



Federation of German Industries – 11053 Berlin, Germany

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Via email:

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Nancy M. Morris, Secretary  
U.S. Securities and Exchange Commission  
100 F Street N.E.  
Washington, DC 20549-1090

*Date*  
21 January 2008

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Re: FILE NUMBER S7-27-07; SEC RELEASE NOS. 33-8860 AND  
34-56803; CONCEPT RELEASE ON MECHANISMS TO ACCESS  
DISCLOSURES RELATING TO BUSINESS ACTIVITIES IN OR  
WITH COUNTRIES DESIGNATED AS STATE SPONSORS OF  
TERRORISM

Ladies and Gentlemen:

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The following comment is submitted on behalf of the Federation of  
German Industries (Bundesverband der Deutschen Industrie e.V., BDI) in  
reference to the Concept Release published in the *Federal Register* on  
23 November 2007 addressing mechanisms for accessing disclosures  
relating to business activities in or with countries designated by the U.S.  
Department of State (State Department) as state sponsors of terrorism (State  
Sponsors). The U.S. Securities and Exchange Commission (SEC) has  
requested comment on the Concept Release.

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For the reasons set forth below, the BDI respectfully urges that the SEC  
not implement any mechanism of the type contemplated in the Concept  
Release. The BDI has significant concerns with the premise of the Concept  
Release, the effect the Concept Release may have on investors and foreign  
issuers, including German issuers, and the effect the Concept Release may  
have on U.S. capital markets. If the Concept Release were to be pursued,  
we have substantial concerns about its implementation.

### **About the BDI**

The Federation of German Industries (BDI) is the leading umbrella  
organization of German industry and industry-related service providers. The  
BDI is an association of associations. The BDI speaks for 37 sector  
associations, 15 regional offices located throughout Germany, and  
approximately 100,000 companies with a collective workforce of some  
eight million individuals. Headquartered in Berlin, the BDI maintains  
offices in Brussels, London, Tokyo and Washington. The BDI is a founding  
member of BusinessEurope, headquartered in Brussels. A list of the  
members of the BDI is attached as Annex A to this letter.

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A. The Concept Release may lead to misperceptions about U.S. and foreign corporations

The purpose of the Concept Release is to examine the appropriateness of facilitating access to disclosures regarding business activities in or with countries designated by the United States as state sponsors of terrorism. German industry has strong objections to the purpose of the Concept Release, regardless of the mechanism(s) used to select and highlight certain business activities in these countries.

The practice of the State Department to designate countries as “state sponsors of terrorism” is unilateral insofar as the measure is not applied internationally. Preparing and giving enhanced visibility to a listing of “state sponsors of terrorism” could lead to negative perceptions of business activities in these countries, however legal or immaterial those dealings might be. That the designation is not applied internationally could have particular adverse implications for foreign companies.

In the absence of evidence to the contrary, there is no basis to conclude that disclosures about activities in listed states relate to illegal transactions. Or that these activities support, however inadvertently or indirectly, terrorist activities. The SEC explicitly recognized this in a web tool launched in June (June Web Tool).

Despite disclaimers and the opportunity to examine the entire financial report, disclosures associated with “terrorism” and “state sponsors of terror” might act as a red flag to investors and other users, potentially clouding judgment. Investors may reason the SEC would not take such a special step without a good reason to do so. References to “terrorism” and “state sponsors of terrorism” could provoke strong reactions by investors and other users, which could lead to imprudent investment decisions.

It should be pointed out that the Concept Release, if implemented, would not capture information for corporations that do not file financial reports with the SEC. This could exacerbate the potential for imbalanced perceptions by suggesting, for instance, that the selected disclosures represent the total population of businesses with dealings in or with the designated nations.

SEC reporting requirements are based on financial risk. The touchstone for disclosing information is materiality. Materiality is not the basis used by the State Department to compile the list of state sponsors of terrorism (Sponsors List). Nor is the list necessarily based on financial risk. Political and other issues may underpin the Sponsors List.

Drawing attention to a selected pool of flagged disclosures would disrupt the financial reports, which are prepared to be examined as a whole. Furthermore, to promote transparency and for other reasons, issuers can voluntarily disclose non-material information. Links to non-material disclosures, which transpired during the debut of the June Web Tool, could

confuse investors. They might misconstrue the non-material information as material and take action on that basis.

Issuers might respond to a selection process that fails to differentiate between material and non-material disclosures by restricting the scope of their voluntary disclosures. The potential reduction in information provided in financial reports might not serve the needs of investors and other users.

The Concept Release could subject corporations to undue disadvantages, lead investors and others users to make decisions based on incomplete information, and induce misinformed impressions about U.S. and foreign issuers.

B. The Concept Release may challenge the SEC's traditional role as a politically-neutral arbiter and enforcer of securities laws. It could establish a precedent of engaging in areas that may not have direct bearing on market risk or on securities regulation

The BDI is concerned about the precedent that might be set by the Concept Release. If the SEC were to flag disclosures about State Sponsors, other parties might lobby for special attention to their issues. Parrying these requests might be difficult, if the SEC were to grant special treatment to a particular type of activity that may not correspond to financial or market risks.

Facilitating access to disclosures about State Sponsors is not necessarily consistent with a focus on financial risk, and may engage the SEC in areas outside its core competence and expertise, as acknowledged in the Concept Release.<sup>1</sup>

If implemented, the Concept Release could set a precedent for engaging in areas that may not correspond to financial risk or the functioning of the securities markets. Although there is no separate requirement to disclose business activities in or with countries on the Sponsors List, this subset of disclosures would get preferential treatment.

C. The Concept Release may have a particularly detrimental effect on foreign issuers

The BDI has significant concerns about the effect the Concept Release may have on foreign issuers. The Concept Release may adversely affect foreign issuers more severely than American issuers.

The Concept Release could lead to a greater distortion of information provided by foreign issuers as compared to U.S. issuers, given current SEC

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<sup>1</sup> “We [the SEC] do not have the expertise or information necessary to identify the particular countries whose governments have funded, sponsored, provided a safe haven for, or otherwise supported terrorism. Nor is it the Commission’s role to determine the degree to which a public company’s business activities may support terrorism or may be inconsistent with U.S. foreign policy or U.S. national interests.” *Federal Register* Vol. 72 No. 225 Friday, November 23, 2007, 65863.

reporting rules and regulations. Foreign corporations are given more time to file reports and other statements with the SEC, and generally are required to file a lesser number of reports and statements, compared to U.S. corporations. In consequence, as many as twelve months may elapse between submissions. In the meantime, company operations may change.

Parsing disclosures based on information contained in reports submitted on an annual basis, the situation with the June Web Tool and the use of Form 20-F, would result, in many instances, in presenting incomplete, inaccurate or out-of-date information. Given the longer reporting deadlines and the smaller pool of submitted reports and statements, the risk of linking to outdated, inaccurate information would be greater for foreign issuers and their investors. The June Web Tool included at least one link to outdated information.<sup>2</sup>

The BDI is concerned that foreign issuers would suffer severe, possibly irreversible, damage to reputation as a result of the Concept Release. For various reasons, including political designations such as the Sponsors List, the scope of international business can vary around the world. The degree of activity—legal activity that complies with all applicable domestic and international laws and conventions—in or with countries included in the Sponsors List may be substantially greater for foreign issuers, including German companies, than for U.S. firms. Accordingly, foreign issuers may be more likely to fall subject to a process that targets disclosures of State Sponsors, and they may suffer disproportionately any adverse effects flowing therefrom. This could compromise foreign issuers as well as their investors in the United States and abroad.

D. The Concept Release may have an adverse effect on U.S. capital markets

The BDI applauds the steps the SEC has taken to enhance the attractiveness of U.S. capital markets, including actions that will benefit foreign issuers. The revised rules for delisting from U.S. capital markets, and the decision to allow certain foreign registrants to submit financial statements prepared in accordance with International Financial Reporting Standards, are just two examples. As leading investors in the United States, German companies, issuers and non-issuers, stand to benefit significantly from these actions.

The BDI supports the efforts of the Administration to sustain competitive capital markets. Last year, the U.S. Department of Commerce launched the *Invest in America* initiative to “manage foreign direct investment promotion” and to engage in “outreach to foreign governments and investors.”<sup>3</sup> Secretary of the Treasury Hank Paulson has underscored the importance of maintaining an “open door” policy to attract foreign

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<sup>2</sup> In its Form 20-F filed 27 March 2007, on page 15, Deutsche Bank Aktiengesellschaft reported that it “discontinued such activities [a limited amount of business with counterparties in Sudan] in 2006.” The June Web Tool listed Deutsche Bank.

<sup>3</sup> <http://trade.gov/investamerica/>.

capital and to provide Americans with diverse, stable and valuable investment options.

The BDI is concerned that the Concept Release could impair U.S. capital markets by spurring, however indirectly, investment decisions based on false assumptions or allegations, or on incomplete, incorrect or outdated information. Decisions on these bases could compromise issuers, foreign issuers in particular, and investors.

E. There are concerns associated with implementing the Concept Release, should the SEC proceed notwithstanding the objections raised above

Should the SEC pursue the Concept Release, there are concerns regarding the accuracy and completeness of data presented, the editorial and selection process used to target the disclosures, the availability of other currently existing measures, and the potential for serious damage to issuers' reputations. If it proceeds, the SEC should use the standard rule proposal process to ensure a proper public notice and comment period.

The Concept Release would require the SEC to exercise editorial judgment: to establish criteria for searching disclosures, and to apply the criteria to determine which disclosures to target. Despite best efforts, there can be no assurance that the criteria would match the underlying purpose for targeting the disclosures, that the criteria would be applied consistently, that the criteria would not change, and that the disclosures ultimately selected would be properly chosen.

Processes involving difficult judgments and the application of criteria to technical information inherently carry risks of inaccuracy, inconsistency, incompleteness and bias, however inadvertent and despite best efforts. There can be no assurance that these risks would not be present in connection with implementing the Concept Release.

Reviewing, rating and processing disclosures on a timely basis could challenge SEC resources, given high reporting volumes, other obligations and limited resources. Given the volume of data submitted, and the corpus of non-SEC information disseminated by issuers, there can be no assurance that the information presented would be complete, accurate and up-to-date.

The SEC enables investors and other users to access financial information online through the EDGAR (Electronic Data-Gathering, Analysis, and Retrieval) system. The SEC recently added an "advanced full-text search function"<sup>4</sup> to make it easier for investors to retrieve information, including disclosures about State Sponsors. From this standpoint, the Concept Release would duplicate the functionality of EDGAR.

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<sup>4</sup> *Federal Register* Vol. 72 No. 225 Friday, November 23, 2007, 65863. See FN8 on that page also.

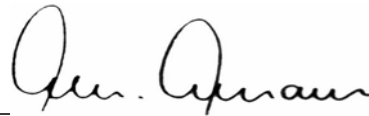
In sum, implementing the Concept Release would give rise to risks regarding human error, capacity and the exercise of editorial judgment. The so-called web tool might operate via the internet but human effort would be required to design and operate it. It would duplicate the functionality of EDGAR and could impair the reputation of issuers.

## **Conclusion**

For the reasons stated above, we urge the SEC not to proceed with the Concept Release and not to develop a mechanism, of any type, that would single out issuers and present a listing of disclosures that correspond to activities in or with countries designated as sponsors of terror by the State Department. The Concept Release may depart from the SEC's role with regard to investors, securities and the capital markets, and may challenge SEC resources. Implementing the Concept Release may compromise investors by presenting outdated and incomplete information upon which inaccurate impressions or misinformed decisions may be made. The Concept Release may cause detriment to issuers, foreign issuers in particular, by linking to disclosures containing outdated information, and by impairing issuers' reputations. Finally, the Concept Release could adversely affect the competitiveness of U.S. financial markets.

We would be pleased to answer any questions you may have regarding the comments contained in this submission.

Respectfully submitted



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Dr. Werner Schnappauf  
Director General and  
Member of the Presidential Board  
Bundesverband der Deutschen Industrie e.V.

CC

Hon. Christopher Cox, Chairman  
Hon. Paul S. Atkins, Commissioner  
Hon. Kathleen L. Casey, Commissioner  
Hon. Annette L. Nazareth, Commissioner

Mr. John White, Director, Division of Corporation Finance

**BDI Member Associations**

- German Aerospace Industries Association (BDLI)
- German Airports Association (ADV)
- Association of the German Automotive Industry (VDA)
- German Building Materials Association (S+E)
- Association of the German Chemical Industry (VCI)
- Federation of the German Cigarette Industry
- German Construction Industry Federation (HDB)
- German Electrical and Electronic Manufacturers' Association (ZVEI)
- VDMA Federation of the German Engineering Industry
- Federation of German Fine Ceramic Industry (AKI)
- Federation of the German Food and Drink Industries (BVE)
- German Foundry Association (DGV)
- Glass Industry Federation (BV Glas)
- BITKOM German Association for Information Technology, Telecommunications and New Media
- Association of Interconnected Energy Companies and Regional Energy Suppliers in Germany (VRE)
- German Mining Association (WVB)
- Federation of the German Non-Ferrous Metals Industry (WVM)
- Association of the German Oil and Gas Producers (WEG)
- SPECTARIS. German Industrial Association for Optical, Medical and Mechatronical Technologies
- Federation of Paper - Cardboard and Plastics - Processing Industry (HPV)
- Association of the German Petroleum Industry (MWV)
- German Association of Research-based Pharmaceutical Companies (VFA)
- Association of Plastics Processing Industry (GKV)
- Association of German Potash and Salt Industry (VKS)
- German Pulp and Paper Association (VDP)
- German Rubber Manufacturers' Association (wdk)
- German Shipbuilding and Ocean Industries Association (VSM)
- German Steel Federation
- Structural Steel and Power Engineering Association SET
- WSM Federation of Steel and Metal Processing
- Association of Sugar Manufacturers
- Central Confederation of the German Textile and Fashion Industry
- Federation of German Tourism Industry (BTW)
- The German Association for the Waste Disposal Industry (BDE)
- Federation of German Woodworking and Furniture Industries (HDH)
- Federation of the German Saw and Wood Industry (VDS)
- Working Group for miscellaneous Industries