SWISS STATE SECRETARIAT FOR ECONOMIC AFFAIRS

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

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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.

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