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FFB:vy

30 September, 2005

Ms Saskia Stomp
Technical Director
Fédération des Experts Comptables Européens AISBL
Av. d'Auderghem 22-28
1040 Bruxelles
Belgium

Dear Ms Stomp:

re Discussion Paper on Comfort letters

I refer to David Devlin's letter of 9 May requesting comments on the FEE's discussion paper on accountants' comfort letters in the context of the Prospectus Directive. This paper was extremely timely given the increased focus by market participants on the role of due diligence in the public offering process and the importance of efficient and constructive cooperation with the issuer's auditors in this process. I am grateful to the FEE for its forbearance in allowing me to submit these comments after the original deadline.

I have had a number of discussions with underwriter clients about the discussion paper and have also seen the comments of August 9, 2005 from Dr Andreas Meyer of Deutsche Bank. I agreed with Dr Meyer that much of the thinking underlying the discussion paper constitutes a substantial setback both for underwriters and investors. I would also agree with him that the proposed practices present a regime which is substantially lower, in terms of underwriter and investor protection, than that which current prevails in the market. Specifically, the discussion paper fails to recognise that it is the issuer's accountants who are in a position better than any other third party involved in the offering process to assure underwriters and, accordingly, investors, that the issuer's historical financial results as presented in the prospectus adequately present its position as at a date reasonably proximate to the date of the prospectus.

In this letter I shall first comment on the 11 Discussion issues and then respond to some of the other issues raised and make some general comments.

Discussion Issue 1

In my view the preferred reporting model is a combination of a review and agreed procedures, resulting in appropriate negative assurance for the period since the most recent financial statements included in the prospectus and confirmation as to the correct extraction

of the financial data in the prospectus. The procedures should also include confirmation of various calculations and equivalents customarily included in a prospectus as well confirmation of the narrative description of GAAP differences. In appropriate circumstances other procedures may well be required and appropriate. I see no logical reason why these various elements cannot be combined and if this causes inconsistencies with the IFAC framework for assurance engagements, I would suggest that the Framework be revised to address these and bring it into line with market practitioners' expectations; in any event, the Framework as referenced in the Discussion Paper is at odds with the Prospectus Directive which does not require a review report to be included in the prospectus in all cases. For example, there is no such requirement for wholesale debt.

Discussion Issue 2

From the underwriters' perspective the principal advantage of an engagement letter is that it contains the agreed form of comfort letter and if the engagement letter is signed early in the process that can be a big help. Too often, however, the negotiation of the engagement letter seems to be used as a way of postponing agreement on the accountants' role until a very late stage in the offering process, resulting in unnecessary tensions and wasted time as accountants seek to impose inappropriate obligations on the underwriters and often fail to understand the import of their own standard terms of business, which are generally incorporated into the letter. If one looks at the ICMA standard form engagement letter, the principal substantive limitation imposed by it on underwriters is that the accountants' replies to questions in the due diligence meetings may not be relied upon unless confirmed in writing. In my experience, such a confirmation is often difficult to obtain. I would prefer to follow the US practice in which the terms of the accountants' engagement are a matter for negotiation between them and their client, the issuer.

Discussion Issue 3

Underwriters as part of their due diligence almost always become privy to non public information and they have their own internal procedures to deal with this. The Market Abuse Directive introduces further controls in this regard. To the extent that the comfort letter does result in the underwriters having non public information, these procedures are sufficient. However, apart from the negative assurance (which is usually given in a far less qualified form by the issuer in the prospectus), there is generally little in the comfort letter that is not in the prospectus and thus that is not public.

Discussion Issue 4

To the extent that accountants are under a professional obligation of secrecy, they should be released from it to allow them to participate fully in the offering process. As an aside, I would note that some accountants believe that the information they are being asked to disclose is "their" information and therefore ask underwriters to agree to some form of confidentiality undertaking; this is misguided as the information is generally confidential to the issuer not to the accountants.

Discussion Issue 5

I do not believe that it is appropriate to lay down any rigid standard here and agree with Dr Meyer's observations on this issue.

Discussion Issue 6

I do not believe that an audit base is necessary where all that the accountants are being asked to do is confirm correct extraction of the data from financial statements audited by another firm. I would agree that as a matter of prudence the accountants should be satisfied that the issuer's internal controls during the period in question were satisfactory but an audit base should not be a precondition to this confirmation. Similarly, where one firm of accountants has taken over from another and has suggested re-classifications or the like of items in the financial statements that they then audit and opine upon, they should be prepared to provide comfort on this work; I have experienced a number of situations where the failure to do this has resulted in considerable difficulty and has adversely affected the accountants' relationship with their client. Of course, appropriate qualifications in the comfort letter would be acceptable.

Discussion Issue 7

The auditors should be independent and should so sate in the comfort letter.

Discussion Issue 8

My view is that the Regulation only requires a review report to be included in the prospectus if it has been "published" and then only in the case of specified offerings. I am glad that the FEE supports inclusion of the review report in the prospectus whenever reviewed financial information is included within it. This can only be to the benefit of investors.

Discussion Issue 9

I do not believe that it is reasonable to move the cut-off date up to the date of the prospectus as the accountants need time to do their procedures. I do not believe that it is necessary to describe the accountants' terms of engagement in the prospectus.

Discussion Issue 10

If the accountants are basing their negative assurance on internal, unreviewed, management accounts, presumably they need to determine that these accounts are based on the same GAAP as those against which they are giving assurance and that internal management reporting functions are satisfactory.

Discussion Issue 11

I agree.

Other Issues

- *Tables, etc.* Unless other procedures have been agreed, I agree that comfort need not be provided on amounts not derived from accounting records.

- *Narrative description of GAAP differences* I am glad to see that the FEE agrees that the auditors should continue to provide comfort on this aspect of the prospectus.

However, in recent weeks we have found that they are not prepared to do this. I would assert that this is a critical part of the auditors' participation in the offering process and the fact that there appears to be a coordinated effort among the leading accountancy firms to refuse to perform this procedure gives rise to serious concerns.

- *Pro Formas* Often *pro forma* financial data are included even when there is no report on it in the prospectus. In these circumstances, comfort on the *pro forma* data should be given.

- *Capitalisation* Under the Prospectus Directive, a capitalisation table is no longer required for wholesale debt offerings. If it is included, the auditors should perform procedures on it.

- *Governing Law* The ICMA convention that the law and jurisdiction governing the underwriting agreement should be that which govern the comfort letter is the practice to be followed so as to ensure that liabilities and obligations are aligned.

General

- *Engagement Letter* The form of engagement letter and the Discussion Paper's commentary on it raise the following points:

    - There is not in my experience an obligation imposed on the underwriter to advise the auditor of any misstatements in the prospectus; no doubt, if an underwriter was aware of any relating to the financial statements, it would contact the auditors.

    - The underwriter is not, generally, responsible for the content of the prospectus and even when it is, the responsibility is generally limited; to suggest, as the form of engagement letter does, that the responsibility is co-equal with that of the issuer is wrong.

    - There should be no limitation of liability.

    - See my comments above regarding governing law and jurisdiction.

- *Comfort Letter* The form of comfort letter and the Discussion Paper's commentary on it raise the following points:

    - See my comments above regarding interim financial statements and comfort on them.

    - See my comments above regarding responsibility for the prospectus.

    - See my comments above regarding governing law and jurisdiction.

- *Underwriting Agreement* The Discussion Paper suggests that the accountants should be provided with a draft of the Underwriting Agreement to enable them to understand the context of the offering. I am sure that few would object to this, but in reality this

agreement will provide little, if any, information material to the accountants' engagement that is not provided in the draft prospectus.

I hope that you find these comments helpful. Please let me know if you or any of your colleagues would like to discuss them further.

Yours sincerely,

pp Francis Fitzherbert-Brockholes