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Zurich, 9. September 2005
Referenz: Thomas Stenz

## Discussion Paper on Comfort Letters

Dear Mrs Slomp

We would like to thank the FEE for the effort made in preparing this comprehensive paper of a European view on comfort letters. Although Switzerland is not a member state of the EU and, thus, is not directly subject to the new Prospectus Directive, we strongly support a final paper by the FEE on this topic because capital markets operate on a more and more global basis. We also believe that the content of the paper is broadly in line with today's international practice on comfort letters based on our experience in Switzerland. The Swiss Institute does not yet have a Standard on comfort letters but clearly the needs for such a standard have evolved over the past few years. As a result, we could very well foresee referring to a final FEE paper as a standard or at least best practice paper for use in Switzerland as opposed to preparing our own separate country specific standard. In addition, the SWX Swiss Exchange, has introduced a "EU compatible segment" as of 1 July 2005. The requirements for the content of listing documents for securities of this segment mainly mirror the requirements of the EU Prospectus Directive.

With respect to each of the „Issues for discussion" included in your discussion paper we have the following comments:

1. We clearly favor the second model proposed in your discussion paper. I.e. a proper separation of „assurance engagements" and "agreed upon procedures" despite the fact that practice in Switzerland is currently mixed.

   However, the FEE, preferring the agreed upon procedures model should make the following considerations:

- The proposed lower level of comfort contrasts to the existing and commonly practiced reporting models. Also the AICPA framework generally does not permit negative assurance without having performed a review, however, the comfort letter makes an exception, i.e. allows negative comfort for the change period.
- Conflicts of applications of the established models and the proposed new model will arise in particular in transaction including also US offerings. Thus, it would be desirable to clarify the scope of applicability of the established SAS 72 and IPMA models and the new proposed model. If several models are applicable for the same situation, the investment banks will choose the one providing most comfort, i.e. negative assurance for the change period.

We suggest to accept this widely accepted international/US practice also in the FEE paper.

2. This has been and still is a clear problem in Switzerland and remains unsolved in that certain banks refuse to sign engagement letters, yet want to be an addressee of the comfort letter. Despite lengthy discussions with the Swiss Banking Association, no common agreement on this issue has been reached. From a practical point of view, we would suggest that signing the engagement letter is (either as party to the agreement or acknowledging the agreement) be the recommended solution (and that appendix 2 be changed accordingly), with the receipt of a so-called “due-diligence defense letter” (see question 5 in your paper) from the lead underwriter being an acceptable alternative. If this is acceptable, an example wording of such a letter should be included in the final FEE paper.

3. We do not see such a problem.

   The SAS 72 and the IPMA models allow the issue of a private review comfort to the underwriters on unaudited interim financial information in the comfort letter. We suggest that the reasons for the approach by the AICPA should be explored and compared to the applicable frameworks.

   Further, from a liability point of view, we are wondering whether inclusion of an audit report is increasing the auditors’ direct liability towards the investors under the applicable frameworks compared to when the review report is not included in the prospectus. However, whether this approach is acceptable in case of a qualified review report, is questionable.

4. The Swiss legal framework knows the principle of auditors' secrecy. The arrangement letter with the client should include a provision releasing the auditor from such secrecy towards the underwriters, their counsels and the counsels of the issuer.

5. We currently believe that a comfort letter should only be issued to the lead underwriter and potentially co-underwriters, always provided that the recipients sign an engagement or due diligence defense letter (see issue number 2). Although, the directors, as the persons responsible for the offering document, have a due diligence defence, the comfort letter should not be used by them for due diligence purposes, as we deem it not appropriate that they can avoid their prospectus liability by referring to a comfort letter relating to information they are the owner/responsible originator. They should only be copied.

   Selling shareholders should only be addresses of the comfort letter, if they represent a due diligence undertaking like the financial intermediaries.

6. We believe that the auditors issuing a comfort letter on a prospectus should, as a minimum, have audited the most recent annual financial statements of the issuer. For practical reasons, the remaining two years of financial information could also be audited by other auditors and it should be left up to the current reporting auditors' professional judgment to assess the degree of reliance, respectively additional work required on the other two years of financial information. Under specific circumstances and after a change of the auditor, a comfort letter has been issued when the auditor has otherwise gained sufficient knowledge of the issuer's accounting system and internal control, e.g. based on the on-going audit of the current financial year. Further, depending on the situation, comfort for the change period should be limited to report the factual findings instead of providing negative assurance.

7. While from a theoretical point of view compliance with the IFAC Code of Ethics is not strictly required for agreed-upon-procedures work, we believe that for comfort letters it should apply. The public and underwriters' expectations clearly warrant this in our view.

8. This is an interesting question from a legal point of view. We understand that the new EU Prospectus Directive requires this. It is not a current requirement of the Swiss Stock Exchange (SWX). In practice however if interim financial information is reviewed, this review clearance is also printed in the prospectus. We believe this question should be left to the regulators.

9. The SAS 72 and IPMA models foresee negative assurance up to the cut off date. Practice is that the cut off date is 3 to 5 business days prior to the issue date of the comfort letter. Comfort through the date of the prospectus is not possible.

With respect for the period between the latest audited/reviewed balance sheet date and the latest date for which management accounts are available (normally the month end), negative assurance as of a month-end should only be given if the available month-end financial information fulfils the requirements as set out on p. 14 of the Discussion Paper and if this information has been prepared on a basis substantially consistent with that of the latest audited (or reviewed) financial statements included in the prospectus. Further, negative assurance should be limited to specific line items and should not extend to the information as a whole.

With respect for the period between the latest audited/reviewed balance sheet date and the cut off date, negative assurance as of the cut off date should only be given if management has sufficient information to determine whether or not increases or decreases have actually occurred in specific items. In the absence of a formal closing of the books, together with consolidating entries, etc., it simply may not be possible for management to make any representations regarding most items (e.g. net current assets, stockholders' equity, net sales or net income) and, therefore, auditors should not comment thereon. Thus comfort is mostly limited to very few items like share capital and long-term bank loans/borrowings.

10. We believe that such internal monthly financial statements should be prepared following regular reporting principles and not be prepared in isolation for the specific purpose of the comfort letter. For example, at a company that historically has only prepared quarterly financial statements, limited comfort (i.e. a review) should only be given on quarterly financial information and not months in between. In such a case, such interim month-end closings should only be covered through agreed-upon-procedures work. In addition, the review opinion should only be given on a complete set of financial information in line with the respective Gaap policy for interim financial information (for example IAS 34).

11. We agree that comfort on general assertions should not be given.

    We think that the materiality principle as suggested on p. 14 (getting the underwriter's agreement on his assessment of materiality) should not be introduced for the following reason: How can management have reliable evidence and thus can represent that a change has not exceeded a certain threshold if they cannot determine the exact amount?

In addition we would like to add the following comments with regard to the proposed comfort letter model:

## A. Introductory paragraph

We do not see the necessity of reference to the accounting and audit principles applied on the historical financial information. This information is already included in the audit report, and we have experienced that banks tend to interpret this as an update of the audit opinion.

If a report on pro forma financial information or on prospective financial information is issued, such reports should be mentioned in the introductory paragraph as well.

## B. Section 4

We are wondering as to whether this section should be moved in the introductory paragraph, i.e. not let the review be part of the comfort letter or, at least, change the wording. Section 9 should be modified to avoid the interpretation that the no-responsibility for establishing the scope and nature of the procedures do not relate to the audit (the draft refers only to sections 7 and 8).

Yours sincerely

Treuhand Kammer
Komission für Wirtschaftsprüfung

Thomas Stenz Stephan Glanz