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Director General

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Mr Ronald S Boster
Acting Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803

Dear Mr Boster,

Subject: Comments to PCAOB rulemaking Docket number N° 001

1. INTRODUCTION

We thank you for the opportunity to comment on the proposed rules on the registration of audit firms with the Public Company Accounting Oversight Board (PCAOB), implementing Title 1 of the Sarbanes-Oxley Act (SOA). We make the following comments in the context of the constructive regulatory dialogue between the United States and the European Union on financial markets because the Act and its implementing measures have important effects on US-listed EU companies and EU auditors.

The Sarbanes-Oxley Act aims at restoring investors' confidence in US capital markets. The European Commission and our 15 Member States share these concerns and support the objectives and many measures of the Act, because investor protection is equally important for the European Union and its Member States as it is for the US authorities.

While the US authorities rightfully expect high standards of conduct from audit firms providing audit services to companies raising capital on American markets irrespective of whether they are domiciled in the United States or overseas, they are not necessarily better placed than the European Union and its Member States to establish precise rules that ought to apply to auditors domiciled in the European Union. Only tailored regulatory solutions can fully accommodate the

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: C 107 3/16. Telephone: direct line (32-2) 2961121. Fax: (32-2) 2993081.

http://europa.eu.int/comm/internal_market/
E-mail: Erik.Van-der-plaats@cec.eu.int

different legal environment in the EU and US so as to achieve, efficiently and effectively, the same objectives.

We understand that the PCAOB is under severe time constraints for setting up its operations and regret the resulting pressure that has been placed on proper due process. We set out below the main points that have come to our attention in the very limited time for assessing and making comments to the proposed rules and Form 1.

The European Commission and its Member States are of the firm view that EU audit firms from the EU should not have to register with the PCAOB. We therefore request a full exemption for all EU audit firms and auditors under section 106 (c) of the SOA. We propose more effective ways to improve audit quality.

2. ANALYSIS OF THE PROPOSED RULES AND FORM 1

Our analysis of the proposed rules, from an EU perspective, showed that the proposed rulemaking:

(1) **Creates an unnecessary overlap with existing EU registration requirements.** All EU audit firms are subject to licensing and registration requirements for more than 20 years on the basis of EU legislation (Directive 84/253/EEC). This law is fully complied with in all Member States.;

(2) **Creates conflicts of law in particular on data protection and access to "documents".** With regards to data protection, much of the information being requested by the PCAOB is, under European legislation dealing with data protection (Directive 95/46/EC), considered as "personal data" or even "sensitive personal data". This requires that specific consent should be given by each "accountant" of the audit firm prior to the transmission of the registration application. More importantly, the above Directive prohibits transfers of personal data to countries outside the European Economic Area which do not provide adequate data protection in accordance with the Directive. The US is such a country. The European Commission has approved a data flow contractual clause, the safe harbour, with the US to facilitate compliance with the Directive. If adhered to, it would also allow the transfer of the data to the PCAOB. However, the present safe harbour arrangement is operated under the FTC (Federal Trade Commission) and does not cover the financial services sector. As a matter of fact there exists no safe harbour agreement on financial services. It is therefore, at present, legally impossible for EU audit firms to submit a large part of the information requested for the registration to the US PCAOB.

In respect of access to documents, in several Member States the auditor is only allowed to provide audit working papers to Courts or to defined inspection authorities, a restriction that cannot be waived by the audit client. In these cases it is simply illegal for the audit firm to give consent to the access of "documents" as required by item 8.1 of Form 1. Moreover, in case audit working papers or any other document would contain personal data, they could not be transferred to the PCAOB.

(3) **Leading to distorting the EU market for audit services.** The proposed registration requirements create an enormous incremental cost for providing audit services in relation

to US issuers. In practice this would mean that many smaller and medium sized EU audit firms would most likely no longer accept audit engagements in relation to US issuers. This would be unwelcome in itself and tends to further the concentration of the market for audit services in the EU and perhaps worldwide as well.

(4) **Would pre-empt EU policy making on auditing.** Registration of the most important EU audit firms with the PCAOB, in combination with the required direct application of US auditing standards and independence requirements, would create a drive via these firms to have the same standards as the US applied in the EU. This would undermine our regulatory sovereignty in particular because EU audit regulation is applicable for the statutory audits of a million plus companies, a significantly higher number than the 15.000 SEC registrants. In addition we are yet to be convinced that these standards are, without exception, as good as those that already apply.

(5) **Takes a maximalist approach on the registration of foreign audit firms** by using the option of SOA Section 106 (a)2 to require the registration of foreign audit firms that play a substantial role in the preparation and furnishing of audit reports in relation to US issuers. A more effective, and less harmful, alternative would be for the PCAOB to change US audit practice by adoption of an auditing standard requiring the (US) group auditor to take full responsibility for the group audit. The US group auditor could no longer in his audit report refer to the audit opinions of other (foreign) subsidiary auditors without consideration.

(6) **Takes an over-maximalist approach** as it goes in some instances beyond the intent of the Sarbanes Oxley Act. For example, from the wording used in section 102 (b) 2 E it is clear that this section refers to licensed CPA's. However, the PCAOB definition of "accountant" (rule 1001) comprises also persons who hold an undergraduate or higher degree in other fields than accounting. This extension beyond section 102 increases significantly the scope of persons that need to be registered in Part VII of Form 1. Another example is to ask for more than *pending* criminal, civil or disciplinary proceedings as (section 102 (b) 2 F of SOA);

(7) **Has discriminatory and disproportionate consequences for foreign audit firms.** The registration requirements in section 102 have not been drafted from a foreign registrants perspective. US audit firms would, on average, provide a much larger number of audit reports on US issuers. This would mean that that the relative cost for registration of US firms is relatively lower compared to EU audit firms that may issue only one such a report. An EU audit firm with one potential US issuer client, would need to register thousands of "accountants" the majority of whom are performing solely EU audits. We believe that in addition to requiring the US group auditor to take full responsibility for group audits (see point 4), the registration requirements could be refined to become more proportionate by only requiring the registration of foreign audit firms that audit a significant number of foreign issuers (dual listed companies) or issuers that are material for the US markets in terms of trading volumes or shareholdings. The average trading volume in securities of EU companies with a dual listing on the NYSE is, on average, no more than 2.5% of the trading volumes in their European home market.

(8) **Has some inconsistencies**. For example, Form 1 item 7.2 listing of accountants associated with the non US applicant does not coincide with the intent of the section by section analysis on this point 7.02. This results in a significantly broader scope of accountants to be registered!

In section B of the summary, the PCAOB provides arguments why pre-existing requirements on foreign audit firms and SOA justifies the registration of foreign audit firms with the PCAOB, a line of argumentation that could easily be turned around: because of exiting requirements on foreign audit firms there is no need for further registration. More importantly, we noted that the present PCAOB proposal completely lacks any cost-benefit consideration. In our view it is crucial for any proposed capital market measure to consider: (a) whether it is necessary to increase the efficiency of the capital market, (b) whether it is likely to increase the efficiency of the capital market and (c) whether it could be substituted by less harming regulation. If applied to the proposed registration of audit firms from the EU, our answers to the second question would be clearly no. Also, because the description in the summary of pre-existing requirements on foreign audit firms, notably via SECPS requirements, makes clear that foreign audit firms are already sufficiently covered. We simply fail to see the added value of the registration of many EU audit firms and tens of thousands of "accountants" at an estimated cost of tens of million euros. This is even more unconvincing as all EU audit firms and auditors are licensed and registered by competent authorities and subject to legally underpinned public oversight, external quality assurance systems, etc.

In our view a more effective regulatory approach would be the conclusion of an EU-US Memorandum of Understanding ensuring access to audit working papers where it is justified and to start quickly a regulatory dialogue on equivalent measures in relation to audit. This would be more effective because whatever consent audit firms have to give in item 8.1 and 8.2 and whatever unilateral sections on the access to audit working papers the SOA contains (section 106 (b)) it is simply legally impossible for EU audit firms from several Member States to give access to audit working papers by the PCAOB (and any other document from any audit client (section 105 (b) (2) (B) and (C)). It would be inconceivable for us that due to conflicts of law, EU audit firms could no longer be in a position to perform audit work in relation to US issuers.

We also would like to give you some additional comments that in our opinion are relevant for applicants. The proposed rules and Form 1:

- **lack some definitions or clarity ("bright lines")** which create a uncertainty for the applicant. For example, there is no definition of "associated person", "accountant associated with" the applicant, what "documents" the registrant gives consent to reproduce for the PCAOB. It is also unclear whether foreign audit firms should register all associated entities for example other foreign firms from the same network but located in other jurisdictions.

- **lack of operational safeguards that would guarantee a fair and equal treatment for all applicants.** The present lack of definitions and guidance underline the importance of appropriate safeguards on fair judgements. For example, the proposed rule does not describe a possibility to appeal against a rejection by the PCAOB.

Conclusion

The European Commission requests a full exemption of registration for EU audit firms and auditors under section 106 (c) of SOA for the following reasons: (i) there are existing EU registration requirements, (ii) there are conflicts of EU and national law, (iii) there is an unjustified cost-benefit relation for foreign applicants, (iv) it will have impacts on the EU markets for audit services and (iv) missing definitions and inconsistencies in the proposed rules. This makes registration for EU audit firms impossible, inefficient and/or ineffective.

The European Commission and its Member States fully share the objectives of the Sarbanes Oxley Act and the intent of the PCAOB. However, we believe strongly there are far more efficient and effective (and less harmful) ways to ensure high quality audits that contribute to the protection of investors, wherever they are domiciled, as well as other stakeholders. The European Commission therefore propose to start quickly the EU-US regulatory dialogue aimed at achieving an effective Memorandum of Understanding on mutual access to audit working papers and to work towards equivalent auditing standards, quality assurance and public oversight as a basis for mutual recognition.

Yours sincerely

Signed

p.o. D. J. WRIGHT

for

Alexander SCHAUB
Director-General