

DER PRÄSIDENT

12/17/2002

Mr. Jonathan G. Katz  
Secretary, Securities and Exchange Commission

**per E-Mail: rule-comments@sec.gov**

**File No. 33-8150.wp**

**Proposed rule: Implementation of Standards of Professional Conduct for Attorneys**

Dear Mr. Katz,

thank you very much for the opportunity of commenting on the proposed rules for implementation of standards of professional conduct for lawyers as authorized by section 307 of Sarbanes-Oxley Act.

I may comment on behalf of the German Federal Bar which is the central representative body of about 120.000 German lawyers on the federal level vis-à-vis the Parliament, the national authorities and the higher courts.

The German Federal Bar urges the SEC to exclude foreign lawyers, i.e. German lawyers from the proposed rules. Foreign lawyers established outside the U.S.A. should not be considered as “appearing and practicing” before the SEC for the following reasons:

First of all, the extra-territorial impact of the proposed rules on German professional rules (Bundesrechtsanwaltsordnung) may results in a dilemma situation for

attorneys in Germany. On the one hand attorneys are bound to particular secrecy rules set by the home country. In Germany for example, section 43b subparagraph II of the German Lawyers Act requires: "The Lawyer is bound by professional secrecy obligations. This duty refers to information that the lawyer became aware of in the course of the exercise of his profession. This does not apply to facts which are public or do not require secrecy according to their significance."

At the same time the lawyer would be obliged by the "noisy withdrawal" principle under certain circumstances prescribed by the proposed rules. That of course contravenes drastically with the aforementioned understanding of the German lawyer-client privilege.

The principle of secrecy is a core value and a cornerstone of the profession in Germany. It would be absolutely unacceptable to breach this rule due to extraterritorial regulations.

Secondly, the notion of having professional obligations regulated by an entity outside the own borders is strange anyhow. There is no necessity for regulations of lawyers in Germany besides those existing. As in the U.S.A. lawyers are regulated by local bars. In Germany, lawyers are admitted to the local bars as well. There exists the German Lawyers Act as federal law and subordinate statutes elaborating the Act. The bars and special professional courts supervise lawyers according to a very sophisticated system. To avoid undermining this system and to comply with international law standards I propose on these grounds to exempt foreign lawyers from the proposed rules as well.

Thirdly, in Germany a similar principle to the "reporting up the ladder" is already existing. The lawyers' client is the company itself not a single official to whom the lawyer may have frequent correspondence. As a result the lawyer is required to give the client the best and safest possible advice including reporting any malfeasances "up the ladder" arising from contractual and ethical obligations. Thus, an equivalent to the proposed principle is in force. However, it seems obvious that foreign lawyers cannot be obliged to report violations of U.S. securities laws. How

could they be able to have the same expertise as U.S. American lawyers regarding U.S. law knowledge.

Fourthly, it is a basic principle of the rules governing German lawyers that a company's lawyer has duties only with respect to the company who is his/her client and can therefore not at the same time be an auditor in the interest of a third party, be it the shareholders or a regulatory body. This does not mean that a different lawyer can not be engaged in order to assist a client in the pursuance of such auditing functions, but this lawyer must be retained by the shareholder(s) or the regulatory body and not by the company itself.

Moreover, we would like to draw more detailed attention to the proposed Section 205.6(c), which would allow the SEC to impose on a German lawyer the penalties prescribed by the Exchange Act.

As we understand such penalties include punitive damages.

For that reason, we would like to emphasize that the submission of German attorneys to punitive damages fundamentally violates the German conception of division of power. This opinion is based on a landmark decision of the German Supreme Court. The Supreme Court has ruled that only criminal courts possess the constitutional power to impose punishment on citizens. The Supreme Court has stated that such protections granted by the criminal procedure code cannot be circumvented by American punitive damages (Bundesgerichtshof [German Supreme Court], *Neue Juristische Wochenschrift* 1992, 3096, 3103).

Therefore, the proposed Section 205.6 implicates a violation of the German *ordre public*, provided that the above assumption and the interpretation of the word "penalties" are correct.

Finally, section 307 of Sarbanes-Oxley Act does not require the SEC either to include foreign lawyers or to impose the principle of "noisy withdrawal". To phrase it differently: There seems no necessity for the Federal Government of the United States to include foreign lawyers within the scope of Sarbanes-Oxley nor to estab-

lish the requirements of “noisy withdrawals”. Which most certainly leads us to the inquiry, why should there be a necessity for the SEC to include foreign lawyers considering the aforementioned arguments?

So please, reconsider your thoughts on the proposed rules and exempt foreign lawyers from Sarbanes-Oxley Act.

Sincerely,

(Dr. Dombek)