



**Federal Office of Justice**  
**Bundesamt für Justiz**  
**Office fédéral de la justice**  
**Ufficio federale di giustizia**

Company and financial reporting law division

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Mr Jonathan G. Katz  
Securities and Exchange Commission  
450 Fifth Street  
NW  
Washington  
DC 20549-0609  
United States

**SEC Release 34-50047**  
**File No. PCAOB-2004-04:PCAOB Rulemaking Docket No. 013**

Dear Mr Katz

The Swiss Federal Office of Justice, Company and Financial Reporting Law Division, appreciates the opportunity to comment on the PCAOB's proposed rules referred to above.

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 Sarbanes-Oxley Act (SOA) and its implementing rules, in particular in the field of legal conflicts between SOA provisions and Swiss law (see II B., first bullet point).

On January 14, 2004, we had the pleasure to brief a PCAOB delegation in Berne on the planned ambitious Swiss oversight system and to discuss the key elements of the planned PCAOB regime for non-U.S. public accounting firms and the legal conflicts mentioned above.

The Swiss government has meanwhile passed the draft of the new Auditor Admission and Oversight Act as of June 23, 2004. The draft provides for an independent auditor oversight board and, with a view to the international co-operation, takes into consideration the U.S. model as well as relevant EU law and fully incorporates the principle of home country control. The Swiss Parliament is to start its deliberations on the draft in autumn 2004. The act will, however, not come into force before mid-2007 at the earliest.

The draft Swiss act shows in full clarity that the Swiss oversight system is designed to achieve the same goals and objectives as the SOA, as adapted to the Swiss legal and economic situation.

## **I. General remarks**

By way of general comment, the Swiss Government supports the approach chosen by the PCAOB to rely to the maximum extent possible on the home-country system.

As pointed out in more detail below, we are of the opinion, however, that the PCAOB could go further in applying this principle vis-à-vis non-U.S. public accounting firms and thereby avoiding international conflicts of law without jeopardizing its mandate (see II B., first bullet point).

In addition, Swiss public accounting firms feel some of the consequences of the U.S. oversight system already prior to a future inspection, and may feel them particularly if a case calling for an actual investigation should arise before domestic oversight begins to be operational. They have to live with a considerable degree of uncertainty until a clear and reliable system of international cooperation has been established. 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 are in place in Switzerland.

## **II. Comments to the Release PCAOB-2004-04**

### **A. Proposed Rule 4011**

#### ***Statement by Foreign Registered Public Accounting Firm***

- The Board announces that if a foreign registered public accounting firm were selected for inspection before the finalization of changes to its non-U.S. system, it would make its reliance determination under Rule 4012 *based on the system in place at the time of the determination* (PCAOB Release 2004-005, page A2-3).

At the meeting between the PCAOB delegation and Swiss authorities on January 14, 2004, it was stated that the Swiss oversight board would not be operational before mid-2007. An agreement was reached that no inspection by the PCAOB should take place in Switzerland until the Swiss oversight board were fully operational. We presume that this agreement is still valid despite the Board's announcement.

### **B. Proposed Rule 4012**

#### ***Inspections of Foreign Registered Public Accounting Firms***

- The Board does not believe that a "mutual recognition" model would be in the interests of U.S. investors or the public because non-U.S. regulatory authorities do not have the same mission. The Board, therefore, wants to preserve its ability to participate fully and directly in the inspection, investigation and sanction of foreign registered public accounting firms (PCAOB Release 2004-005, page A2-6).

As said above, the future Swiss oversight system on the basis of the draft Swiss act will pursue fundamentally the same mission as the PCAOB on the basis of the SOA, taking into consideration the differences between the U.S. and Swiss economies.

The ways and means how to implement this shared mission in light of the circumstances of a given case can only be determined within the dialogue that is to take place between the Board and the Swiss government, or audit oversight authorities once operational. We understand that the preservation of the ability to inspect, investigate and sanction foreign public accounting firms directly is based on a general skepticism towards (unknown) non-U.S. systems. In our view, however, this does not preclude that mutual confidence in each other's oversight work makes mutual recognition possible.

We therefore clearly prefer the European Unions' mutual recognition approach. As far as the Swiss oversight system is concerned, the Swiss government will recognize and rely on foreign oversight systems on the condition that these are equivalent to the Swiss system. This is the only way to minimize the unnecessarily duplicative administrative burdens of dual or even multiple oversight. Internationally active public accounting firms could be subject to three, four or more oversight bodies in the future. If these oversight systems follow more or less the same principles and pursue fundamentally the same mission (what we expect to be the case in the long run), separate parallel inspections do not make sense.

Furthermore, the ability to participate directly in the inspection, investigation and sanctioning of foreign registered public accounting firms is not always guaranteed on an international level. As highlighted in our previous comments, 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.

Although we welcome the Board's intention to enter into a dialogue with its international counterparts, we still believe that clear and legally binding international agreements are necessary if Article 271 should be waived and be replaced by a mutually acceptable system (which might then also allow the Swiss oversight board to rely on inspections of U.S. accounting firms conducted by the PCAOB).

- In assessing the independence of a non-U.S. system, the Board intends 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 (Rule 4012 (b) (2) (iii)).

This requirement could therefore be taken to mean that the responsible members of the future Swiss accounting oversight body could not have been engaged in the business of auditing or accounting for at least the last five years immediately before assuming their position.

Such a requirement, however, may not be met to its full extent in a small market like Switzerland. The number of experts in this field is limited and it could be difficult to find adequate decision-makers not having 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 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. Also, the Board announced not to apply a "check-the-box" process but to analyze non-U.S. systems as a whole (PCAOB Release 2004-005, page A2-9).

- The Board states that if a non-U.S. regulator is unable to share information due to asserted conflict of law, this 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 (PCAOB Release 2004-005, page A2-15).

We share the Board's view insofar that not all legal conflicts will be solved by waivers and consents (PCAOB Release 2004-005, pages A2-15 and 16). The legal conflicts issue is crucial to Switzerland and might involve conflicts with Swiss administrative and legal assistance principles as well as with secrecy rights of persons other than registered accounting firms and issuers. The same legal impediments that make direct inspection, investigation and sanctioning a violation of Swiss law apply to the involvement of a 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, including treatment of confidential documents are solved in a mutually satisfactory and predictable way.

Switzerland therefore welcomes the Board's intention to discuss these issues with its counterparts (PCAOB Release 2004-005, footnote no. 1 on page A2-18) before taking action.

**C. *Proposed Rule 5113***  
***Reliance on the Investigation of Non-U.S. Authorities***

- 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.  
 As long as such an international 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)+ ). 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. The Board wants to preserve certain “flexibility”. (PCAOB-Release 2004-005, page A2-23). When it comes to choose between legal certainty and flexibility, we believe that the former has priority. 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 (PCAOB Release 2004-005, pages A2-20 and 21). Even though the Board adds 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). In our view, the Board’s opinion that a foreign registered public accounting firm that violates law in two separate jurisdictions has deliberately chosen to subject itself to both laws (and therefore to both sanction systems), does not give due consideration to the international connectivity and interdependency of today’s economic world. The global economy would be severely hampered if an internationally active accounting firm would have to expect multiple sanctions for the same acts or omissions in several jurisdictions. We think that it is a general understanding and widely accepted principle of international law that cumulative sanctions for the same offence should be avoided.

**D. Rules 6001 and 6002**

***Assisting Non-U.S. Authorities in Inspections and in Investigations***

- Switzerland 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.

Yours sincerely

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