# DEUTSCHES AKTIENINSTITUT

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Mr David Devlin
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31 August 2005

Dear Mr Devlin,

Many thanks for giving us the opportunity to comment on the FEE Discussions Paper on Comfort Letters Issued in relation to Financial Information in a Prospectus. Enclosed please find the response of Deutsches Aktieninstitut e.V. to the FEE Discussion Paper.

Should you have any questions please do not hesitate to contact me.

Yours sincerely,

Uta Kunold

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Legal Counsel

Encl.

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# Response to the Discussion Paper "Comfort Letters Issued in relation to Financial Information in a Prospectus" of the Fédération des Experts Comptables Européens (FEE)

**31 August 2005**

## Introduction

Deutsches Aktieninstitut e.V. (DAI) is the association of German exchange-listed stock corporations and other companies and institutions which are engaged in the capital markets development. Its most important tasks include improving the relevant institutional and legal framework of the German capital market and the development of a harmonised European capital market, enhancing corporate financing in Germany and promoting the acceptance for equity among investors and companies.

Deutsches Aktieninstitut was involved in the establishment of the German standard for comfort letters "IDW Prüfungsstandard: Grundsätze für die Erteilung eines Comfort Letter (IDW PS 910)" issued by the Institut der Wirtschaftsprüfer e.V. – IDW (Institute of Public Auditors in Germany, Incorporated Association) in March 2004. An English translation of the standard is available as IDW Auditing Standard: Standards for Issuance of a Comfort Letter (IDW AuS 910). This standard has been developed on the basis of intensive discussions between a comfort letter working group of the IDW and the DAI working group which consists of representatives from various investment banks and from several law firms.[1]

The German comfort letter standard is based on the U.S. standard for comfort letters as set forth in the Statement on Auditing Standards no. 72 (SAS 72)

[1] Respresentatives of the following investment banks and law firms are members of the DAI working group: Bayerische Hypo- und Vereinsbank AG (HVB Group); BHF-Bank AG; Commerzbank AG; Credit Suisse First Boston (Europe) Limited; Deutsche Bank AG; Dresdner Bank AG; DZ Bank AG; Goldman Sachs International; HSBC Trinkaus & Burkhardt KGaA; J.P. Morgan AG; Morgan Stanley Bank AG; Merrill Lynch Europe PLC; Sal. Oppenheim jr. & Cie. KGaA; UBS Deutschland AG; WestLB AG; Freshfields Bruckhaus Deringer; Linklaters Oppenhoff & Rädler.

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"Letters of Underwriters and Certain Other Requesting Parties" issued by the American Institute of Public Certified Accountants (AICPA). Both SAS 72 and IDW AuS 910 reflect the well established market practice that comfort letters in particular contain a negative assurance which covers the period from the date of the latest audited or reviewed financial statements until the so-called cut-off date of the comfort letter. Unlike SAS 72, IDW AuS 910 is specifically tailored to German law requirements. In particular, it provides for additional so-called post audit review procedures (*Untersuchungshandlungen nach Erteilung eines Bestätigungsvermerks*, examination of events after the issuance of the auditors report, see IDW AuS 910 paragraph 40 et seqq.) which have been developed with a view to the limited responsibility of a German auditor in relation to his audit opinion under German law.

## A. General Comments

The Discussion Paper „Comfort Letters Issued in relation to Financial Information in a Prospectus" issued in April 2005 refers to the Prospectus Directive 2003/71/EC (the "Prospectus Directive") which apparently has caused the FEE to propose a European framework for the issuance of comfort letters.

The issuance of comfort letters is closely related to the prospectus liability regime in the various jurisdictions. Art. 6 of the Prospectus Directive provides that Member States have to ensure that responsibility for the information given in prospectuses is provided for. The Prospectus Directive does, however, expressly not harmonise, nor does it change, the prospectus liability rules in the Member States. Rather, it harmonises the regulatory prospectus requirements and facilitates cross-border offerings and listings. While this is a further step to a harmonised European capital market, it does not mean that cross-border offerings constitute a new development that has just been initiated by the new pan-European regulatory framework provided by the Prospectus Directive. By contrast, even under the previous regime, cross-border private placements and offering or listings on the basis of the mutual recognition of prospectuses were possible and were in fact undertaken many times. In other words, while the Prospectus Directive may constitute an opportunity for the FEE to propose a European standard for comfort letters, there are no new legal reasons why such standard should be required as a consequence of the Prospectus Directive.

Against this background, the FEE Discussion Paper is a significant step backward in comparison to existing market practice in connection with the issuance of comfort letters. In some jurisdictions established standards for the issuance of comfort letters (such as IDW AuS 910 or the recommendation of the Institut Österreichischer Wirtschaftsprüfer in Austria) already exist. They are usually based on the U.S. standard SAS 72. In the absence of a local standard, there is at least a market practice which generally follows SAS 72.

The content of, and the level of comfort given in, the proposed European comfort letter are substantially less than what is normally given in international capital markets transactions in accordance with the existing market practice in leading capital markets. These deficiencies seem partly be based on a misunderstanding of the existing market practice. The auditor does, in a comfort letter, not only provide a report of factual findings with no expression of an assurance. Rather, comfort letters usually contain a negative assurance with respect to the so-called change period in which the auditor confirms that, in the course of the procedures performed by him, nothing came to his attention that causes him to believe that certain pre-defined accounting line items have increased, decreased or changed. A comfort letter without this key confirmation is accepted only on an exceptional basis, e.g. because 135 days or more have elapsed since the date of the latest audited or reviewed financial statements (so-called 135 day rule).

The FEE Discussion Paper therefore gives the impression that it is driven by self-protection rather than making a contribution, or to continue the cooperation with other market participants, with regard to the increasing sensitivity for investor protection. It is therefore highly unlikely that the approach taken in the FEE Discussion Paper will be accepted in the capital markets, namely by the underwriters.

As a procedural matter, the responses to the FEE Discussion Paper should not be summarised as stated in the introduction of the Discussion Paper. Rather, the full text of the responses are made available on the FEE website. This would reduce both time and work for FEE and the risk that a summary falls short of certain aspects which, in the view of the relevant participant, may be crucial.

## B. Detailed Comments

Our detailed comments on the FEE Discussion Paper are stated below:

### In relation to 1. INTRODUCTiON

***Issue for Discussion 1:***

***Which of the different reporting models do you prefer and why? Are there any other reporting models you think should be considered?***

*Which reporting model should be chosen?*

Any pan-European comfort letter framework should follow the first reporting model which provides for assurance engagements and agreed-upon procedures reporting. Such model is accepted market practice. Comfort letters are issued either as SAS 72 letters or in a format which follows SAS 72. In any

event, the key content of comfort letters comprises assurances by the auditors in relation to matters which are not covered by the audit report included in the prospectus.

By contrast, the FEE Discussion Paper and the second model proposed by it seem to assume that a comfort letter is primarily a report prepared by auditors on the basis of agreed-upon procedures from which the addressees should draw their own conclusions. It is obvious that this assumption is not in line with market practice. In all developed capital markets, namely the U.S., comfort letters are issued on the basis of the SAS 72 standard which has been accepted as market standard globally (including in particular in Europe) and which, by no means, is primarily an agreed-upon procedures engagement.

Further, the FEE Discussion Paper states that comfort letters "may also involve assurance work in order to provide assurance on certain figures". This is confusing because assurance will only be given in relation to an entire set of financial statements and not on specific figures (which may only be subject to factual findings in connection with the so-called "circle-up").

Moreover, a comfort letter is not a "mixture" between an "agreed upon procedures" engagement and an "assurance" engagement. Rather, it can be described as a combination of different levels of procedures or as a result of several steps to be undertaken. The work undertaken by auditors for the purposes of a comfort letter involves several steps to be undertaken where at the end the auditor issues an assurance. With respect to (unaudited) interim financial statements, the auditor would typically provide a negative assurance based on a review of such interim financial statements to the effect that, roughly spoken, he has not become aware of any changes in relation to certain pre-defined accounting line items since the most recent audited financial statements. A lower level of detail of information and work is the basis for a negative assurance with respect to the so-called change period for which no interim or annual financial statements are available. Such period can only be dealt with by reading of minutes and management accounts and inquiries of the management of the issuer. This stepped approach was established by SAS 72 and has been followed by other standards such as IDW AuS 910 and constitutes therefore the existing market practice.

Given this market practice, the FEE should focus on the first model (which should be understood as a combination model as described above). Otherwise, Europe would either significantly deviate from, and thus fall short, accepted international standards or, more likely, this would become a mere theoretical discussion without any practical relevance. Also, in the past, it has not been felt nor argued that a "gap" between the IFAC International Framework for Assurance Engagements and existing comfort letter standards would hinder auditors to issue comfort letters. Any pan-European rules for comfort letters should be based on existing market practice rather than on

dogmatic considerations and a framework of rules which, in practice, have not become relevant.

*Other reporting models/Areas on which the auditor has already reported on*

Further, when using the first model, the FEE should take into account that areas in the prospectus on which the auditor has already reported may also be addressed in the comfort letter. There is no general principle that such areas fall outside the scope of comfort letters. Such concept may be acceptable and understandable where the auditor as an expert is specifically liable (as, for instance, in the U.S.). However, in most European jurisdictions, there is no such concept of a specific prospectus liability of experts. In Germany, for instance, an auditor is not liable to investors (including the underwriters) if the prospectus is incorrect in relation to the audited financial statements. The underwriters are in turn however liable to investors with respect to the entire prospectus and it is unlikely that an auditor is liable to underwriters.

In addition, in respect of audited financial statements, events which with hindsight, i.e. after the issuance of the auditor's report, provide better insight into conditions that existed at the balance sheet date, may have occurred without being reflected in the relevant auditor's report.

For these reasons the aforementioned negotiations between the DAI working group and the IDW working group developed the so-called "post audit review procedures" as a result of which the auditors issue a negative assurance to the effect that they are not aware of any such event which provides a new insight into conditions that existed at the balance sheet date. These procedures constitute the main added value which the German comfort letter standard offers to underwriters compared to SAS 72 comfort letters. This concept should not be removed in connection with a new European comfort letter framework. On the contrary, it should be a model for jurisdictions where no comfort letter standards exist yet.

*Impact of the Prospectus Directive?*

There is no reason either why the established market practice should change in light of the Prospectus Directive. European cross-border offerings on the basis of the same offering document are not new. European wide private placements and even public offerings in several European jurisdictions based on the mutual recognition of prospectuses were already possible, and actually conducted, also under the previous prospectus regime. Further, the Prospectus Directive does not change the liability regimes in the various Member States. The liability regimes are however crucial for the scope and the understanding of comfort letters the very purpose of which is to address liability issues.

Furthermore, we do not believe that, as stated on page 13 of the FEE Discussion Paper, any assurance expressed on interim financial information is to be

included in the prospectus itself. Besides the fact that it is unclear what the FEE means by referring to "assurance" in this context, the Prospectus Regulation (EC) no. 809/2004 (the "Prospectus Regulation") does not require any(!) audit or review report be included in the prospectus. Rather, only those audits or reports are to be included which have already been published. By contrast, there is no requirement to include in a prospectus any statement issued in relation to a review of interim financial statements which is made solely for the purposes of the relevant issue of securities in connection with due diligence procedures. Any negative assurance in relation to such review will still be given in the comfort letter and not in the prospectus itself (see also the section "Interim Information, Issue for Discussion 8" below). Even if it were included in the prospectus itself, this would, depending on the applicable liability regimes, typically not mean that such statement can be omitted in the comfort letter.

To sum up, neither the Prospectus Directive nor the Prospectus Regulation contain nor imply anything which requires a change to the existing market practice for comfort letters.

**In relation to 2. COMFORT LETTERS**

The Discussion Paper assumes that underwriters ask for comfort letters only in relation to financial statements that have not been "expertised" yet. As set out in "Other reporting models/Areas on which the auditor has already reported on" above, this is not a precise and full description of the scope of comfort letters issued in accordance with existing market practice.

As set out above, it is market practice that comfort letters contain a negative assurance. This key element of comfort letters is missing in the list of content items for a comfort letter tabled on page 7 of the FEE Discussion Paper.

Should the FEE continue to focus on the second reporting model, it is in fact important that the FEE does not intend to apply such model to jurisdictions where a national professional standard for comfort letters already exists. As set out above, the FEE Discussion Paper would constitute a significant set back with respect to SAS 72 and IDW AuS 910 and the market standard in the most important capital markets (as, for instance, the U.S., the U.K. and Germany) and therefore such reduction of the existing level of comfort provided by a comfort letter would not be acceptable.

**In relation to 2.2 The Comfort Letter**

***Addressee***

The FEE Discussion Paper provides that the "auditor should ask to be provided with a draft of the underwriting agreement to understand the context in which a comfort letter will be issued". Such request is not necessary since it should be sufficient that the auditor is able to review a draft prospectus. At least in Europe it is uncommon that an auditor is provided with a draft subscription agreement to which the auditor is not a party.

***Issue for Discussion 2:***

***Underwriters or other parties other than the issuer may be reluctant to enter into a written agreement with the auditor. As, by the nature of the engagement – agreed-upon procedures – the responsibility of the definition of the scope of work is with the underwriter, it is preferable to formalise the agreement of the scope of work in writing, especially on a liability standpoint.***

***Can the auditor only issue a comfort letter to the parties that have signed the engagement letter?***

No. Underwriters do not engage auditors to provide a comfort letter, rather it is the issuer's obligation under an underwriting agreement to procure that its auditors deliver a comfort letter in form and substance acceptable to the underwriters as a condition precedent to the underwriting commitment. Auditors in the past had tried to require underwriters as addressees of a comfort letter to sign an engagement letter. The attempt to introduce such concept was not successful and it is the very prevailing market practice that a separate engagement letter is not signed. The only apparent reason why underwriters should sign an engagement letter is the limitation of liability which might be introduced through the engagement letter. In the past, this was however not acceptable to underwriters (who in turn are fully liable) and lengthy discussions and negotiations between banks and auditors about this are not in the interest of the issuer who just want to issue securities in the most economic and efficient manner. Having two separate documents (engagement letter and comfort letter) also involves the risk that the statements made therein are contradictory. Further, it is common for comfort letter engagements at present as well as in the case of other experts such as legal advisers that an engagement letter is only signed by their client and that the client asks them to issue a "third party" legal opinion to other parties who have not signed the engagement letter. There is no reason why this should be different in case of comfort letters and such concept is not common for comfort letters in the U.S. and in many European jurisdictions.

***Issue for Discussion 3:***

***The fact that a private comfort letter is issued to banks/underwriters could raise the issue of the banks/underwriters having a different level of information compared to investors. However, the issuance of a comfort letter does not create differences in the level of information available to banks and investors, as (a) the letter is sent to the bank in respect of their capacity as underwriter, not in their capacity as investors, (b) the comfort letter is part of the due diligence process that the bank has to perform to accept its responsibility towards the investing public, and (c) it does not include other information than the information in the prospectus.***

***Does the issuance of a comfort letter create a different level of information?***

No, a comfort letter in the form in which it is issued in accordance with current market practice, is intended to ensure that the information provided to investors in the prospectus is correct. If specific findings are reported then such information should also be set out in the prospectus (if such information is material) or, if such information is not material, it should not be relevant from an investor's point of view.

***Issue for Discussion 4:***

***Certain jurisdictions have professional secrecy provisions; the auditor should assess if he is authorised, according to the applicable laws and regulations, to provide information to a third party. In particular, he should consider if the applicable law permits the issuer to relieve the auditor of its professional secrecy; in certain jurisdictions, nobody, including the issuer, can relieve an auditor of this obligation.***

***Should the issuer, being the auditor's client, relieve the auditor of his professional secrecy in all cases, if at all possible?***

Yes, the auditor should ask the issuer to relieve him from his professional secrecy for the purposes of the relevant transactions. Otherwise, the objectives of the comfort letter would be defeated and protection of the capital markets would be diminished.

***Issue for Discussion 5:***

***It is practice that the auditor only issues comfort letters to underwriters or other parties to the transaction that have a "due diligence defence" and that request such involvement as part of their own reasonable investigation and not as a substitute for their due diligence responsibility. For example, it is common in the US for other parties (such as a selling shareholder or sales agent) that receive the comfort letter to provide a representation letter that states:***

***"This review process applied to the information relating to the issuer is substantially consistent with the due diligence review process that an underwriter would perform in connection with this placement of securities. We are knowledgeable with respect***

***to the due diligence review process that an underwriter would perform in connection with a placement of securities registered pursuant to the [applicable law]."***

***To which parties and under which conditions can the auditor issue a comfort letter?***

There should not be any limitation as to the circle of possible addressees of a comfort letter and any specific conditions such addressee needs to fulfil. The question raised above seems to be driven by principles which are only known in the context of an SAS 72 comfort letter. SAS 72 is based on the U.S. concept of underwriters and other parties which have a statutory due diligence defence. Parties which do not benefit from such due diligence defence have to provide a representation of the type quoted in "Issue for Discussion 5" above.

A European comfort letter framework should not be based on such concept since a specific statutory due diligence defence comparable to Section 11 of the U.S. Securities Act is not known in Europe nor is there a specific understanding of the type and the scope of due diligence required. As already mentioned above, the auditors are not subject to an expert prospectus liability as in the U.S. The attempt to introduce a similar concept in European jurisdictions was therefore not successful and such requirement is not provided for in IDW AuS 910 where it has been discussed but finally dropped.

### *Reference to Auditing Standards*

***Issue for Discussion 6:***

***Even if an audit base is preferable, the auditor can assess if his understanding of the entity's internal control is sufficient to allow him to issue a comfort letter. The extent of the matters that can be comforted need to be adapted to the circumstances, and it is likely that an auditor that has no audit base will be able to provide a different level of comfort compared with that provided by an auditor that has an audit base.***

***This situation can exist in several circumstances:***

- ***First year of operations,***
- ***Change in statutory auditor, and***
- ***Information in the prospectus reviewed by a reporting auditor and not by the statutory auditor. This situation is not possible in certain countries (such as France), possible in others (such as United Kingdom) and mandatory in others (such as Greece).***

***Is an audit base always possible or required?***

No, an audit base should not be required for the issuance of a comfort letter. In some cases, it will not be possible or at least not be practicable that the auditor who did the last audit also issues the comfort letter. If a company has appointed a new auditor, it is unlikely, and often not appropriate nor in the interest of the company either, that the auditor who audited the last financial statements issues a comfort letter during the period for which a new auditor has been appointed. This may involve some additional work to the extent a new auditor does not feel sufficiently familiar with the issuer's accounting. This should however be acceptable. If by contrast an audit base were strictly and formally required this may prevent an issuer from a securities offering for at least one year if one of the circumstances above apply.

### *Independence*

***Issue for Discussion 7:***

***The Independence Section of the IFAC Code of Ethics strictly is not required for agreed-upon procedures work where only factual findings are reported. Given that the procedures carried out are of an audit nature and are often combined with assurance work in practice, we recommend that auditors should be required to respect the independence requirements for comfort-letter types of engagement.***

***Should explicit independence requirements be introduced? Should the comfort letter contain a section on independence?***

A paragraph on independence is common practice for the issuance of comfort letters (generally paragraph 1 of the comfort letter). There is no reason why this should be changed. It is sufficient if the general independence requirements for audit works apply *mutatis mutandis*.

### *Level of Comfort*

The discussion on the various levels of comfort and assurances and the use of terms such as "reasonable assurance" are quite confusing. In particular, comfort and assurance are not contradictory terms and a comfort letter may contain assurance statements. The relevant level of comfort depends on the type of work undertaken by an auditor (audit, review or agreed upon procedures work). The technical term used for the type of assurance given in comfort letters is "negative assurance" while terms such as "reasonable assurance" or "limited assurance" are uncommon and not used in practice.

### *Agreed upon procedures*

As set out above, the nature of a comfort letter as described in the FEE Discussion Paper substantially deviates from the nature of a comfort letter as understood by the market. In particular, the FEE Discussion Paper does not reflect that the standard negative assurance in relation to the period between the latest audited or reviewed financial statements and the cut-off date for

the comfort letter is one of the key statements typically made in a comfort letter. Thus, the statements in the FEE Discussion Paper that "the auditor simply provides a report of the factual findings of agreed-upon procedures" and that "no assurance is expressed" are not consistent with current market practice. It is not correct either that "users of the report assess for themselves the procedures and findings reported by the auditor and draw their own conclusions from the auditor's work." If such concept became the basis of a European comfort letter framework, the most important items for which a comfort letter is issued would fall away and comfort letters would loose their value for both underwriters and the quality of financial information disclosed to the capital markets. In other words, this would constitute a big step backwards in comparison to current market practice.

***Review***

The statements of the FEE Discussion Paper in relation to a review and a "limited assurance" are confusing. Where it states that, under ISRE 2400, limited assurance can only be provided if the related figures have been subject to a review, this is irritating because the entire ISRE 2400 solely deals with a review and does not address other scenarios where an assurance may be given. Thus, it is not a surprise that ISRE 2400 does not elaborate on such other circumstances. In particular, ISRE 2400 is not a standard for any type of negative assurance. Comfort letters in practice however contain a negative assurance for the "change period", i.e. from the date of the latest audited or reviewed financial statements until the relevant cut-off date, and this negative assurance is based on agreed-upon procedures work rather than a review.

Further, as mentioned above, the term "limited assurance" is not known neither under ISRE 2400 nor as a term which is used in practice. Rather, the most commonly used term is "negative assurance" which is also referred to in ISRE 2400.

***Interim Information***

***Issue for Discussion 8:***

***The discussion paper takes the position that any interim financial information that has be reviewed should be put in the prospectus, together with the review report. Keeping the review report private in a comfort letter would result in supplying more information to the underwriter than to the users of the prospectus, which in our view is not acceptable.***

***However, the Regulation seems to allow the issuer to choose not to publish the interim financial information (if they were not otherwise required to).***

***How do you think the requirement in the Regulation (Annex I, item 20.6.1) should be understood?***

Annex I, item 20.6.1 of the EU Prospectus Regulation does not require any audit or review report be included in the prospectus. Rather, only those audits or reports are to be included which relate to interim financial information which has already been published. By contrast, there is no requirement to include in a prospectus a review of interim financial statements which is made voluntarily and solely for the purposes of the relevant issue of securities in connection with due diligence procedures and which has not been published yet.

Any negative assurance in relation to such review will still be given in the comfort letter and not in the prospectus itself. No auditing standard should impose stricter requirements than the regulatory requirements of the competent authorities.

As set out above, a comfort letter, by its nature, only confirms that the information disclosed in the prospectus is reliable and it does not provide the recipients of the comfort letter with more information than the "ordinary" investors. The comfort letter does not contain any additional factual information. There is therefore no reason why the report in the comfort letter should be disclosed in the prospectus pursuant to general prospectus disclosure rules.

### *Subsequent Changes*

***Issue for Discussion 9:***

***Underwriters sometimes require comfort as to subsequent changes up to the cut-off date. Such comfort can be given by means of specific procedures performed or in the form of limited assurance. Where the latter is required, the auditor needs to apply the procedures of a review (ISRE 2400), which requires interim information to be available at a date as close as possible to the cut-off date. No limited assurance can be given for the period after that date.***

***In which circumstances can the auditor give assurance through the date of a prospectus?***

***Do you agree that any review or audit carried out for the purposes of providing comfort should lead to the auditor's assurance engagement being included in the prospectus together with the interim financial information that is being reported on?***

As set out in respect of "Interim Information" above, a review of financial information does not need to be included in the prospectus unless such financial information has been published. Besides this, it is irrelevant for the issuance of a comfort letter whether a review opinion has actually been included in the prospectus since the auditors will, in many jurisdictions, not be liable to the underwriters while the underwriters often are liable for the correctness of the entire prospectus.

Most importantly, it would be an unacceptable step backwards in comparison to current market practice (as constituted by SAS 72 and national standards based on SAS 72 such as IDW AuS 910) if a negative assurance were not be given anymore on agreed-upon procedures basis (but only on the basis of a review in accordance with ISRE 2400). The concept of a negative assurance in relation to the residual "change period" after the date of latest audited or reviewed financial statements provided on the basis of the reading of minutes of the board and shareholders' meetings and enquiries to the management together with the reading of monthly management reporting constitutes an acceptable and useful concept which has been used in practice for a long time and which should not be changed.

***Issue for Discussion 10:***

***In some circumstances, the auditor needs to derive comfort from internal monthly financial reporting.***

***Which criteria should be met to make internal management reporting a useful basis for giving (limited) comfort provided it is performed in line with the IAASB Assurance Framework?***

It is market practice that a negative assurance can be given in relation to the change period even if no monthly internal management reporting is available (see, for instance, paragraph 79 of IDW AuS 910). It therefore appears to be superfluous, and it would make no particular sense, if now specific criteria for such reporting were imposed.

***Issue for Discussion 11:***

***General practice prohibits comfort from being issued on general assertions such as "material adverse changes", as these assertions are not defined from an accounting standpoint. The role of the auditor should be limited to reporting on accounting figures or figures derived from accounting figures (differences, percentages,...)***

***Do you agree with this statement? If not, why not?***

Yes, we agree that auditors are usually not asked to provide comfort in relation to general assertations such as "material adverse changes".

Confirmations of auditors in comfort letters are however on the other hand not limited to "reporting on accounting figures or figures derived from accounting figures". As explained above, auditors usually give negative assurances with respect to financial statements and not only agreed-upon procedures statements with respect to specific accounting figures.

***Tables, Statistics and Other Financial Information***

It is common practice that the auditor compares certain items set forth in a prospectus with schedules prepared by the management of the company. This is part of the so-called "circle-up" procedures. This practice should not change.

***Narrative Description of GAAP Differences***

The proposed wording is not in line with market practice. It is surprising that, according to the proposed wording, an auditor would state that he makes no comment as to whether all IFRS accounting policies, which are applicable to the consolidated financial statements of the company, have been identified. By contrast, an auditor who had audited a company's financial statements should be able to identify all such IFRS accounting policies.

***Financial Forecasts***

We disagree with the statement that auditors do, in comfort letters, not address issues in connection with financial forecast information. By contrast, SAS 72, for instance, contains specific guidance to this effect (see AICPA Professional Standards, section AU §634.44).

***Pro Forma Information***

The FEE Discussion Paper states further in the first sentence of the section "Pro Forma Information" that auditors do not usually comment on pro forma information in the comfort letter. This statement is not in line with market practice since both SAS 72 and the German standard IDW AuS 910 contain the relevant wording and provide for guidance on the relevant procedures (see AICPA Professional Standards, section AU 634.42, 43; IDW AuS 910, paragraphs 91, 92).

As set out above, if the auditor's report is set out in the prospectus, underwriters will still require a confirmation in the comfort letter to ensure the auditor's responsibility for his statement. This also applies to pro forma financials.

***Other Information***

In particular the last paragraph of this section is confusing. It is current practice that the comfort in relation to the statement of capitalisation and indebtedness is provided in the course of the "circle-up" procedure. The level of comfort for this information (neither audited nor reviewed) is a confirmation by the auditor in the comfort letter that, having performed a comparison or recomputation, the relevant amount is in agreement with the amount contained in the company's records (see Appendices to IDW AuS 910, Example 2.2 no. 9. (G), (H)). This is common practice and it is considered as necessary

while at the same time it is also sufficient. There is no reason or need why this should be changed. The last paragraph should be removed.

***Restriction on Use***

While the proposed "Restriction on Use" language in principle follows market practice, we note that, similar to IDW AuS 910, the proposed language contains the limitation "as being responsible for the content of the prospectus". This language which has been inserted in IDW AuS 910 only just before its publication has been heavily criticised by market participants. So far, the auditors were not able to explain the legal reasoning behind this and the "leading" standard SAS 72 does not contain such restriction either.

***Responsibility and Liability***

The third paragraph of this section addresses choice of law and jurisdiction matters. These matters are not dealt with in the U.S. standard SAS 72. If a European standard nevertheless provides for guidance in relation to this (similar to IDW AuS 910), then it should not provide for an exclusive jurisdiction. Otherwise, it would exclude the possibility that underwriters that are sued by investors for prospectus liability reasons may call in auditors so that both together can defend the action. This may not be possible under the applicable civil procedure laws if the parties agreed on an exclusive place of jurisdiction.

***Date and Signature***

The cut-off date which in fact is a common concept in comfort letters is typically specified in the comfort letter itself and not in the underwriting agreement. While, similar to the FEE Discussion Paper, SAS 72 also uses a cut-off date of five days before the date of the comfort letter as an example (AICPA Professional Standards, section AU §634.23), the German standard IDW AuS 910 refers to a cut-off date of one to three working days before the date of the letter (IDW AuS 910, paragraph 108). Such shorter period is preferable since the addressees of a comfort letter are responsible for the accuracy and the completeness of a prospectus as of its date. Therefore, the period between the cut-off date and the date of the prospectus should be as short as possible.

**In relation to 4. ENGAGEMENT LETTER**

It seems to be common practice that an issuer instructs its auditor to issue a comfort letter on the basis of an engagement letter. We agree that such engagements, and the issuance of comfort letters, may be based on different terms in different jurisdictions and legal environments.

However, it is not market practice that further addressees (other than the issuer) of a comfort letter are included into the engagement or even become a party to the engagement letter. As set out above, the engagement letter should not address matters which should be subject to the comfort letter only.

Therefore, as in the case of other expert opinions issued for the benefit of third parties, the comfort letter itself should contain all relevant statements and it should not be qualified or explained by other related documents.

With respect to the list of items set out in the FEE Discussion Paper which, according to the FEE are normally covered by an engagement letter, we stress that an engagement letter for the issuance of comfort letters does not contain any responsibilities of the underwriters. As set out above, underwriters are normally not a party to the engagement letter and there is no reason why they should become a party to engagement letters in future as they are not obliged to perform any due diligence for the benefit of the auditor.

Generally, the various legal relationships should be clearly separated. While the underwriters should not be made a party to the engagement, there is no reason why an auditor should receive a draft of the underwriting agreement to which the auditor is not a party (see section 2.2 Comfort Letter "Addressee" above).

As already mentioned above, it is also uncommon to refer in this context to a regulatory body as a recipient of a comfort letter.

**In relation to APPENDIX 1 – ILLUSTRATIVE EXAMPLE OF A COMFORT LETTER**

The following comments are meant to supplement the remarks already made above.

**Preamble (page 25)**

The content of comfort letters is not limited to agreed-upon procedures. It is therefore not appropriate to make reference to ISRS 4400. Rather, there are specific standards for comfort letters such as SAS 72 and IDW AuS 910 which may give specific guidance for the issuance of a comfort letter.

**No. 3**

A reference to procedures for identifying events relevant to the auditor's report (so called post audit review procedures) as they are well established in Germany under IDW AuS 910 (see paragraph 40 et seqq.) should be added.

**No. 4**

The negative assurance based on the review engagement should also be referred to.

**No. 6**

The second sentence "We make no representation as to whether the transaction will take place or the number of the Notes/Shares to be sold in the transaction." is neither usual nor relevant for the auditors' work. This sentence should therefore be removed.

**No. 7**

For the avoidance of doubt, it should be clarified in line with common market practice that the regarding of minutes must relate to all executive, administrative or supervisory bodies and/or committees of the issuer.

The reference to the inquiries in sub-paragraph "a. (ii) (2)" appears to be superfluous. Such changes should already be covered by the management accounts referred to in the same paragraph.

Furthermore, a conclusion by the auditor is usually given in the form of a "negative assurance" (see, for instance, IDW PS 910, paragraph 78; AICPA Professional Standards, section AU 634.64 ; Example A no. (4b) and (5b)). Such conclusion should referred to in item 7a. As set out above, it is not sufficient that only facts provided by the management in relation to the changes in the period covered by the management accounts are stated in the comfort letter, as proposed in the FEE Discussion Paper. Rather, a statement by the auditor, i.e. the comfort given by the customary "negative assurance", should be made.

With respect to item 7b, the proposed concept shows the same lack of comfort. The mere reporting of changes which exceed a certain threshold is not in line with market practice and provide less comfort than the usual wording.