
4a. member or agent of a counseling agency recognized under Sections 3 and 8 of the Act on Pregnancies in Conflict Situations;	4a. Mitglied oder Beauftragten einer anerkannten Beratungsstelle nach den §§ 3 und 8 des Schwangerschaftskonfliktgesetzes,
5. a state-recognized social worker or state-recognized social education worker; or	5. staatlich anerkanntem Sozialarbeiter oder staatlich anerkanntem Sozialpädagogen oder
6. member of a private health, accident or life insurance company or a private medical clearing house,	6. Angehörigen eines Unternehmens der privaten Kranken-, Unfall- oder Lebensversicherung oder einer privatärztlichen Verrechnungsstelle
shall be punished with imprisonment for not more than one year or a fine.	anvertraut worden oder sonst bekanntgeworden ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.
(2) Whoever, without authorization, discloses a secret of another, in particular, a secret which belongs to the realm of personal privacy or a business or trade secret, which was confided to, or otherwise made known to him in his capacity as a:	(2) Ebenso wird bestraft, wer unbefugt ein fremdes Geheimnis, namentlich ein zum persönlichen Lebensbereich gehörendes Geheimnis oder ein Betriebs- oder Geschäftsgeheimnis, offenbart, das ihm als
1. public official;	1. Amtsträger,
2. person with special public service obligations;	2. für den öffentlichen Dienst besonders Verpflichteten,
3. person who exercises duties or	3. Person, die Aufgaben oder Befugnisse

Penal Code	Strafgesetzbuch - StGB
powers under the law on staff representation;	nach dem Personalvertretungsrecht wahrnimmt,
4. member of an investigative committee working for a legislative body of the Federation or a Land, another committee or council which is not itself a member of the legislative body, or as an assistant for such a committee or council; or	4. Mitglied eines für ein Gesetzgebungsorgan des Bundes oder eines Landes tätigen Untersuchungsausschusses, sonstigen Ausschusses oder Rates, das nicht selbst Mitglied des Gesetzgebungsorgans ist, oder als Hilfskraft eines solchen Ausschusses oder Rates,
5. publicly appointed expert who is formally obligated by law to conscientiously fulfill his duties, or shall be similarly punished.	5. öffentlich bestelltem Sachverständigen, der auf die gewissenhafte Erfüllung seiner Obliegenheiten auf Grund eines Gesetzes förmlich verpflichtet worden ist, oder
6. Individuals who are formerly obligated by law to conscientiously fulfil their duties of confidentiality with respect to carrying out scientific research.	6. Personen, die auf die gewissenhafte Erfüllung ihrer Geheimhaltungspflicht bei der Durchführung wissenschaftlicher Forschungsvorhaben auf Grund eines Gesetzes förmlich verpflichtet worden ist,
Particular statements about personal or material relationships of another which have been collected for public administration purposes, shall be deemed to be the equivalent of a secret within the meaning of sentence 1; sentence 1 shall not, however, be applicable to the extent that such particular statements have been made known to other public authorities or other agencies for public administration purposes and the law does not prohibit it.	anvertraut worden oder sonst bekanntgeworden ist. Einem Geheimnis im Sinne des Satzes 1 stehen Einzelangaben über persönliche oder sachliche Verhältnisse eines anderen gleich, die für Aufgaben der öffentlichen Verwaltung erfaßt worden sind; Satz 1 ist jedoch nicht anzuwenden, soweit solche Einzelangaben anderen Behörden oder sonstigen Stellen für Aufgaben der öffentlichen Verwaltung bekanntgegeben werden und das Gesetz dies nicht untersagt.
(3) Other members of a bar association shall be deemed to be the equivalent of a lawyer named in subsection (1), number 3. Equivalent of the persons named in subsection (1) and sentence 1 shall be their professionally active assistants and those persons who work with them in preparation for exercise of the profession. After the death of the person obligated to safeguard the secret, whoever acquired the secret from the deceased or from his estate shall, furthermore, be the equivalent	(3) Einem in Absatz 1 Nr. 3 genannten Rechtsanwalt stehen andere Mitglieder einer Rechtsanwaltskammer gleich. Den in Absatz 1 und Satz 1 Genannten stehen ihre berufsmäßig tätigen Gehilfen und die Personen gleich, die bei ihnen zur Vorbereitung auf den Beruf tätig sind. Den in Absatz 1 und den in Satz 1 und 2 Genannten steht nach dem Tod des zur Wahrung des Geheimnisses Verpflichteten ferner gleich, wer das Geheimnis von dem Verstorbenen

Penal Code	Strafgesetzbuch - StGB
of the persons named in subsection (1) and in sentences 1 and 2.	oder aus dessen Nachlaß erlangt hat.
(4) Subsections (1) to (3) shall also be applicable if the perpetrator, without authorization, discloses the secret of another after the death of the affected person.	(4) Die Absätze 1 bis 3 sind auch anzuwenden, wenn der Täter das fremde Geheimnis nach dem Tod des Betroffenen unbefugt offenbart.
(5) If the perpetrator acts for compensation or with the intent of enriching himself or another or of harming another, then the punishment shall be imprisonment for not more than two years or a fine.	(5) Handelt der Täter gegen Entgelt oder in der Absicht, sich oder einen anderen zu bereichern oder einen anderen zu schädigen, so ist die Strafe Freiheitsstrafe bis zu zwei Jahren oder Geldstrafe.

1.19 Stock Corporation Act

Stock Corporation Act	Aktiengesetz -AktG
§ 119 Rights of the Shareholders' Meeting	**§ 119 Rechte der Hauptversammlung**
(1) The shareholders' meeting shall resolve on all maters expressly provided for by law or the articles of association, in particular	(1) Die Hauptversammlung beschließt in den im Gesetz und in der Satzung ausdrücklich bestimmten Fällen, namentlich über
1. the appointment of members of the supervisory board, unless they are to be appointed to the supervisory board or elected as employee representatives of the supervisory board pursuant to the Codetermination Act, the Supplemental Codetermination Act, or the Labor Management Relations Act 1952;	1. die Bestellung der Mitglieder des Aufsichtsrats, soweit sie nicht in den Aufsichtsrat zu entsenden oder als Aufsichtsratsmitglieder der Arbeitnehmer nach dem Mitbestimmungsgesetz, dem Mitbestimmungsergänzungsgesetz oder dem Betriebsverfassungsgesetz 1952 zu wählen sind;
2. the appropriation of any net retained profits;	2. die Verwendung des Bilanzgewinns;
3. the ratification of the acts of the members of the management board and the supervisory board;	3. die Entlastung der Mitglieder des Vorstands und des Aufsichtsrats;
4. the appointment of auditors;	4. die Bestellung des Abschlußprüfers;
5. the amendment of the articles of association;	5. Satzungsänderungen;
6. measures to raise or reduce capital;	6. Maßnahmen der Kapitalbeschaffung

	und der Kapitalherabsetzung;
7. the appointment of auditors for the examination of matters in connection with the formation or the management of the stock corporation;	7. die Bestellung von Prüfern zur Prüfung von Vorgängen bei der Gründung oder der Geschäftsführung;
8. the dissolution of the stock corporation.	8. die Auflösung der Gesellschaft.
(2) The shareholders' meeting may only resolve on matters concerning the management of the stock corporation if the management board so requires.	(2) Über Fragen der Geschäftsführung kann die Hauptversammlung nur entscheiden, wenn der Vorstand es verlangt.
§ 130 Minutes	**§ 130 Niederschrift**
(1) Each resolution of the shareholders' meeting shall be recorded in the minutes of the proceedings, which shall be prepared in the form of a notarial deed. The same applies to any request made by minority shareholders pursuant to § 120 (1) sentence 2, §§ 137 and 147 (1). For companies whose shares are not listed on a stock exchange, if no resolutions are adopted for which the law requires a vote by a majority of three-quarters or larger, it shall suffice if the minutes are signed by the chairperson of the supervisory board.	(1) Jeder Beschluß der Hauptversammlung ist durch eine über die Verhandlung notariell aufgenommene Niederschrift zu beurkunden. Gleiches gilt für jedes Verlangen einer Minderheit nach § 120 Absatz 1 Satz 2, §§ 137 und 147 Absatz 1. Bei nichtbörsennotierten Gesellschaften reicht eine vom Vorsitzenden des Aufsichtsrats zu unterzeichnende Niederschrift aus, soweit keine Beschlüsse gefaßt werden, für die das Gesetz eine Dreiviertel- oder größere Mehrheit bestimmt.
(2) The minutes shall state the place and date of the meeting, the notary's name, the form and result of the voting and any conclusions of the chairperson regarding any resolutions.	(2) In der Niederschrift sind der Ort und der Tag der Verhandlung, der Name des Notars sowie die Art und das Ergebnis der Abstimmung und die Feststellung des Vorsitzenden über die Beschlußfassung anzugeben.
(3) The documents regarding notice of the meeting shall be attached to the minutes if their contents are not recorded in the minutes.	(3) Die Belege über die Einberufung sind der Niederschrift als Anlage beizufügen, wenn sie nicht unter Angabe ihres Inhalts in der Niederschrift aufgeführt werden.
(4) The minutes shall be signed by the notary. The presence of witnesses is not required.	(4) Die Niederschrift ist von dem Notar zu unterschreiben. Die Zuziehung von Zeugen ist nicht nötig.
(5) After the meeting, the management board shall promptly submit to the commercial register an officially certified copy of the minutes and any attachments thereto, which shall be signed by the	(5) Unverzüglich nach der Versammlung hat der Vorstand eine öffentlich beglaubigte, im Falle des Absatzes 1 Satz 3 eine vom Vorsitzenden des Aufsichtsrats unterzeichnete Abschrift der Niederschrift und

chairperson of the supervisory board if paragraph (1) sentence 3 applies.	ihrer Anlagen zum Handelsregister einzureichen.

1.20 Works Council Act -WCA

Works Council Act - WCA	**Betriebsverfassungsgesetz - BetrVG**
§ 2 Status of trade unions and employers' associates	**§ 2 Stellung der Gewerkschaften und Vereinigungen der Arbeitgeber**
(1) The employer and the works council shall work together in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers' associations represented in the establishment for the good of the employees and of the establishment.	(1) Arbeitgeber und Betriebsrat arbeiten unter Beachtung der geltenden Tarifverträge vertrauensvoll und im Zusammenwirken mit den im Betrieb vertretenen Gewerkschaften und Arbeitgebervereinigungen zum Wohl der Arbeitnehmer und des Betriebs zusammen.
(2) In order to permit the trade unions represented in the establishment to exercise the powers and duties established by this Act, their agents shall, after notification of the employer or his representative, be granted access to the establishment, in so far as this does not run counter to essential operational requirements, mandatory safety rules or the protection of trade secrets.	(2) Zur Wahrnehmung der in diesem Gesetz genannten Aufgaben und Befugnisse der im Betrieb vertretenen Gewerkschaften ist deren Beauftragten nach Unterrichtung des Arbeitgebers oder seines Vertreters Zugang zum Betrieb zu gewähren, soweit dem nicht unumgängliche Notwendigkeiten des Betriebsablaufs, zwingende Sicherheitsvorschriften oder der Schutz von Betriebsgeheimnissen entgegenstehen.
(3) This Act shall not affect the functions of trade unions and employers' associations and more particularly the protection of their members' interests.	(3) Die Aufgaben der Gewerkschaften und der Vereinigungen der Arbeitgeber, insbesondere die Wahrnehmung der Interessen ihrer Mitglieder, werden durch dieses Gesetz nicht berührt.
§ 5 Employees	**§ 5 Arbeitnehmer**
(1) In this Act the term "employee" (male and female) comprises wage earners and salaried employees including persons employed for the purpose of their vocational training, regardless of whether they are engaged in indoor work, in field service, or in tele-work. The term includes persons engaged in home work who work principally for one and the same establishment.	(1) Arbeitnehmer (Arbeitnehmerinnen und Arbeitnehmer) im Sinne dieses Gesetzes sind Arbeiter und Angestellte einschließlich der zu ihrer Berufsausbildung Beschäftigten, unabhängig davon, ob sie im Betrieb, im Außendienst oder mit Telearbeit beschäftigt werden. Als Arbeitnehmer gelten auch die in Heimarbeit Beschäftigten, die in der Hauptsache für den Betrieb arbeiten.

Works Council Act - WCA	**Betriebsverfassungsgesetz - BetrVG**
(2) The following shall not be considered as employees for the purposes of this Act:	(2) Als Arbeitnehmer im Sinne dieses Gesetzes gelten nicht
1. in establishments belonging to a corporation, the members of the organs that are legally empowered to represent the corporation;	1. in Betrieben einer juristischen Person die Mitglieder des Organs, das zur gesetzlichen Vertretung der juristischen Person berufen ist;
2. partners in an ordinary commercial partnership or members of another association of persons in the establishment belonging to the partnership or association, in so far as they are empowered by law, its own by-laws or the articles of association to represent the association or to exercise management functions;	2. die Gesellschafter einer offenen Handelsgesellschaft oder die Mitglieder einer anderen Personengesamtheit, soweit sie durch Gesetz, Satzung oder Gesellschaftsvertrag zur Vertretung der Personengesamtheit oder zur Geschäftsführung berufen sind, in deren Betrieben;
3. persons whose employment is not primarily for the purpose of earning their livelihood but is chiefly inspired by charitable or religious motives;	3. Personen, deren Beschäftigung nicht in erster Linie ihrem Erwerb dient, sondern vorwiegend durch Beweggründe karitativer oder religiöser Art bestimmt ist;
4. persons whose employment is not primarily for the purpose of earning their livelihood but principally for their cure or recovery, rehabilitation, moral improvement or education;	4. Personen, deren Beschäftigung nicht in erster Linie ihrem Erwerb dient und die vorwiegend zu ihrer Heilung, Wiedereingewöhnung, sittlichen Besserung oder Erziehung beschäftigt werden;
5. the spouse, the life partner, as well as the relatives by blood or marriage of the first degree living with the employer.	5. der Ehegatte, der Lebenspartner, Verwandte und Verschwägerte ersten Grades, die in häuslicher Gemeinschaft mit dem Arbeitgeber leben.
(3) Unless this Act expressly provides to the contrary, it shall not apply to executive staff. Executive staff are employees who, under their contract of employment and by their status in the company or establishment,	(3) Dieses Gesetz findet, soweit in ihm nicht ausdrücklich etwas anderes bestimmt ist, keine Anwendung auf leitende Angestellte. Leitender Angestellter ist, wer nach Arbeitsvertrag und Stellung im Unternehmen oder im Betrieb
1. are entitled on their own responsibility to engage and dismiss employees on behalf of the establishment or one of its departments; or	1. zur selbständigen Einstellung und Entlassung von im Betrieb oder in der Betriebsabteilung beschäftigten Arbeitnehmern berechtigt ist oder
2. are endowed with general authority (power of procuration) or full power of representation or power to sign, the latter also being important in relation	2. Generalvollmacht oder Prokura hat und die Prokura auch im Verhältnis zum Arbeitgeber nicht unbedeutend ist oder

Works Council Act - WCA	Betriebsverfassungsgesetz - BetrVG
to the employer; or	
3. regularly carry out other duties which are important for the existence and development of the company or an establishment and fulfilment of which requires particular experience and knowledge, if, in doing so, they either essentially make decisions on their own responsibility or substantially influence these decisions; this may also be the case with stipulated procedures, particularly those based on legal provisions, plans or guidelines and when co-operating with other executive staff.	3. regelmäßig sonstige Aufgaben wahrnimmt, die für den Bestand und die Entwicklung des Unternehmens oder eines Betriebs von Bedeutung sind und deren Erfüllung besondere Erfahrungen und Kenntnisse voraussetzt, wenn er dabei entweder die Entscheidungen im Wesentlichen frei von Weisungen trifft oder sie maßgeblich beeinflusst; dies kann auch bei Vorgaben insbesondere aufgrund von Rechtsvorschriften, Plänen oder Richtlinien sowie bei Zusammenarbeit mit anderen leitenden Angestellten gegeben sein.
(4) In case of doubt, executive staff under subsection (3), clause 3, are employees who	(4) Leitender Angestellter nach Absatz 3 Nr. 3 ist im Zweifel, wer
1. have been assigned to the executive staff on the occasion of the last election of the works council, the executives' committee or of supervisory board members of the employees or by means of a final and conclusive legal decision; or	1. aus Anlass der letzten Wahl des Betriebsrats, des Sprecherausschusses oder von Aufsichtsratsmitgliedern der Arbeitnehmer oder durch rechtskräftige gerichtliche Entscheidung den leitenden Angestellten zugeordnet worden ist oder
2. belong to a management level at which executive staff are predominantly represented in the company; or	2. einer Leitungsebene angehört, auf der in dem Unternehmen überwiegend leitende Angestellte vertreten sind, oder
3. regularly receive an annual salary which is customary for executive staff in the company; or	3. ein regelmäßiges Jahresarbeitsentgelt erhält, das für leitende Angestellte in dem Unternehmen üblich ist, oder
4. if there is still doubt on application of clause 3, regularly receive an annual salary which is three times greater than the reference figure as per section 18 of Book Four of the Social Code.	4. falls auch bei der Anwendung der Nummer 3 noch Zweifel bleiben, ein regelmäßiges Jahresarbeitsentgelt erhält, das das Dreifache der Bezugsgröße nach § 18 des Vierten Buches Sozialgesetzbuch überschreitet.
§ 23 Dereliction of statutory duties	**§ 23 Verletzung gesetzlicher Pflichten**
(1) One-fourth or more of the employees with voting rights or the employer or a trade union represented in the	(1) Mindestens ein Viertel der wahlberechtigten Arbeitnehmer, der Arbeitgeber oder eine im Betrieb vertretene

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establishment may apply to the labour court for an order to remove from office any member of the works council or to dissolve the council on the grounds of grave dereliction of its statutory duties. The works council itself may also apply for the removal of a member.	Gewerkschaft können beim Arbeitsgericht den Ausschluss eines Mitglieds aus dem Betriebsrat oder die Auflösung des Betriebsrats wegen grober Verletzung seiner gesetzlichen Pflichten beantragen. Der Ausschluss eines Mitglieds kann auch vom Betriebsrat beantragt werden.
(2) Where a works council is dissolved, the labour court shall without delay appoint an electoral board for a fresh election. Section 16 (2) shall apply, mutatis mutandis.	(2) Wird der Betriebsrat aufgelöst, so setzt das Arbeitsgericht unverzüglich einen Wahlvorstand für die Neuwahl ein. § 16 Abs. 2 gilt entsprechend.
(3) Where the employer has grossly violated his duties under this Act, the works council or a trade union represented in the establishment may apply to the labour court for an order to the employer enjoining him to cease and desist from an act, allow an act to be performed or perform an act. If the employer does not obey an executory court order to cease and desist from an act or allow an act to be performed, the labour court shall, on application and after prior warning, impose a fine on him for each such violation. If the employer does not carry out an act imposed on him by an executory court order, the labour court shall, on application, give a decision that he shall be made to perform the act imposed on him subject to payment of fines. Such application may be made by the works council or by a trade union represented in the establishment. The maximum amount of the fine shall be Euro 10,000.	(3) Der Betriebsrat oder eine im Betrieb vertretene Gewerkschaft können bei groben Verstößen des Arbeitgebers gegen seine Verpflichtungen aus diesem Gesetz beim Arbeitsgericht beantragen, dem Arbeitgeber aufzugeben, eine Handlung zu unterlassen, die Vornahme einer Handlung zu dulden oder eine Handlung vorzunehmen. Handelt der Arbeitgeber der ihm durch rechtskräftige gerichtliche Entscheidung auferlegten Verpflichtung zuwider, eine Handlung zu unterlassen oder die Vornahme einer Handlung zu dulden, so ist er auf Antrag vom Arbeitsgericht wegen einer jeden Zuwiderhandlung nach vorheriger Androhung zu einem Ordnungsgeld zu verurteilen. Führt der Arbeitgeber die ihm durch eine rechtskräftige gerichtliche Entscheidung auferlegte Handlung nicht durch, so ist auf Antrag vom Arbeitsgericht zu erkennen, dass er zur Vornahme der Handlung durch Zwangsgeld anzuhalten sei. Antragsberechtigt sind der Betriebsrat oder eine im Betrieb vertretene Gewerkschaft. Das Höchstmaß des Ordnungsgeldes und Zwangsgeldes beträgt 10.000 Euro.
§ 75 Principles for the treatment of persons employed in the establishment	**§ 75 Grundsätze für die Behandlung der Betriebsangehörigen**
(1) The employer and the works council shall ensure that every person employed in the establishment is treated in accordance with the principles of law and	(1) Arbeitgeber und Betriebsrat haben darüber zu wachen, dass alle im Betrieb tätigen Personen nach den Grundsätzen von Recht und Billigkeit behandelt werden,

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equity and in particular that there is no discrimination against persons on account of their race, creed, nationality, origin, political or trade union activity or convictions, gender or sexual identity. They shall make sure that employees do not suffer any prejudice because they have exceeded a certain age.	insbesondere, dass jede unterschiedliche Behandlung von Personen wegen ihrer Abstammung, Religion, Nationalität, Herkunft, politischen oder gewerkschaftlichen Betätigung oder Einstellung oder wegen ihres Geschlechts oder ihrer sexuellen Identität unterbleibt. Sie haben darauf zu achten, dass Arbeitnehmer nicht wegen Überschreitung bestimmter Altersstufen benachteiligt werden.
(2) The employer and the works council shall safeguard and promote the untrammelled development of the personality of the employees of the establishment. They shall promote the independence and personal initiative of the employees and working groups.	(2) Arbeitgeber und Betriebsrat haben die freie Entfaltung der Persönlichkeit der im Betrieb beschäftigten Arbeitnehmer zu schützen und zu fördern. Sie haben die Selbständigkeit und Eigeninitiative der Arbeitnehmer und Arbeitsgruppen zu fördern.
§ 80 General duties	**§ 80 Allgemeine Aufgaben**
(1) The works council shall have the following general duties:	(1) Der Betriebsrat hat folgende allgemeine Aufgaben:
1. to see that effect is given to Acts, ordinances, safety regulations, collective agreements and works agreements for the benefit of the employees;	1. darüber zu wachen, dass die zugunsten der Arbeitnehmer geltenden Gesetze, Verordnungen, Unfallverhütungsvorschriften, Tarifverträge und Betriebsvereinbarungen durchgeführt werden;
2. to make recommendations to the employer for action benefiting the establishment and the staff;	2. Maßnahmen, die dem Betrieb und der Belegschaft dienen, beim Arbeitgeber zu beantragen;
2a. to promote the implementation of actual equality between women and men, in particular, as regards recruitment, employment, training, further training and additional training and vocational advancement;	2a. die Durchsetzung der tatsächlichen Gleichstellung von Frauen und Männern, insbesondere bei der Einstellung, Beschäftigung, Aus-, Fort- und Weiterbildung und dem beruflichen Aufstieg, zu fördern;
2b. to promote reconciliation of family and work;	2b. die Vereinbarkeit von Familie und Erwerbstätigkeit zu fördern;
3. to receive suggestions from employees and the youth and trainee delegation and, if they are found to be justified, to negotiate with the employer for their implementation; it shall inform the employees concerned	3. Anregungen von Arbeitnehmern und der Jugend- und Auszubildendenvertretung entgegenzunehmen und, falls sie berechtigt erscheinen, durch Verhandlungen mit dem Arbeitgeber auf eine Erledigung hinzuwirken; er hat

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of the state of the negotiations and their results;	die betreffenden Arbeitnehmer über den Stand und das Ergebnis der Verhandlungen zu unterrichten;
4. to promote the rehabilitation of severely handicapped persons and other persons in particular need of assistance;	4. die Eingliederung Schwerbehinderter und sonstiger besonders schutzbedürftiger Personen zu fördern;
5. to prepare and organise the election of a youth and trainee delegation and to collaborate closely with said delegation in promoting the interests of the employees referred to in section 60 (1); it may invite the youth and trainee delegation to make suggestions and to state its view on various matters;	5. die Wahl einer Jugend- und Auszubildendenvertretung vorzubereiten und durchzuführen und mit dieser zur Förderung der Belange der in § 60 Abs. 1 genannten Arbeitnehmer eng zusammenzuarbeiten; er kann von der Jugend- und Auszubildendenvertretung Vorschläge und Stellungnahmen anfordern;
6. to promote the employment of elderly workers in the establishment;	6. die Beschäftigung älterer Arbeitnehmer im Betrieb zu fördern;
7. to promote the integration of foreign workers in the establishment and to further understanding between them and their German colleagues, and to request activities to combat racism and xenophobia in the establishment;	7. die Integration ausländischer Arbeitnehmer im Betrieb und das Verständnis zwischen ihnen und den deutschen Arbeitnehmern zu fördern, sowie Maßnahmen zur Bekämpfung von Rassismus und Fremdenfeindlichkeit im Betrieb zu beantragen;
8. to promote and safeguard employment in the establishment;	8. die Beschäftigung im Betrieb zu fördern und zu sichern;
9. to promote health and safety at work and the protection of the environment in the establishment.	9. Maßnahmen des Arbeitsschutzes und des betrieblichen Umweltschutzes zu fördern.
(2) The employer shall supply comprehensive information to the works council in good time to enable it to discharge its duties under this Act; such information shall also refer to the employment of persons who have not entered into a contract of employment with the employer. The works council shall, if it so requests, be granted access at any time to any documentation it may require for the discharge of its duties; in this connection the works committee or a committee set up in pursuance of section 28 shall be entitled to inspect the payroll	(2) Zur Durchführung seiner Aufgaben nach diesem Gesetz ist der Betriebsrat rechtzeitig und umfassend vom Arbeitgeber zu unterrichten; die Unterrichtung erstreckt sich auch auf die Beschäftigung von Personen, die nicht in einem Arbeitsverhältnis zum Arbeitgeber stehen. Dem Betriebsrat sind auf Verlangen jederzeit die zur Durchführung seiner Aufgaben erforderlichen Unterlagen zur Verfügung zu stellen; in diesem Rahmen ist der Betriebsausschuss oder ein nach § 28 gebildeter Ausschuss berechtigt, in die Listen über die Bruttolöhne und -gehälter Einblick zu nehmen. Soweit es zur ordnungsgemäßen

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showing the gross wages and salaries of the employees. The employer shall provide knowledgeable personnel as informers to the works council, if necessary for the proper discharge of its functions, having due regard to the suggestions of the works council, except where this is precluded by imperative operational requirements.	Erfüllung der Aufgaben des Betriebsrats erforderlich ist, hat der Arbeitgeber ihm sachkundige Arbeitnehmer als Auskunftspersonen zur Verfügung zu stellen; er hat hierbei die Vorschläge des Betriebsrats zu berücksichtigen, soweit betriebliche Notwendigkeiten nicht entgegenstehen.
(3) In discharging its duties the works council may, after making a more detailed agreement with the employer, call on the advice of experts in as far as the proper discharge of its duties so requires.	(3) Der Betriebsrat kann bei der Durchführung seiner Aufgaben nach näherer Vereinbarung mit dem Arbeitgeber Sachverständige hinzuziehen, soweit dies zur ordnungsgemäßen Erfüllung seiner Aufgaben erforderlich ist.
(4) The informers and experts shall be bound to observe secrecy as prescribed in section 79, mutatis mutandis.	(4) Für die Geheimhaltungspflicht der Auskunftspersonen und der Sachverständigen gilt § 79 entsprechend.
§ 87 Right of co-determination	**§ 87 Mitbestimmungsrechte**
(1) The works council shall have a right of co-determination in the following matters in so far as they are not prescribed by legislation or collective agreement:	(1) Der Betriebsrat hat, soweit eine gesetzliche oder tarifliche Regelung nicht besteht, in folgenden Angelegenheiten mitzubestimmen:
1. matters relating to the rules of operation of the establishment and the conduct of employees in the establishment;	1. Fragen der Ordnung des Betriebs und des Verhaltens der Arbeitnehmer im Betrieb;
2. the commencement and termination of the daily working hours including breaks and the distribution of working hours among the days of the week;	2. Beginn und Ende der täglichen Arbeitszeit einschließlich der Pausen sowie Verteilung der Arbeitszeit auf die einzelnen Wochentage;
3. any temporary reduction or extension of the hours normally worked in the establishment;	3. vorübergehende Verkürzung oder Verlängerung der betriebsüblichen Arbeitszeit;
4. the time and place for and the form of payment of remuneration;	4. Zeit, Ort und Art der Auszahlung der Arbeitsentgelte;
5. the establishment of general principles for leave arrangements and the preparation of the leave schedule as well as fixing the time at which the leave is to be taken by individual	5. Aufstellung allgemeiner Urlaubsgrundsätze und des Urlaubsplans sowie die Festsetzung der zeitlichen Lage des Urlaubs für einzelne Arbeitnehmer, wenn zwischen dem

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employees, if no agreement is reached between the employer and the employees concerned;	Arbeitgeber und den beteiligten Arbeitnehmern kein Einverständnis erzielt wird;
6. the introduction and use of technical devices designed to monitor the behaviour or performance of the employees;	6. Einführung und Anwendung von technischen Einrichtungen, die dazu bestimmt sind, das Verhalten oder die Leistung der Arbeitnehmer zu überwachen;
7. arrangements for the prevention of accidents at work and occupational diseases and for the protection of health on the basis of legislation or safety regulations;	7. Regelungen über die Verhütung von Arbeitsunfällen und Berufskrankheiten sowie über den Gesundheitsschutz im Rahmen der gesetzlichen Vorschriften oder der Unfallverhütungsvorschriften;
8. the form, structuring and administration of social services whose scope is limited to the establishment, company or combine;	8. Form, Ausgestaltung und Verwaltung von Sozialeinrichtungen, deren Wirkungsbereich auf den Betrieb, das Unternehmen oder den Konzern beschränkt ist;
9. the assignment of and notice to vacate accommodation that is rented to employees in view of their employment relationship as well as the general fixing of the conditions for the use of such accommodation;	9. Zuweisung und Kündigung von Wohnräumen, die den Arbeitnehmern mit Rücksicht auf das Bestehen eines Arbeitsverhältnisses vermietet werden, sowie die allgemeine Festlegung der Nutzungsbedingungen;
10. questions related to remuneration arrangements in the establishment, including in particular the establishment of principles of remuneration and the introduction and application of new remuneration methods or modification of existing methods;	10. Fragen der betrieblichen Lohngestaltung, insbesondere die Aufstellung von Entlohnungsgrundsätzen und die Einführung und Anwendung von neuen Entlohnungsmethoden sowie deren Änderung;
11. the fixing of job and bonus rates and comparable performance-related remuneration including cash coefficients;	11. Festsetzung der Akkord- und Prämiensätze und vergleichbarer leistungsbezogener Entgelte, einschließlich der Geldfaktoren;
12. principles for suggestion schemes in the establishment;	12. Grundsätze über das betriebliche Vorschlagswesen;
13. principles governing the performance of group work; group work within the meaning of this provision is defined as a group of employees performing a complex task within the	13. Grundsätze über die Durchführung von Gruppenarbeit; Gruppenarbeit im Sinne dieser Vorschrift liegt vor, wenn im Rahmen des betrieblichen Arbeitsablaufs eine Gruppe von Arbeitnehmern eine ihr

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establishment's workflows, which has been assigned to it and is executed in a largely autonomous way.	übertragene Gesamtaufgabe im Wesentlichen eigenverantwortlich erledigt.
(2) If no agreement can be reached on a matter covered by the preceding subsection, the conciliation committee shall make a decision. The award of the conciliation committee shall take the place of an agreement between the employer and the works council.	(2) Kommt eine Einigung über eine Angelegenheit nach Absatz 1 nicht zustande, so entscheidet die Einigungsstelle. Der Spruch der Einigungsstelle ersetzt die Einigung zwischen Arbeitgeber und Betriebsrat.
§ 94 Staff questionnaires, assessment criteria	**§ 94 Personalfragebogen, Beurteilungsgrundsätze**
(1) Staff questionnaires shall require the approval of the works council. If no agreement is reached on their contents, the matter shall be decided by the conciliation committee. The award of the conciliation committee shall take the place of an agreement between the employer and the works council.	(1) Personalfragebogen bedürfen der Zustimmung des Betriebsrats. Kommt eine Einigung über ihren Inhalt nicht zustande, so entscheidet die Einigungsstelle. Der Spruch der Einigungsstelle ersetzt die Einigung zwischen Arbeitgeber und Betriebsrat.
(2) Subsection (1) shall apply, mutatis mutandis, to any personal data contained in written employment contracts that are to be generally used in the establishment and to the formulation of general assessment criteria.	(2) Absatz 1 gilt entsprechend für persönliche Angaben in schriftlichen Arbeitsverträgen, die allgemein für den Betrieb verwendet werden sollen, sowie für die Aufstellung allgemeiner Beurteilungsgrundsätze.

2 Cited German Cases

2.1 Federal Constitutional Court, judgement of 8 July 1997 - 1 BvR 2111/94, 195/95, 2189/95 (BVerfG AP no. 39 on Art. 2 GG)

Federal Constitutional Court, judgement of 8 July 1997 - 1 BvR 2111/94, 195/95, 2189/95 (BVerfG AP no. 39 on Art. 2 GG)	**Bundesverfassungsgericht, Urteil vom 08.07.1997 - 1 BvR 2111/94, 195/95, 2189/95 (BVerfG AP Nr. 39 zu Art. 2 GG)**
Under the general right to privacy (art. 2, para. 1 in connection with art. 1, para. 1 German Constitution (GG)), it was agreed with all employees taken over from the public service of the German Democratic Republic that before any decision on a termination under the provisions of the conciliation agreement was taken, their employers required that they reply to questions on previous party activities within the SED [Socialist United Party of the German Democratic Republic] and activities with the Ministry for State Security. However, questions relating to proceedings concluded prior to 1970 infringed the employees' general right to privacy. If they were answered incorrectly, it would not be permitted for this to have any labour-law consequences. Where the constitutional complaints are admissible, they are also justified. As a result of the contested decisions, there is an infringement of the occupational freedom of Complainants 1 (art. 12, para. 1 in connection with art. 33, para. 2 GG) and of the right to privacy of Complainants 2 and 3 (art. 2, para. 1 in connection with art. 1 para. 1 GG). Both occupational freedom and the general right to privacy have a bearing on the interpretation and application of the statutory provisions. On the basis of the constitution, therefore, the judge must ascertain whether the application of these provisions affects this basic right in any individual case. If so, then he has to interpret and apply the provisions in the	Es war mit dem allgemeinen Persönlichkeitsrecht (Art. 2 Abs. 1 i. V. mit Art. 1 Abs. 1 GG) der aus dem öffentlichen Dienst der Deutschen Demokratischen Republik übernommenen Arbeitnehmer grundsätzlich vereinbart, daß die Arbeitgeber von ihnen vor der Entscheidung über eine Kündigung nach den Vorschriften des Einigungsvertrages verlangten, Fragen über frühere Parteifunktionen in der SED und Tätigkeiten für das Ministerium für Staatssicherheit zu beantworten. Fragen nach Vorgängen, die vor dem Jahre 1970 abgeschlossen waren, verletzten jedoch das allgemeine Persönlichkeitsrecht der Beschäftigten. Wurden sie unzutreffend beantwortet, dürfen daraus keine arbeitsrechtlichen Konsequenzen gezogen werden. Die Verfassungsbeschwerden sind, soweit sie zulässig sind, auch begründet. Durch die jeweils angegriffenen Entscheidungen werden die Beschwerdeführerinnen zu 1) in ihrer Berufsfreiheit (Art. 12 Abs. 1 i. V. mit Art. 33 Abs. 2 GG), die Beschwerdeführer zu 2) und 3) außerdem in ihrem allgemeinen Persönlichkeitsrecht (Art. 2 Abs. 1 i. V. mit Art. 1 Abs. 1 GG) verletzt. Wie die Berufsfreiheit strahlt auch das allgemeine Persönlichkeitsrecht auf die Auslegung und Anwendung der gesetzlichen Vorschriften aus. Der Richter hat daher von Verfassungs wegen zu prüfen, ob von ihrer Anwendung im Einzelfall dieses Grundrecht berührt wird. Trifft das zu, dann hat er diese Vorschriften im Lichte der Grundrechte auszulegen und anzuwenden.

light of the basic rights.	

2.2 Federal Labour Court, 18 December 1984 - 3 AZR 389/83 (BAG AP no. 8 - Sec. 611 German Civil Code right to privacy)

Federal Labour Court, 18 December 1984 - 3 AZR 389/83 (BAG AP no. 8 - Sec. 611 German Civil Code right to privacy)	**Bundesarbeitsgericht, 18.12.1984 - 3 AZR 389/83 (BAG AP Nr. 8 zu § 611 BGB Persönlichkeitsrecht)**
The employer infringes the employee's general right to privacy if it grants third parties access to the employee's personal files without his knowledge. This is the case, for example, if the employment agreement and a personal loan agreement are shown to another employer to whom the employee intends to apply. An infringement of the right to privacy is deemed to exist where an invasion of personal privacy occurs, which also includes an intrusion into the professional activities of the person concerned. Whether the right to privacy is infringed in a personal case can only be evaluated on the basis of a balance of legally protected values and of interests giving careful consideration to all the relevant circumstances. In the present case, this leads to the conclusion that the Defendant acted unlawfully. The information to which the employer is entitled concern only the performance and conduct of the employee during the employment relationship. The additional information issued by the Defendant in the present case were not covered by the employer's right to information. This applies particularly to viewing access to the employment agreement. The disclosure of employment conditions agreed between the parties to an employer to whom the Plaintiff wished to apply was sufficient to weaken the Plaintiff's negotiating position. The employer is ultimately not entitled to encroach upon on-going negotiations.	Der Arbeitgeber verletzt das allgemeine Persönlichkeitsrecht des Arbeitnehmers, wenn er dessen Personlakten einem Dritten ohne Wissen des Betroffenen zugänglich macht. Dies ist z. B. dann der Fall, wenn der Arbeitsvertrag und ein Personalkreditvertrag einem anderen Arbeitgeber gezeigt werden, bei dem sich der Arbeitnehmer bewerben will. Eine Verletzung des Persönlichkeitsrechts liegt vor bei einem Eingriff in die Individualsphäre, zu der auch das berufliche Wirkung des Betroffenen gehört. Ob das Persönlichkeitsrecht im einzelnen Fall verletzt ist, läßt sich nur aufgrund einer Güter- und Interessenabwägung unter sorgsamer Würdigung aller Umstände beurteilen. Diese führt im vorliegenden Fall zu dem Ergebnis, daß die Beklagte rechtwidrig gehandelt hat. Die Auskünfte, zu denen der Arbeitgeber berechtigt ist, betreffen nur Leistung und Verhalten des Arbeitnehmers während des Arbeitsverhältnisses. Die weitergehenden Informationen, die die Beklagte im vorliegenden Fall erteilt hat, waren vom Auskunftsrecht des Arbeitgebers nicht gedeckt. Dies gilt insbesondere für die Einsicht in den Arbeitsvertrag. Die Bekanntgabe der zwischen den Parteien vereinbarten Arbeitsbedingungen an einen Arbeitgeber, bei dem sich die Klägerin bewerben wollte, war geeignet, die Verhandlungsposition der Klägerin zu schwächen. Zu einem solchen Eingriff in schwebende Verhandlungen ist der Arbeitgeber grundsätzlich nicht berechtigt.

2.3 Federal Labour Court, 15 July 1987 - 5 AZR 215/86 (BAG AP No. 14 - Sec. 611 German Civil Code right to privacy)

Federal Labour Court, 15 July 1987 - 5 AZR 215/86 (BAG AP No. 14 - Sec. 611 German Civil Code right to privacy)	Bundesarbeitsgericht, 15.07.1987 - 5 AZR 215/86 (BAG AP Nr. 14 zu § 611 BGB Persönlichkeitsrecht)
On the basis of the protection of privacy granted under constitutional law, the employer is obliged to hold careful custody of the employee's personal files, to treat certain information confidentially and to ensure that the relevant information officer also treats the information confidentially (continuation of the Senate's previous established case law). The employer must also ensure that as few employees as possible have access to personnel files. Claims on the basis of infringements of rights to privacy are not covered by exclusivity stipulations whose scope of applications covers claims arising from the employment agreement or the employment relationship. The general right of privacy granted by art. 1 and art. 2 protects employees not only from excessive monitoring and investigation of their private lives, such as with the aid of medical or psychological reports, but also covers protection from the divulgence of personal data, such as that which the employer has acquired by admissible means. This results in the following with regard to the keeping of personnel files: personnel files must not be made generally accessible but must be kept in safe custody. The employer must treat particular information confidentially or ensure that the relevant information officer treats the information confidentially. As few employees as possible must granted access to personnel files. Sensitive information, including information concerning an employee's physical, mental or psychological state of health and general statements on the employee's personality shall require increased	Aufgrund des verfassungsrechtlich gewährleisteten Persönlichkeitsschutzes ist der Arbeitgeber verpflichtet, die Personalakten des Arbeitnehmers sorgfältig zu verwahren, bestimmte Informationen vertraulich zu behandeln und für die vertrauliche Behandlung durch die Sachbearbeiter Sorge zu tragen (Fortführung der bisherigen Rechtsprechung des Senats). Auch muß der Arbeitgeber den Kreis der mit Personalakten befaßten Mitarbeiter möglichst eng halten. Ansprüche aus Persönlichkeitsverletzungen fallen als absolute Rechte nicht unter Ausschlußklauseln, die ihren Wirkungsbereich auf Ansprüche aus dem Arbeitsvertrag oder dem Arbeitsverhältnis erstrecken. Das durch Art. 1 und Art. 2 gewährleistete allgemeine Persönlichkeitsrecht schützt den Arbeitnehmer nicht nur vor einer zu weitgehenden Kontrolle und Ausforschung seiner Persönlichkeit, etwa mit Hilfe ärztlicher oder psychologischer Gutachten; es umfaßt ebenfalls den Schutz vor der Offenlegung personenbezogener Daten, und zwar auch solcher, von denen der Arbeitgeber in zulässiger Weise Kenntnis erlangt hat. Für die Führung von Personalakten ergibt sich daraus: Die Personalakten dürfen nicht allgemein zugänglich sein, sondern müssen sorgfältig verwahrt werden. Der Arbeitgeber muß bestimmte Informationen vertraulich behandeln oder für die vertrauliche Behandlung durch die Sachbearbeiter Sorge tragen. Auch muß der Kreis der mit Personalakten befaßten Beschäftigten möglichst eng gehalten werden. Sensible Daten, zu denen insbesondere auch solche über den körperlichen, geistigen oder seelischen Gesundheitszustand und allgemeine Aussagen über die Persönlichkeit

protection.	des Arbeitnehmers gehören, bedürfen des verstärkten Schutzes.

2.4 Federal Labour Court 04 April 1990 - 5 AZR 299/89 (BAG AP NO. 21 - Sec. 611 BGB right of privacy)

Federal Labour Court 04 April 1990 - 5 AZR 299/89 (BAG AP NO. 21 - Sec. 611 BGB right of privacy)	**Bundesarbeitsgericht 04.04.1990 - 5 AZR 299/89 (BAG AP Nr. 21 zu § 611 BGB Persönlichkeitsrecht)**
It does not constitute a violation of a savings bank employee's right of personality, as protected by constitutional law, if personnel of the savings bank's accounting control department who are subject to a professional duty of confidentiality examine an employee's personal file in a given instance in order to examine the employer's personnel expenditure. If the employer infringes the employee's right of personality within the scope of the employment, this also comprises a violation of his duties under the employment contract. In the event of objectively illegal interventions in his right of personality, the employee has a claim to forbearance of further interventions. The general right of personality guaranteed by Art. 1 and 2 of the German Constitution not only protects the employee from an excessive control and sounding out of his personality, but also includes protection against disclosure of personal data, including data of which the employer admissibly obtained knowledge. However, the right to protection of personal data is not without limitation. The limits to the inviolable private sphere of lifestyle and personal information is determined in each individual case in accordance with the principle of proportionality. According to this principle, interventions in the right of personality can be justified within the scope of protecting interests meriting greater protection. To this extent, it is necessary to balance a consideration of legally protected values and interests in the individual case, in order to clarify	Es verstößt nicht gegen das verfassungsrechtlich geschützte Persönlichkeitsrecht des Arbeitnehmers einer Sparkasse, wenn zur Verschwiegenheit verpflichtete Mitarbeiter der Sparkassenrevision im Einzelfall zur Überprüfung der Personalausgaben seines Arbeitgebers Einsicht in seine Personalakte nehmen. Verletzt der Arbeitgeber innerhalb des Arbeitsverhältnisses das Persönlichkeitsrecht des Arbeitnehmers, so liegt darin zugleich ein Verstoß gegen seine arbeitsvertraglichen Pflichten. Bei objektiv rechtswidrigen Eingriffen in sein Persönlichkeitsrecht hat der Arbeitnehmer entsprechend den §§ 12, 862, 1004 BGB Anspruch auf Unterlassung weiterer Eingriffe. Das durch Art. 1 und 2 GG gewährleistete allgemeine Persönlichkeitsrecht schützt den Arbeitnehmer nicht nur vor einer zu weitgehenden Kontrolle und Ausforschung seiner Persönlichkeit, sondern es umfaßt ebenfalls den Schutz vor der Offenlegung personenbezogener Daten, und zwar auch solcher, von denen der Arbeitgeber in zulässiger Weise Kenntnis erlangt hat. Das Recht auf informationelle Selbstbestimmung ist jedoch nicht schrankenlos. Wo die Grenze eines unantastbaren Bereichs privater Lebens- und Informationsgestaltung endet, bestimmt sich im Einzelfall nach dem Verhältnismäßigkeitsgrundsatz. Danach können Eingriffe in das Persönlichkeitsrecht durch die Wahrnehmung überwiegend schutzwürdiger Interessen gerechtfertigt sein. Insoweit bedarf es im Einzelfall einer Güter- und Interessenabwägung um zu klären, ob dem Persönlichkeitsrecht des einen

whether the right of personality on the one hand is opposed by equivalent interests meriting protection on the other.	gleichwertige und schutzwürdige Interessen anderer gegenüber stehen.

2.5 Federal Labour Court, 07 September 1995 - 8 AZR 823/93 (BAG AP No. 24 to sec. 242 BGB Duty to provide Information)

Federal Labour Court, 07 September 1995 - 8 AZR 823/93 (BAG AP No. 24 to sec. 242 BGB Duty to provide Information)	**Bundesarbeitsgericht, 07.09.1995 - 8 AZR 828/93 (BAG AP Nr. 24 zu § 242 BGB Auskunftspflicht)**
Even after his employment, the employee is obliged to answer questions put to him by the employer concerning his education and training if it is to be assumed that the declarations made at the time of employment and any subsequent additions are no longer complete. The employee is not obliged to submit extra-judicial declarations concerning possible reasons for termination unless there are particular legal principles in support thereof. According to principles of good faith, there is a duty to provide information if the legal relations existing between the parties are such that the entitled person is excusably uncertain as to the existence or scope of his rights, and the obliged person can easily provide the necessary information required to eliminate such uncertainty. This legal principle has in the meantime been established as customary law. Prerequisite for this is that the employer has a legitimate interest, meriting sanction and protection, in the question being answered. This interest must precisely be connected with the existing employment relationship. As the information can only relate to the existence and scope of rights arising from the employment relationship, there must be a connection with the fulfilment of the employee's contractual performance, with his other obligations or with the employer's obligations. A mere general connection with the employment	Der Arbeitnehmer ist auch nach seiner Einstellung verpflichtet, Fragen des Arbeitgebers zu seiner Vor- und Ausbildung zu beantworten, wenn davon auszugehen ist, daß die bei der Einstellung abgegebenen Erklärungen und danach erfolgten Ergänzungen nicht mehr vollständig vorhanden sind. Der Arbeitnehmer ist nicht verpflichtet, außergerichtliche Erklärungen zu möglichen Kündigungsgründen abzugeben, soweit nicht besondere rechtliche Grundlagen hierfür bestehen. Nach Treu und Glauben besteht eine Auskunftspflicht, wenn die zwischen den Parteien bestehenden Rechtsbeziehungen es mit sich bringen, daß der Berechtigte in entschuldbarer Weise über Bestehen oder Umfang seines Rechts im Ungewissen ist und der Verpflichtete die zur Beseitigung der Unwissenheit erforderliche Auskunft unschwer geben kann. Dieser Rechtsgrundsatz gilt inzwischen als Gewohnheitsrecht. Voraussetzung ist ein berechtigtes, billigenswertes und schutzwürdiges Interesse des Arbeitgebers an der Beantwortung der Frage. Dieses Interesse muß gerade im Zusammenhang mit dem bestehenden Arbeitsverhältnis vorliegen. Da sich die Auskunft nur auf das Bestehen und den Umfang von Rechten aus dem Arbeitsverhältnis beziehen kann, muß ein Zusammenhang mit der Erfüllung der vom Arbeitnehmer geschuldeten vertraglichen Leistung, mit dessen sonstiger

relationship is not sufficient. The obligation to provide information cannot be allowed to constitute an excessive burden for the employees. It must correspond to the relevance of the interest in information. If the employer can reasonably obtain the information elsewhere, the claim is excluded. If the question intervenes in the employee's general right of personality, this intervention must withstand a balancing of mutual interests in accordance with the principle of proportionality. An inviolable private sphere of lifestyle must in any event be allowed. The statutory allocation of the burden of presentation and proof in legal proceedings, and the statutory rules concerning burden of proof are to be taken into account. The situation regarding presentation and proof cannot be inadmissibly changed by granting claims to information under substantive law. According to principles of good faith, the claim to information can only apply as a supplementary measure where the basic allocation of the burden of presentation and proof requires corresponding correction.	Pflichtenbindung oder mit der Pflichtenbindung des Arbeitgebers bestehen. Ein bloßer allgemeiner Zweckzusammenhang mit dem Arbeitsverhältnis reicht hier nicht aus. Die Auskunftsverpflichtung darf keine übermäßige Belastung für den Arbeitnehmer darstellen. Sie muß der Bedeutung des Auskunftsinteresses entsprechen. Kann sich der Arbeitgeber die Informationen auf zumutbare Weise anderweitig verschaffen, ist der Anspruch ausgeschlossen. Greift die Frage in das allgemeine Persönlichkeitsrecht des Arbeitnehmers ein, so muß dieser Eingriff einer Abwägung der beiderseitigen Interessen nach dem Grundsatz der Verhältnismäßigkeit standhalten. Ein unangetasteter Bereich privater Lebensgestaltung muß in jedem Fall gewahrt bleiben. Die gesetzliche Verteilung der Darlegungs- und Beweislast im Prozeß und gesetzliche Beweislastregeln sind zu berücksichtigen. Die Darlegungs- und Beweissituation darf nicht durch die Gewährung materiell rechtlicher Auskunftsansprüche unzulässig verändert werden. Der Auskunftsanspruch kann nach Treu und Glauben nur da ergänzend eingreifen, wo auch die grundsätzliche Verteilung der Darlegungs- und Beweislast einer entsprechenden Korrektur bedarf.

2.6 Federal Labour Court, 28 May 2002 - 1 ABR 32/01 (NZA 2003, 166)

Federal Labour Court, 28 May 2002 - 1 ABR 32/01 (NZA 2003, 166)	**Bundesarbeitsgericht, 28.05.2002 - 1 ABR 32/01 (NZA 2003, 166)**
The works council has a right of codetermination in respect of the introduction of a formula by which editors of a financial newspaper are obliged, on the basis of a contractual collateral agreement, to notify the possession of particular securities to the employer in accordance with sec. 87 para. 1 no. 1 Works Constitution Act (BetrVG). This measure is not subject to the partial	Dem Betriebsrat steht bei der Einführung eines Formulars, in dem Redakteure einer Wirtschaftszeitung aufgrund einer vertraglichen Nebenabrede den Besitz bestimmter Wertpapiere dem Arbeitgeber anzuzeigen haben, ein Mitbestimmungsrecht nach § 87 Abs. 1 Nr. 1 BetrVG zu. Diese Maßnahme unterliegt nicht dem Tendenzschutz nach § 118 Abs. 1 Nr. 1 BetrVG.

exemption from codetermination pursuant to sec. 118 para. 1 no. 1 BetrVG. For a right of co-determination to take effect within the meaning of sec. 87 para. 1 BetrVG, it is irrelevant whether the matter in question is a unilateral measure of the employer or a standard contractual regulation. If a provision in the interests of the operational procedure (also) affects the private conduct of the employees, a codetermination of the works councils pursuant to sec. 87 para. 1 no. 1 comes into consideration. It remains undecided whether sec. 75 para. 1 BetrVG establishes a claim to forbearance in favour of the works council. According to the consistent case law of the senate, the works council has a right of codetermination in accordance with sec. 87 para 1 no. 1 BetrVG in respect of measures relating to the employees' conduct in the business. According to sec. 87 para. 1 no. 1 BetrVG, only measures regulating the employees' performance of work are free from rights of codetermination. Employees' performance of work is affected if the employer, by means of its power of organisation and direction, specifies in more detail what work is to be carried out and how this is to occur. Accordingly, only regulations in which the performance of work is directly specified are not subject to codetermination. Regulations which serve to coordinate other conduct of the employees relate to the order of the business. The works council has a right of codetermination in respect of the introduction and contents of such regulations. The case law of the senate recognises that a gross violation by the employer of its duties specified in sec. 75 para. 2 sentence 1 BetrVG, can lead to a claim to forbearance on the part of the works council in the event of the further	Für das Eingreifen eines Mitbestimmungsrechtes im Sinne des § 87 Abs. 1 BetrVG ist es unerheblich, ob es sich in der fraglichen Angelegenheit um eine einseitige Maßnahme des Arbeitgebers oder um eine vertragliche Einheitsregelung handelt. Betrifft eine Regelung im Interesse der betrieblichen Abläufe (auch) das private Verhalten der Arbeitnehmer, kommt eine Mitbestimmung des Betriebsrats nach § 87 Abs. 1 Nr. 1 in Betracht. Es bleibt offen, ob § 75 Abs. 1 BetrVG einen Unterlassungsanspruch zugunsten des Betriebsrats begründet. Nach der ständigen Rechtsprechung des Senats hat der Betriebsrat nach § 87 Abs. 1 Nr. 1 BetrVG bei solchen Maßnahmen mitzubestimmen, die das Ordnungsverhalten der Arbeitnehmer im Betrieb betreffen. Mitbestimmungsfrei sind nach 87 Abs. 1 Nr. 1 BetrVG lediglich Maßnahmen, die das Arbeitsverhalten regeln sollen. Dieses ist berührt, wenn der Arbeitgeber kraft seiner Organisations- und Leitungsmacht näher bestimmt, welche Arbeiten auszuführen sind und in welcher Weise das geschehen soll. Danach unterliegen nur solche Anordnungen nicht der Mitbestimmung, in denen die Arbeitspflicht unmittelbar konkretisiert wird. Anordnungen, die dazu dienen, das sonstige Verhalten der Arbeitnehmer zu koordinieren, betreffen die Ordnung des Betriebs. Über deren Einführung und über deren Inhalt hat der Betriebsrat mitzubestimmen. In der Rechtsprechung des Senats ist anerkannt, daß ein grober Verstoß des Arbeitgebers gegen seine in § 75 Abs. 2 Satz 1 BetrVG normierten Pflichten bei Vorliegen der weiteren Voraussetzungen des § 23 Abs. 3 BetrVG zu einem Anspruch des Betriebsrats auf Unterlassung führen kann.

preconditions of sec. 23 para. 3 BetrVG being fulfilled.	

2.7 Federal Supreme Court (BGHZ 116, 268)

Federal Supreme Court (BGHZ 116, 268)	**Bundesgerichtshof (BGHZ 116, 268)**
Any provision in any agreement on the sale of a medical practice which stipulates the handing-over of files concerning patients and consultations even without the consent of the patients concerned, shall be deemed to infringe both the patients' right of informational self-determination and the obligation to medical confidentiality (art. 2, para. 1, German Constitution (GG), sec. 203 Criminal Code (StGB)); any such agreement shall be deemed to infringe a legal prohibition (sec. 134 GG) and shall thus be null and void.	Eine Bestimmung in einem Vertrag über die Veräußerung einer Arztpraxis, die den Veräußerer auch ohne Einwilligung der betroffenen Patienten verpflichtet, die Patienten- und Beratungskartei zu übergeben, verletzt das informationelle Selbstbestimmungsrecht der Patienten und die ärztliche Schweigepflicht (Art. 2 Abs. 1 GG, § 203 StGB); sie ist wegen Verstoßes gegen ein gesetzliches Verbot (§ 134 BGB) nichtig.

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FINAL RULES RELATING TO THE OVERSIGHT OF NON-U.S. PUBLIC ACCOUNTING FIRMS	PCAOB Release No. 2004-005 June 9, 2004 PCAOB Rulemaking Docket Matter No. 013

Summary: After public comment, the Public Company Accounting Oversight Board (the "Board" or "PCAOB") has adopted rules related to the oversight of non-U.S. accounting firms. The five rules the Board has adopted are PCAOB Rules 4011 and 4012, PCAOB Rule 5113 and PCAOB Rules 6001 and 6002, plus related definitions.

The Board will submit these rules to the Securities and Exchange Commission ("Commission") for approval pursuant to Section 107 of the Sarbanes-Oxley Act of 2002 (the "Act"). The Board's new rules will not take effect unless approved by the Commission.

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* * *

The Sarbanes-Oxley Act of 2002 directs the Board to, among other things, establish a registration system and inspection and enforcement programs for accounting firms that audit or play a substantial role in the audit of issuers.[1/] Section 106(a) of the Act provides that non-U.S. public accounting firms are subject to the Act

[1/] See the Act and the rules of the Board.

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and the rules of the Board and the Commission issued under the Act in the same manner and to the same extent as a U.S. public accounting firm.

To address the special issues raised by non-U.S. firms, the Board developed a framework under which the Board could implement the Act's provisions by relying, to an appropriate degree, on a non-U.S. oversight system. This framework is described in PCAOB Release No. 2003-020, Briefing Paper on the Oversight of Non-U.S. Public Accounting Firms (October 28, 2003) (the "Briefing Paper"). The Briefing Paper was followed by proposed rules, which generally articulated the Briefing Paper's framework for cooperation between the PCAOB and its counterparts in other countries.[2/] The Board's adoption of final rules concludes this process.

The five rules the Board has adopted are PCAOB Rules 4011 and 4012, PCAOB Rule 5113 and PCAOB Rules 6001 and 6002, plus related definitions. The text of these rules and a detailed discussion of each are attached as Appendices 1 and 2, respectively. Section A of this release provides background information relating to the development of the Board's approach to the oversight of non-U.S. firms. Section B provides a general overview of the operation of the rules. Section C describes the changes made to the rules in response to public comments.

A. Background

As discussed in the Briefing Paper, the Board has engaged in a constructive dialogue with non-U.S. regulators concerning reforms in the oversight of accounting firms that audit public companies and the possible development of a cooperative arrangement for such oversight. This dialogue has demonstrated that the Board and its foreign counterparts share many of the same objectives. These include protecting investors from inaccurate financial reporting, improving audit quality, ensuring effective and efficient oversight of accounting firms, and helping to restore the public trust in the auditing profession.

As also explained in the Briefing Paper, underlying this convergence of views is the global nature of the capital markets. Because of the global nature of these markets, the effects of a corporate reporting failure in one country tend to ripple through the financial markets of another, potentially causing substantial economic damage. The

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[2/] PCAOB Release No. 2003-024, Proposed Rule on Oversight of Non-U.S. Firms (December 10, 2003).

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Board believes that the best way to fulfill its mission – that is, protection of investors in the U.S. markets – is to participate in global efforts to protect investors in all markets. To that end, the Board believes that it is in the interests of the public, investors and the Board's non-U.S. counterparts to develop an efficient and effective cooperative arrangement where reliance may be placed on the home-country system to the maximum extent possible.

The Board hopes that its approach to oversight of non-U.S. public accounting firms will encourage improvements in audit quality for firms in jurisdictions that have or create independent and rigorous auditor oversight systems. Already, significant changes in the regulation of non-U.S. accounting firms have occurred in certain jurisdictions, including a number of proposals for the creation of new bodies to improve audit quality and verify compliance with local auditing and related professional practice standards.

The Board's approach towards the oversight of non-U.S. firms endeavors to build upon the work of these new bodies – and, where available, existing bodies – in order to minimize administrative burdens and legal conflicts that firms face and to conserve Board resources, without undermining or ignoring the Board's statutory mandates.

The cooperative approach envisaged by the Board in the Briefing Paper and reflected in the final rules also addresses potential conflicts of law that may arise in connection with an inspection or an investigation. The Board believes that it is appropriate that a cooperative approach respect the laws of other jurisdictions, to the extent possible. At the same time, every jurisdiction must be able to protect the participants in, and the integrity of, its capital markets as it deems appropriate. Thus, the Board believes that a cooperative approach in which the Board works in the first instance with the home-country system to attempt to resolve potential conflicts of laws reflects the appropriate balance between the interests of different systems and their laws.

B. Overview of Board's Rules

The rules adopted address the Board's oversight of non-U.S. accounting firms that register with the Board and the Board's willingness to assist non-U.S. authorities in their oversight of U.S. firms.

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The Board's rules on inspections (PCAOB Rules 4011 and 4012) provide a foreign registered public accounting firm an opportunity to minimize the unnecessarily duplicative administrative burdens of dual oversight by requesting that the Board rely – to an extent deemed appropriate by the Board – on inspections of the registered firm under the home country's oversight system. Under the Board's rules, a firm would first provide the Board with a one-time statement asking the Board to rely on a non-U.S. inspection. At an appropriate time before each inspection of a non-U.S. firm that has submitted such a statement, the Board would determine the appropriate degree of reliance based on information about the non-U.S. system obtained primarily from the non-U.S. regulator regarding the independence and rigor of the non-U.S. system. The Board would also base its decision on its discussions with the appropriate entity or entities within the oversight system concerning the specific inspection work program for the non-U.S. firm's inspection at hand. The more independent and rigorous a home-country system, the higher the Board's reliance on that system. A higher level of reliance translates into less direct involvement by the Board in the inspection of the non-U.S. registered public accounting firm.

The Board's rule on investigations (PCAOB Rule 5113) provides that the Board may, in appropriate circumstances, rely upon the investigation or sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority. The Board's reliance would depend, in part, on the independence and rigor of the non-U.S. authority. Reliance also may depend on the non-U.S. authority's willingness to update the Board regarding the investigation on a regular basis and its willingness and authority to share the relevant evidence gathered with the Board.

The Board has also adopted two rules reflecting its willingness to assist non-U.S. authorities in their oversight of firms located in the U.S. and registered with the Board. PCAOB Rule 6001 relates to inspections and provides that the Board may, as it deems appropriate, assist a non-U.S. authority in its inspection of a registered U.S. firm. PCAOB Rule 6002 relates to investigations and provides that the Board may, as it deems appropriate and to the extent permitted by law, assist a non-U.S. authority in the investigation of a registered U.S. accounting firm.

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C. Public Comment Process and Board Responses

The Board released its proposed rules on the oversight of non-U.S. firms on December 10, 2003. The Board received 22 written comment letters.[3/] In response to these comments, the Board's rules both clarify and modify certain aspects of the proposal. Most significantly, the changes include –

- eliminating proposed Exhibit 99.3 to Form 1 which would have allowed an applicant an option to provide the name and physical address of the applicant's foreign registrar or any other authority responsible for regulation of the applicant's practice of accounting;

- eliminating the requirement that a foreign registered public accounting firm submit a petition that describes the laws, rules and/or other information of the non-U.S. system;

- adding a requirement that a foreign registered public accounting firm that seeks to have the Board rely on a non-U.S. inspection provide a written statement, signed by an authorized partner or officer of the firm, certifying that the firm seeks such reliance for inspections conducted by the Board;

- inserting within the text of the rule the illustrative criteria that the Board may consider when determining the degree, if any, to which the Board may rely on a non-U.S. inspection;

- adopting a rule providing that the Board may, as it deems appropriate, provide assistance in an inspection of a registered public accounting firm pursuant to the laws and/or regulations of a non-U.S. jurisdiction; and

- adopting a rule where the Board may, as it deems appropriate, provide assistance in an investigation of a registered public accounting firm pursuant to the laws and/or regulations of a non-U.S. jurisdiction.

3/ The Board's responses to the comments are discussed in more detail in the section-by-section analysis in Appendix 2. The comment letters are available on the Board's Web site – www.pcaobus.org – and will be attached to the Form 19b-4 that the Board will file with the Commission.

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* * *

On the 9th day of June, in the year 2004, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ADOPTED BY THE BOARD.

/s/ J. Gordon Seymour

J. Gordon Seymour
Acting Secretary

June 9, 2004

APPENDICES –

1. Rules Relating to the Oversight of Non-U.S. Public Accounting Firms

2. Section-by-Section Analysis of Rules Relating to Oversight of Non-U.S. Firms

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Appendix 1 – Rules Relating to the Oversight of Non-U.S. Public Accounting Firms

RULES

SECTION 1. GENERAL PROVISIONS

* * *

Rule 1001. Definitions of Terms Employed in Rules.

When used in the Rules, unless the context otherwise requires:

* * *

(f)(ii) Foreign Registered Public Accounting Firm

The term "foreign registered public accounting firm" means a foreign public accounting firm that is a registered public accounting firm.

(n)(iii) Non-U.S. Inspection

The term "non-U.S. inspection" means an inspection of a foreign registered public accounting firm conducted within a non-U.S. oversight system.

* * *

SECTION 4. INSPECTIONS

* * *

Rule 4011. Statement by Foreign Registered Public Accounting Firms

A foreign registered public accounting firm that seeks to have the Board rely, to the extent deemed appropriate by the Board, on a non-U.S. inspection when the Board conducts an inspection of such firm pursuant to Rule 4000 shall submit a written statement signed by an authorized partner or officer of the firm to the Board certifying that the firm seeks such reliance for all Board inspections.

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Rule 4012. Inspections of Foreign Registered Public Accounting Firms

(a) If a foreign registered public accounting firm has submitted a statement pursuant to Rule 4011, the Board will, at an appropriate time before each inspection of such firm, determine the degree, if any, to which the Board may rely on the non-U.S. inspection. To the extent consistent with the Board's responsibilities under the Act, the Board will conduct its inspection under Rule 4000 in a manner that relies to that degree on the non-U.S. inspection. In making that determination, the Board will evaluate –

(1) information concerning the level of the non-U.S. system's independence and rigor, including the adequacy and integrity of the system, the independence of the system's operation from the auditing profession, the nature of the system's source of funding, the transparency of the system, and the system's historical performance; and

(2) discussions with the appropriate entity or entities within the system concerning an inspection work program.

(b) The Board's evaluation made pursuant to paragraph (a) may include, but not be limited to, consideration of –

(1) the adequacy and integrity of the system, including –

(i) whether the system has the authority to inspect audit and review engagements, evaluate the sufficiency of the quality control system, and perform such other testing as deemed necessary of foreign public accounting firms; and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the system has the authority to conduct investigations and disciplinary proceedings of foreign public accounting firms, any persons of such firms, or both, that may have violated the laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

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(iii) whether the system has the authority to impose appropriate sanctions for violations of the non-U.S. jurisdiction's laws and standards relating to the issuance of audit reports, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

(iv) whether the persons within the system have adequate qualifications and expertise;

(2) the independence of the system from the auditing profession, including –

(i) whether the system has the authority to establish and enforce ethics rules and standards of conduct for the individual or group of individuals who govern the system and its staff and has prohibited conflicts of interest, and whether the system can exercise such authority without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(ii) whether the person or persons governing the system –

(A) have been appointed, or otherwise selected, by the government of the non-U.S. jurisdiction, without the approval of, or consultation with, any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms; and

(B) may be removed only by the government of the non-U.S. jurisdiction and may not be removed by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(iii) whether a majority of the individuals with whom the system's decision-making authority resides do not hold licenses or certifications authorizing them to engage in the business of auditing or accounting and did not hold such licenses or certificates for at least the last five years immediately before assuming their position within the system;

(iv) whether a majority of the individuals with whom the system's decision-making authority resides, including the individual who functions as the entity's chief executive or equivalent thereof, are not practicing public accountants; and

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(v) whether each entity within the system has the authority to conduct its day-to-day operations without the approval of any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(3) the source of funding for the system, including whether the system has an appropriate source of funding that is not subject to change, approval or influence by any person affiliated or otherwise connected with a public accounting firm or an association of such persons or firms;

(4) the transparency of the system, including whether the system's rulemaking procedures and periodic reporting to the public are openly visible and accessible; and

(5) the system's historical performance, including whether there is a record of disciplinary proceedings and appropriate sanctions, but only for those systems that have existed for a reasonable period of time.

* * *

SECTION 5. INVESTIGATIONS AND ADJUDICATIONS

* * *

Part 1 – Inquiries and Investigations

* * *

Rule 5113. Reliance on the Investigations of Non-U.S. Authorities

Upon the recommendation of the Director of Enforcement and Investigations or upon the Board's own motion, the Board may, in appropriate circumstances, rely upon the investigation or a sanction, if any, of a foreign registered public accounting firm by a non-U.S. authority.

* * *

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SECTION 6. INTERNATIONAL

* * *

Rule 6001. Assisting Non-U.S. Authorities in Inspections

The Board may, as it deems appropriate, provide assistance in an inspection of a registered public accounting firm organized and operating under the laws of the United States conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

Rule 6002. Assisting Non-U.S. Authorities in Investigations

The Board may, as it deems appropriate, provide assistance in an investigation of a registered public accounting firm organized and operating under the laws of the United States conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

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Appendix 2 – Section-by-Section Analysis of Rules Relating to Oversight of Non-US. Firms

Rule 1001 – Definitions of Terms Employed in Rules

Foreign Registered Public Accounting Firm

The term "foreign registered public accounting firm" in Rule1001(f)(ii) means a foreign public accounting firm that is a registered public accounting firm.

Non-U.S. Inspection

The term "*non-U.S. inspection*" in Rule1001(n)(iii) means an inspection of a foreign registered public accounting firm conducted within a non-U.S. oversight system.

Rule 4011 – Statement by Foreign Registered Public Accounting Firm

PCAOB Rule 4011 states that a foreign registered public accounting firm that seeks to have the Board rely on a non-U.S. inspection when the Board conducts an inspection of such firm pursuant to PCAOB Rule 4000 shall submit a written statement signed by an authorized partner or officer of the firm to the Board certifying that the firm seeks such reliance for Board inspections.

The Board's proposed rule would have required that foreign registered public accounting firms submit to the Board a written petition, in English, describing the non-U.S. system's laws, rules and/or other information to assist the Board in evaluating such system's independence and rigor. Many commenters argued that this requirement was

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neither practical nor effective, that different public accounting firms within the same jurisdiction may translate and describe the system differently, and that non-U.S. regulators, rather than public accounting firms, are in a better position to describe the non-U.S. system, as they may possess information unknown by a foreign registered public accounting firm.

In response to these comments, the Board has decided not to impose the petition requirement. The Board's rule does not require a foreign registered public accounting firm to describe its oversight system, including its legal underpinnings. As explained more fully below, under PCAOB Rule 4012, the Board will, at an appropriate time, obtain information about the non-U.S. system directly from the appropriate non-U.S. regulator.

Instead of requiring a petition, the Board has adopted a rule permitting a foreign registered public accounting firm to submit a one-time statement certifying that it seeks to have the Board rely on a non-U.S. inspection when the Board conducts an inspection pursuant to PCAOB Rule 4000. This statement may be submitted at any time after the foreign public accounting firm's registration application has been approved by the Board. The statement, which must be signed by an authorized partner or officer of the firm, should be addressed to the attention of the Secretary and may be submitted via

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post or electronic mail (secretary@pcaobus.org). If the statement is submitted via electronic mail, the words "Rule 4011 Statement" must be included in the subject line.

The Board believes that a foreign registered public accounting firm's one-time statement, which is not associated with any specific Board inspection, should resolve the concern expressed by some commenters that proposed PCAOB Rule 4011 would have left unclear when a foreign registered public accounting firm should submit the earlier proposed petition. Commenters indicated that some non-U.S. jurisdictions are in the process of developing new auditor oversight regimes or otherwise modifying their existing regimes. Those commenters were uncertain whether their petitions would need to be submitted immediately and then updated as changes occurred, or if they should wait until the changes to their local oversight regimes were finalized. Because the one-time statement is not associated with a specific Board assessment for a specific Board inspection under new PCAOB Rule 4012 and no longer includes any description requirements of the non-U.S. system, a foreign registered public accounting firm may submit the statement without waiting for the finalization of any potential changes to its oversight regime. Of course, if the foreign registered public accounting firm is selected for inspection before the finalization of changes to its non-U.S. system, the Board would make a reliance determination under PCAOB Rule 4012 based on the system in place at the time of the determination. As explained more fully below, finalization of changes

in a non-U.S. system that affects a system's independence or rigor would necessitate a review of the Board's previous determination.

In addition, in response to comments, the Board has eliminated the proposed Exhibit 99.3 to Form 1, which would have allowed an applicant an option to provide the name and physical address of the applicant's foreign registrar or any other authority responsible for regulation of the applicant's practice of accounting. The Board believes it is more efficient for the Board to identify the appropriate non-U.S. regulator itself, rather than have a non-U.S. public accounting firm submit an additional exhibit to the Board through the registration system.

It should be noted that PCAOB Rule 4011 (and PCOAB Rule 4012) are not limitations on the Board. Thus, even if a non-U.S. registered public accounting firm does not choose to submit a statement pursuant to Rule 4011, the Board may take steps it determines are necessary to facilitate the inspection of such firm through the cooperative framework.

Rule 4012 – Inspections of Foreign Registered Public Accounting Firms

The Board has reorganized much of the substance, with some modification, of proposed PCAOB Rule 4011 into PCAOB Rule 4012. PCAOB Rule 4012 provides that the Board shall determine the degree, if any, it may rely on a non-U.S. inspection of a foreign registered public accounting firm that has submitted a statement pursuant to

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PCAOB Rule 4011. The Board will make such determination at an appropriate time before each inspection of such firm. In making that determination, the Board will evaluate (1) information concerning the level of the non-U.S. system's independence and rigor, including the adequacy and integrity of the system, the independence of the system's operation from the auditing profession, the nature of the system's source of funding, the transparency of the system, and the system's historical performance and (2) discussions with the appropriate entity or entities within the system concerning an inspection work program for the particular firm. The Board will consider certain illustrative criterion, now listed in the rule, in applying the broad principles articulated in PCAOB Rule 4012. PCAOB Rule 4012 also provides that the Board shall conduct its inspection under PCAOB Rule 4000 in a manner that relies on non-U.S. inspections, to the degree determined by the Board and to the extent consistent with the Board's responsibilities under the Act.

The Board received wide-ranging comments on the Board's proposal for determining the appropriate degree of reliance, including concerns about the Board's fundamental approach to oversight of foreign registered public accounting firms to requests for clarification or change to the Board's process for assessing a non-U.S. system.

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After careful consideration of the comments, the Board has made certain changes to the proposed rule and offers clarification in other areas, each of which is explained below.

A. Comments on the Board's Overall Approach

With regard to the Board's overall approach, some commenters argued that the Board should adopt a "mutual recognition" model whereby the Board would accord complete deference to the home-country regulator in the areas of inspections, investigations and sanctions. Similarly, one commenter suggested that the Board should not issue its own inspection report for a foreign registered public accounting firm, but instead should rely on the report of the non-U.S. regulator.

The Board does not believe that a "mutual recognition" approach would be in the interests of U.S. investors or the public. While the Board is hopeful that it will be able to place a high degree of reliance on certain non-U.S. systems of oversight, the Board believes that it must preserve the ability to participate fully and directly in the inspection, investigation and sanction of foreign registered public accounting firms if warranted by the particular facts and circumstances. Under the Act, the Board's mission is to oversee the auditors of issuers in order to protect the interests of investors and further the public interest in the preparation of informative, fair, and independent audit reports. More specifically, the Board is required by the Act to conduct inspections in order to assess

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the registered public accounting firm's compliance with U.S. laws, regulations and professional standards. Because non-U.S. regulatory authorities do not have this same mission, deferring to those authorities regardless of the circumstances would not be in the interests of U.S. investors or the public.

Several commenters criticized the principles and related criteria that the Board would consider in evaluating the independence and rigor of a non-U.S. system as disproportionately based on the principles and related criteria that underlie the oversight system in the United States. These commenters suggested that the Board would place a high level of reliance only on those non-U.S. systems that were identical or substantially similar to the Board.

The Board has previously stated that it believes that the "sliding scale" approach can accommodate a variety of oversight systems. The Board does not intend to require that non-U.S. systems be identical or even substantially similar to the PCAOB in order for the Board to place a high level of reliance on them.

That said, the Act and its creation of an independent public oversight entity for auditors (the PCAOB) reflect the view of the U.S. Congress that the self-regulatory system used to ensure high quality audits for U.S. issuers was not adequate. Thus, in determining the degree to which the Board may rely on a non-U.S. regulator to conduct inspections of firms located abroad that audit companies whose securities trade in U.S.

markets, it is appropriate for the Board to evaluate that regulator in light of the principles that underlie the creation of the PCAOB. As explained in the proposing release, however, the listed criteria are not exhaustive, and the presence or absence of any one of the criteria would not necessarily be dispositive. The Board intends to assess the structure and operation of a non-U.S. system as a whole, and not base its decision on whether that system meets a certain number of the criteria.

B. Comments on Board's Assessment – Application of Principles and Criteria

In response to comments, the illustrative criteria the Board may consider in evaluating a non-U.S. system has been moved from the body of the release into the text of PCAOB Rule 4012.

With regard to the application of the principles and criteria, some commenters urged the Board to evaluate a non-U.S. system's independence and rigor on a country-by-country basis rather than firm-by-firm. Those commenters expressed concern that the Board may draw different conclusions with respect to foreign registered public accounting firms that are subject to the same non-U.S. system.

The Board intends to evaluate a non-U.S. system's independence and rigor on a country-by-country basis so that the conclusion regarding its independence and rigor will be the same for all non-U.S. registered public accounting firms within that system. Of course, each time a firm is selected for inspection, the Board would reconfirm that

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assessment in light of any changes that may have occurred to the non-U.S. system. In addition to the Board's consideration of the independence and rigor of a non-U.S. system, however, the Board must also consider the discussions with the non-U.S. regulator regarding the inspection work program for the individual non-U.S. registered public accounting firm selected for inspection. Because an inspection work program is specific to an individual non-U.S. registered public accounting firm, the Board's ultimate determination under PCAOB Rule 4012 can be made only on a firm-by-firm basis.

Some commenters urged the Board to describe precisely how the Board would weigh each of the listed criteria. Others urged the Board to avoid weighing certain criteria too heavily, including 1) whether members that govern the oversight system were appointed by the government, and 2) whether a majority of members hold licenses to practice public accounting.

The proposing release stated that the listed criteria are not intended to be exhaustive, and that the presence or absence of any one of the criteria would not necessarily be dispositive. The Board continues to believe that it should not, in the abstract, specify a weight for individual criterion. Assigning a rigid weight to each criterion would create a "check-the-box" process that could result in the form and structure of an oversight system (rather than the substance within the system) having an inappropriate role in the Board's determination. Oversight systems may differ in

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form, structure and complexity and therefore meet different criteria in different ways, but they nevertheless may achieve the principles in PCAOB Rule 4012 in an equally effective manner. Consequently, the Board does not believe it is appropriate to create a rigid evaluation process that inadvertently penalizes an independent and rigorous system as a result of the Board's use of predetermined weights for the listed criteria. Instead, as explained above, the Board's rule permits the Board to analyze a non-U.S. system as a whole.

Other commenters requested that the Board define the term "any other information," as used in proposed PCAOB Rule 4011(c)(2). The Board's modification of the proposed rule no longer includes those specific words. However, the Board's rule indicates the Board will evaluate *any* information that comes to its attention concerning the level of the non-U.S. system's independence and rigor. In other words, the Board does not intend to exclude any information due to its source. Of course, the Board will take into account the source of the information in considering the probative value of the information.

Several commenters argued that the proposed rule permits the Board unlimited discretion and therefore creates an unacceptable level of uncertainty with respect to the application of the rule in practice. The Board has decided against modifying the rule in response to these comments. While the Board retains the discretion to design

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inspection programs under the Act, the Board believes that the stated principles and criteria allow interested parties enough information to estimate reasonably the extent of reliance on a home-country inspection. In addition, the Board expects the level of uncertainty in a specific jurisdiction to subside as the Board begins to implement the rule.

A few commenters expressed concern that the criteria did not include consideration of whether those that govern have appropriate qualifications and expertise. The Board agrees and has included criteria related to the qualifications and expertise of persons within the non-U.S. system.

Another commenter suggested that the Board's criteria do not address financial, business or personal independence risks. As stated in the proposing release, the Board would consider whether an entity within the system has the authority to establish and enforce ethics rules and standards of conduct for an individual or a group of individuals that govern the system and associated staff. The Board believes this criterion captures the risks related to independence. As part of its assessment process, the Board could consider certain points raised by the specific policies of a code of ethics or a code of conduct and their impact on the independence of the system.

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C. Comments on the Board's Assessment – Process

In addition to the substance of the Board's assessment under the proposed rule, several commenters argued that the Board should make changes to the *process* surrounding the Board's reliance determination.

First, a number of commenters urged the Board to allow an appeal of its reliance determination. The Board has decided against permitting an appeal of the Board's determination. Under the Act, the design and implementation of an inspection work program is within the discretion of the Board. It follows that, because the Board's decision regarding the appropriate degree of reliance, if any, is essentially a decision regarding the design and implementation of inspection work programs for non-U.S. registered public accounting firms, such decision is also properly within the Board's discretion. The Act does not provide for an appeal of the Board's design of such programs. In addition, allowing such an appeal would potentially permit a non-U.S. registered public accounting firm to impede the Board's ability to discharge its obligation under the Act to assess the compliance of that firm with U.S. laws and standards.

Some commenters asserted that the Board should be required to communicate the basis for the Board's determination to the public and representatives of the non-U.S. system. In response to these comments, the Board intends to provide a general description of its activities with representatives of non-U.S. systems either as part of its

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annual report to the public or in a separate public report to make the Board's processes under its framework more transparent. As a practical matter, representatives of the non-U.S. system will be informed of the basis for the Board's assessment as a natural part of the dialogue between the Board and those representatives. Under the framework for cooperation created by the Board's rules, a dialogue will take place between the Board and representatives of the non-U.S. system regarding the structure and operation of such system as well as the content of the inspection work programs for the non-U.S. registered public accounting firms within that system.

Another commenter urged that the Board require itself to maintain its initial assessment unless a formal request to change the assessment is made by the non-U.S. registered public accounting firm or alternatively that the Board provides advance notice of its intent to change its assessment determination. PCAOB Rule 4012 provides that the Board will conduct its inspection under PCAOB Rule 4000 in accordance with its reliance determination to the extent consistent with the Board's responsibilities under the Act. The Board intends to maintain its initial assessment unless there is a change in circumstances subsequent to such determination that necessitates a review of that determination. Generally, such circumstances would include changes in the non-U.S. system that affects the system's independence or rigor or changes in the willingness or ability of a non-U.S. regulator to cooperate with the Board in the inspection of a non-

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U.S. registered public accounting firm. It would not be in the interest of U.S. investors or the public for the Board to wait, notwithstanding a change in the system, until a non-U.S. registered public accounting firm requested a new assessment. If the Board determines that a change in its prior assessment is warranted, the non-U.S. regulator will be informed, again, as a part of the dialogue between that regulator and the Board.

Another commenter suggested that the Board should be required to provide a non-U.S. registered public accounting firm a copy of any written correspondence between the Board and the non-U.S. regulator. The Board disagrees. Providing the subject of the inspection process (i.e., the registered firm) access to such correspondence could permit the firm subject to inspection an opportunity to be aware of the certain details regarding the inspection work program to be used during the inspection of such firm, as well as inhibit frank and open discussions between the Board and the non-U.S. regulator.

One commenter urged the Board to require that its reliance determination be made within a specified time frame. First, PCAOB Rule 4012 already contains a deadline in that it requires that the Board complete discussions and make a determination at an appropriate time *before* the inspection of a registered non-U.S. firm begins. Second, otherwise permitting flexibility in the amount of time allowed is necessary for the Board to engage in a constructive regulator-to-regulator dialogue

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about the structure and operation of the non-U.S. system and the requirements of a specific firm's inspection. Thus, the Board has declined to modify the rule to require the Board to make its determination within a shorter or more specific time frame.

Some commenters stressed that the Board should not weigh unfavorably a non-U.S. regulator's "willingness" to provide access to information when they are prevented from doing so by an asserted conflict of law. As discussed in more detail below, the cooperative framework implemented through these rules may not resolve all potential legal conflicts. Thus, if a non-U.S. regulator is unable to share information, then that factor must be taken into account in the Board's decision on whether it is in the interest of U.S. investors and the public to rely on that regulator. Whether the regulator's inability to share information is weighed "heavily" will depend on the facts and circumstances at hand. Under the Act, the Board must assess each registered public accounting firm's compliance with U.S. laws and standards. A regulator's inability to share information could prevent the Board from making such assessment, which in turn, would prevent the Board from discharging its responsibilities under the Act.

Other commenters noted specifically that potential conflicts of law remain unresolved under the Board's proposed rules and urged the Board to adopt a rule similar to PCAOB Rule 2105 for inspections and investigations of foreign registered public accounting firms. Another commenter requested clarification regarding whether a

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submission made pursuant to PCAOB Rule 2105 in connection with a registration application applies to potential conflicts of law that may arise subsequent to registration and whether a non-U.S. registered public accounting firm's inability to cooperate due to those subsequent conflicts could subject such firm to disciplinary action. The commenter also requested clarification regarding whether a submission made pursuant to PCAOB Rule 2105 is also valid for the so-called "deemed consent" under Section 106 of the Act.

First, to clarify, PCAOB Rule 2105 provides the requirements for applicants that wish to withhold information from their applications for registration with the Board. The rule does not apply to potential conflicts of law that may arise subsequent to registration and does not affect the deemed consent under Section 106 of the Act.

Second, the Board recognizes that its rules relating to the oversight of non-U.S. registered public accounting firms do not conclusively resolve potential conflicts of law. Preserving the Board's ability to access audit work papers and other documents or information maintained by registered public accounting firms, including non-U.S. registered public accounting firms, is critical to the Board carrying out its obligations under the Act. Consequently, the Board does not believe that it is in the interests of U.S. investors or the public for the Board to adopt a rule of general application that

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would limit its ability to access such documents or information regardless of the circumstances or need for those documents or information.

Instead, as explained in the Briefing Paper, the Board envisages that potential conflicts of law that may arise in connection with an inspection or an investigation can be addressed through the cooperative approach. The Board continues to believe that most conflicts of law can be resolved through an approach in which the Board works in the first instance with the non-U.S. regulator or through the use of special procedures such as voluntary consents and waivers. As previously explained, the Board believes that it is appropriate that a cooperative approach respect the laws of other jurisdictions, to the extent possible. At the same time, every jurisdiction must be able to protect the participants in, and the integrity of, its capital markets as it deems necessary and appropriate. The Board believes that working with non-U.S. regulators in the first instance to overcome asserted conflicts of law reflects the appropriate balance between the interests of different systems and their laws.

The comments urging the Board to adopt a rule similar to PCAOB Rule 2105 for inspections and investigations seem to reflect the view that PCAOB Rule 2105 offers an opportunity for resolution to conflicts of law that are asserted during the registration process. Such interpretation is not correct. If the Board decides to treat a registration application in which information is withheld pursuant to PCAOB Rule 2105 as complete,

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such action by the Board would not constitute a concession that the non-U.S. law does in fact prohibit the applicant from supplying the information and would not preclude the Board from contesting that assertion in other contexts.

In other words, PCAOB Rule 2105 does not offer an absolute safe-harbor for public accounting firms that assert a conflict of laws. PCAOB Rule 2105 provides an opportunity for the public accounting firm to be heard on an asserted conflict of law in the context of registration. Although not set out in a separate rule, a similar opportunity to be heard regarding asserted conflicts of law that may arise in the context of inspections and investigations is already provided under the Act and the Board's rules regarding disciplinary hearings.

For those asserted conflicts of law that arise during an inspection or investigation and cannot be resolved by working with the appropriate non-U.S. regulator, by the use of voluntary waivers or consents, or by other means,[1/] the Board's rules provide the registered public accounting firm with an opportunity to present its position to the Board regarding the asserted legal conflict before any action is taken by the Board. If the Board cannot fully conduct an inspection or investigation in a timely manner due to an asserted conflict of law, the Board may consider whether the non-U.S. registered public

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[1/] The Board hopes to resolve potential conflicts of law as part of its discussions with a non-U.S. regulator under PCAOB Rule 4012 *before* the inspection of a non-U.S. registered public accounting firm.

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accounting firm should be sanctioned by the Board for non-cooperation. Under the Act and the Board's rules regarding disciplinary proceedings and hearing procedures, before any sanction may be imposed, a registered public accounting firm will have an opportunity to be heard before an independent hearing officer regarding the asserted conflict of law and whether revocation of its registration is an appropriate sanction. The registered public accounting firm's rights under the Act and the Board's rules include appeal of the hearing officer's decision to the Board, appeal of the Board's decision to the Commission and appeal of the Commission's decision to the court of appeals.

To be clear, the Board is not suggesting that it would in all cases commence a non-cooperation proceeding when a firm asserts a conflict of law that cannot be resolved. As previously explained, the Board expects that most conflicts of laws can be resolved by working with the appropriate non-U.S. regulator, through the use of voluntary waivers or consents, or other means. The point is that a rule like PCAOB Rule 2105 is not needed in the context of inspections and investigations because a similar opportunity to be heard is already provided.

Finally, some commenters sought clarification about the participation of "experts" who are designated by the Board in inspections where the Board has determined that a high level of reliance is appropriate. The Board expects that the participation of at least one Board-designated expert in U.S. Generally Accepted Accounting Principles,

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PCAOB standards and other U.S. professional standards and law will be necessary on all inspections of non-U.S. registered public accounting firms. After the Board has conducted initial inspections through the cooperative framework with the cooperation of the non-U.S. regulator, however, the Board may designate an outside expert who is not a PCAOB employee to participate in the inspection.

Rule 5113 – Reliance on the Investigations of Non-U.S. Authorities

PCAOB Rule 5113 provides that the Board may, in appropriate circumstances, rely upon the investigation or sanction, if any, of a non-U.S. registered public accounting firm by a non-U.S. authority. The Board's reliance would depend, in part, on the independence and rigor of the non-U.S. authority. Reliance also may depend on the non-U.S. authority's willingness to update the Board regarding the investigation on a regular basis and its willingness and authority to share the relevant evidence gathered with the Board.[2/]

Circumstances may require, however, that the Board conduct an investigation relating to the audit work of a non-U.S. registered public accounting firm, or an associated person of such a firm, in connection with the financial statements of an issuer. PCAOB Rule 5113 does not limit the Board's authority under PCAOB Rule 5200

[2/] Of course, PCAOB Rule 5113 does not apply to investigations or sanctions carried out by the Securities and Exchange Commission.

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to commence disciplinary proceedings whenever it appears to the Board that such action is warranted.

Some commenters noted that, because PCAOB Rule 5113 does not definitively limit the Board's authority to initiate an investigation or impose sanctions, it poses the risk that a non-U.S. registered public accounting firm may be subject to an investigation and sanction by both the Board and a non-U.S. authority. One commenter suggested that, because of this risk, the Board should limit its authority and defer to the non-U.S. regulator in matters of investigation and sanction.

The Board has declined to change the rule in response to these comments. As explained earlier, the Board's mission is to oversee the auditors of issuers in order to protect the interests of investors and further the public interest in the preparation of informative, fair, and independent audit reports. Because non-U.S. regulatory authorities do not have the same mission, restricting the Board's authority to conduct investigations or impose sanctions on non-U.S. registered public accounting firms by deferring to non-U.S. authorities – in every case – would not be consistent with the Board's obligations under Section 105 of the Act.

In any event, the Board does not believe that PCAOB Rule 5113 poses a risk of "double jeopardy" for a registered firm. The Board has the authority to investigate and discipline registered public accounting firms only for potential violations of U.S. laws,

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regulations and professional standards. To the extent that a foreign registered public accounting firm's conduct violates laws in two separate jurisdictions, the foreign registered public accounting firm has chosen to subject itself to the laws of those jurisdictions by choosing to operate in multiple jurisdictions.

That said, as the Board explained in the Briefing Paper, when a non-U.S. disciplinary regime provides for appropriate sanctions of non-U.S. registered public accounting firms and individuals and that regime adequately serves the public interest and protects investors, the Board intends to rely, as appropriate, on the work of the other disciplinary system. Certain circumstances, however, may require the PCAOB to conduct the investigation of a non-U.S. registered public accounting firm relating to its audit of an issuer or to impose sanctions beyond those imposed by the non-U.S. system. In doing so, the Board may consider the sanctions of the non-U.S. system when determining the appropriate sanction in the United States.

Several commenters requested that the Board clarify the meaning of the phrase "in appropriate circumstances" in PCAOB Rule 5113 or otherwise provide more detail regarding the circumstances under which the Board would choose to rely on a non-U.S. authority in the context of an investigation. Similarly, one commenter suggested that the Board's approach to inspections and investigations of non-U.S. registered firms

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should be identical, and therefore that the Board should define the conditions for relying on a non-U.S. authority under PCAOB Rule 5113.

While the request for more detail is understandable, the Board has declined to define the phrase "in appropriate circumstances" as the facts and circumstances of any investigation are not predictable. The Board believes it is necessary to preserve a high level of flexibility to decide whether reliance on a non-U.S. authority in an investigation context is in the interest of U.S. investors and the public and would otherwise permit the Board to satisfy its responsibilities under the Act.

In addition, the Board does not believe that its approach to investigations is "inconsistent" with its approach to inspections of non-U.S. registered public accounting firms. Investigations and inspections are different in nature and are governed under different sections of the Act and, therefore, warrant different approaches. Investigations, which are addressed by Section 105 of the Act, are premised on a possible violation of U.S. law, regulation or professional standard. Inspections, on the other hand, are governed by Section 104 of the Act and do not involve perceived violations of law. Rather, inspections, the timing of which is mandated by the Act, are designed to review periodically and, where necessary, encourage improvements in, a registered public accounting firm's compliance with the relevant U.S. laws, regulations and professional standards.

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Finally, some commenters asked that the Board ensure that non-U.S. registered public accounting firms are afforded certain rights whenever the Board relies on a non-U.S. authority in the context of investigations or sanctions. This comment reflects a misunderstanding about the nature of the Board's "reliance" on non-U.S. authorities in the context of investigations and sanctions. With regard to investigations, the Board expects that its participation in an investigation when it "relies" on a non-U.S. authority could take one of two forms: the Board will either 1) *decline* to initiate an investigation of its own and simply rely on the fact that a non-U.S. regulator is conducting the investigation pursuant to its own authority; or 2) initiate an investigation to gather information itself but also accept information gathered by a non-U.S. regulator pursuant to its own authority. In both cases, the non-U.S. regulator is acting pursuant to its own authority, not the authority of the PCAOB or the Act. Therefore, the Board cannot ensure that non-U.S. registered public accounting firms being investigated by a home-country regulator acting under the authority of non-U.S. law are afforded certain rights. The Board can ensure only that registered public accounting firms, including non-U.S. registered public accounting firms, are afforded certain rights with respect to the investigation being conducted by the Board acting pursuant to the authority of the Act and the Board's rules.

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In the context of sanctions, the Board's "reliance" (if any) on a sanction imposed by a non-U.S. authority could also take one of two forms: the Board will either 1) *decline* to initiate a disciplinary hearing and impose no sanction of its own, and simply rely on the fact that a non-U.S. authority is sanctioning pursuant to its own authority; or 2) initiate a disciplinary hearing by relying (at least in part) on an investigative record compiled by a non-U.S. regulator that led to a sanction being imposed by that regulator.

In the first scenario, the Board would be "relying" on a sanction imposed by a non-U.S. regulator by not imposing a sanction itself. Because no sanction is being imposed by the Board, there is no need for a Section 105(c) disciplinary proceeding.

In the second scenario, the Board would be using an investigatory record compiled, at least in part, by a non-U.S. regulator. In that case, however, the Board has initiated a disciplinary proceeding pursuant to Section 105(c) and the Board's rules. As a result, before the Board imposes any sanction, the foreign registered public accounting firm will be afforded the same rights under the Act and the Board's rules as if the Board had compiled the record itself.

Rule 6001 Assisting Non-U.S. Authorities in Inspections

PCAOB Rule 6001 provides that the Board may, as it deems appropriate, provide assistance in an inspection of a registered public accounting firm conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The rule also provides that the

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Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

In response to comments suggesting that the Board adopt a rule reflecting its willingness to assist non-U.S. authorities in their inspection of U.S. firms that audit companies whose securities trade outside the United States, the Board has decided to adopt PCAOB Rule 6001. This rule reflects the Board's previous statements that it is willing to assist in the inspection of U.S. firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions.[3/] Because the interests and needs of non-U.S. regulators will differ across jurisdictions, the Board intends to work out the details of its assistance on the basis of discussions with individual regulators.

Some commenters questioned whether the Act confers authority upon the Board to assist in such inspections. Section 101(c)(5) of the Act grants the Board the authority necessary to assist non-U.S. regulators. Section 101(c)(5) provides that "[t]he Board shall . . . (5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public

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[3/] See PCAOB Release No. 2003-020, Oversight of Non-U.S. Public Accounting Firms (October 28, 2003).

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accounting firms and associated persons thereof, or otherwise to carry out this Act, in order to protect investors, or to further the public interest."

To satisfy the confidentiality requirements under Section 105 of the Act, the Board intends to establish the necessary and appropriate safeguards so that information gathered through its assistance of non-U.S. regulators is maintained separately from the information gathered during a regular or special inspection under Section 104.

Some commenters requested that the Board require, as a condition of its assistance, that the non-U.S. regulator provide a level of confidentiality for information gathered during inspections comparable to that provided by the Act. Because an inspection by a non-U.S. regulator may be conducted pursuant to the authority of non-U.S. law, the Board cannot require or ensure that the non-U.S. regulator will provide a level of confidentiality comparable to that provided by the Act. The level of confidentiality provided by the non-U.S. regulator will be determined by the level allowed under the applicable law of the non-U.S. jurisdiction.

Also consistent with the Board's previous statements regarding cooperation, PCAOB Rule 6001 reflects the Board's intention to provide a level of assistance that is consistent with the Board's determination regarding the non-U.S. oversight system's independence and rigor. In other words, the Board intends to be available to assist in

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the inspection of U.S. public accounting firms where, by virtue of their participation in non-U.S. markets, the U.S. public accounting firm is subject to regulation by a non-U.S. independent public oversight system. However, the Board does not believe it would be appropriate to assist non-U.S. professional associations in their reviews of U.S. public accounting firms.

Because the Board does not believe that local regulators of public accounting firms should impede the efforts of foreign regulators who are taking the necessary steps, as determined by those regulators, to meet their objectives and responsibilities, the Board would not take any steps to hinder a non-U.S. regulator's oversight of a U.S. accounting firm that operates in that regulator's jurisdiction, including obtaining information directly from that firm.

Rule 6002 Assisting Non-U.S. Authorities in Investigations

PCAOB Rule 6002 provides that the Board may, as it deems appropriate, provide assistance in an investigation of a registered public accounting firm conducted pursuant to the laws and/or regulations of a non-U.S. jurisdiction. The rule also provides that the Board may consider the independence and rigor of the non-U.S. system in determining the extent of the Board's assistance.

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With respect to investigations, the Board would assist, to the extent permitted by law in investigations by non-U.S. authorities of U.S. public accounting firms that audit or play a substantial role in the audit of public companies in non-U.S. jurisdictions.