Modul A
Monitoring of company financial statements/
Publication of financial statements
## Contents

### I. Monitoring of company financial statements pursuant to sections 106 et seq. of the WpHG

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I Monitoring of company financial statements pursuant to sections 106 et seq. of the WpHG

I.1 Introduction

Since 1 July 2005, the financial reporting enforcement procedure has offered a further means of monitoring companies' financial statements. In the wake of international accounting scandals such as Enron and Parmalat, German lawmakers had moved to strengthen investor confidence in the correctness of companies' financial statements by introducing an additional procedure for enforcing the accounting rules. This two-tier procedure provides for a division of responsibilities in financial reporting enforcement between the German Financial Reporting Enforcement Panel – a private-law entity that is a body of Deutsche Prüfstelle für Rechnungslegung DPR e.V. and is hereinafter referred to as the “Enforcement Panel” or “FREP” – and the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin), which has been vested with public authority. Unlike most recent capital market legislation, the Financial Reporting Enforcement Act (Bilanzkontrollgesetz – BiKoG) was not based on the transposition of a European directive into German law. However, the Transparency Directive requires the competent bodies to be vested with the authority to examine whether information within the meaning of the Transparency Directive complies with the relevant reporting requirements and to take suitable measures where violations have occurred. In addition, on 28 October 2014, the European Securities and Markets Authority (ESMA) issued guidelines on the enforcement of financial information pursuant to Art. 16 of the ESMA Regulation (Regulation (EU) No. 1095/2010) that formulate basic requirements for enforcement systems in the European Union.

The Issuer Guidelines are designed to provide the companies concerned with an overview of the key questions involved in interpreting and applying the relevant enforcement provisions. In this context, the Issuer Guidelines confine themselves for the most part to the provisions of the Securities Trading Act (Wertpapierhandelsgesetz - WpHG), since these govern the procedures at BaFin.

I.2 Companies and financial reports affected (section 106 of the WpHG)

I.2.1 Scope of application

Section 106 of the WpHG specifies that the enforcement procedure applies to companies that are issuers of admitted securities and whose home country is the Federal Republic of Germany. In this context, companies are deemed to be private-sector enterprises that are required to prepare accounts. By contrast, financial reporting enforcement does not cover public law entities such as the German government and the federal states (Länder) or international organisations such as the World Bank or the European Investment Bank, at least to the extent they these do not engage in competition in a similar manner to private companies. Section 2 (13) of the WpHG defines issuers whose home country is the Federal Republic of Germany. This primarily includes issuers of shares and debt securities that are domiciled and listed in Germany or in another member state of the European Union or another state that is a signatory to the Agreement on the European Economic Area, as well as third-country issuers that are listed in Germany. Under certain additional circumstances options may also exist with respect to the home country. By contrast, pursuant to section 1 (3) of the WpHG financial reporting enforcement does not cover companies that have only listed units in and shares of open-ended investment funds within the meaning of section 1 (4) of the German Investment Code (Kapitalanlagegesetzbuch – KAGB).

A precondition for financial reporting enforcement pursuant to sections 106 et seq. of the WpHG is that the securities must have been admitted to trading on an organised market. ESMA publishes a list of organised markets on its website. Organised markets do not include the regulated unofficial market (Freiverkehr) on German exchanges, for example.

Financial reporting enforcement only applies to companies whose securities are admitted to the regulated market and not to companies whose securities are merely included in exchange trading on this market pursuant to section 33 of the German Exchange Act (Börsengesetz – BörsG). Whereas admission requires the issuer of the securities to apply for this itself, inclusion pursuant to section 33 of the BörsG only requires a trading participant to apply for this or the management to arrange for inclusion ex officio. The decisive question is whether the securities have been admitted pursuant to section 32 of the BörsG at the time the financial reporting enforcement procedure is initiated. An existing listing is a precondition for the financial reporting enforcement procedure; however, an
examination may be continued even if such a listing ceases to exist. Pursuant to section 107 (1) sentence 7 of the WpHG, this applies in particular if the examination is addressing an error whose publication is in the public interest. Even if securities cease to be admitted to trading before an error is identified, the procedure may be continued if there is a public interest in this.\(^1\)

I.2.2 Scope of the examination

The examination covers the most recently adopted annual financial statements and the associated management report, the most recently approved consolidated financial statements and the associated group management report, the most recently published condensed set of financial statements and the associated interim management report and the most recently published payments report or group payments report (section 107 (1) of the WpHG). However, financial statements and reports relating to the financial year before that may also be examined pursuant to section 107 (2) of the WpHG. Financial statements that were prepared or approved at a time when the securities were not yet admitted to trading on the organised market may also fall within the scope of the examination if the other preconditions have been met. This is because there is no statutory criterion requiring the timing of the financial statements and exchange listing to coincide. Additionally, it must be possible to avoid a time gap in which a listed company could not be subjected to financial reporting enforcement procedures even if there were material indications of irregularities.

I.2.3 Standards used in the examination

Pursuant to section 106 of the WpHG, the financial reporting enforcement procedure examines whether the financial statements and reports, together in each case with the accounting on which they are based, comply with the legal requirements including the German Accepted Accounting Principles or the other accounting standards permitted by law. For companies domiciled in Germany, the relevant accounting rules include those contained in the Third Book of the German Commercial Code (\textit{Handelsgesetzbuch} – HGB) and the German Stock Corporation Act (\textit{Aktiengesetz} – AktG) and, in the case of consolidated financial statements, the International Financial Reporting Standards (IFRSs). In this context, the term “legal requirements” is not limited to legislation in the formal sense of the word but also includes, for example, directly applicable EU regulations. Companies domiciled in European countries other than Germany may also be subject to the accounting standards prescribed in their national legislation, as well as to the IFRSs and United States Generally Accepted Accounting Principles (US GAAP).

I.3 Two-tier financial reporting enforcement procedure

I.3.1 Basic principles

In Germany, a two-tier enforcement procedure has been established that provides for an examination both by the FREP and, in certain cases, also by BaFin, which is vested with public authority. The relationship between these two enforcement institutions is as follows:

As a rule, examinations are initiated by the FREP. This examines company financial statements in accordance with its defined Code of Procedures and is not bound to follow any instructions during the process. Further information on the composition of the FREP and its legal basis can be found on its website.\(^2\)

Pursuant to section 342b (2) sentence 3 of the HGB, the FREP may initiate examinations in the following three cases:

- where specific indications for assuming that accounting rules have been violated exist (also known as an “examination with cause”);
- at BaFin’s request; or
- without cause as part of random sampling.

In the case of an examination with cause specific circumstances of a factual nature must exist; mere assumptions, speculation or hypotheses are not enough.\(^3\) Such specific indications may come about in a variety of ways, e.g. as a result of its own research, media reports or notifications and tips received from public authorities, legal persons and natural persons.

Examinations are conducted at BaFin’s request where BaFin itself has specific indications to believe that accounting rules have been violated and it requests the FREP pursuant to section 108 (2) of the WpHG to examine the company’s accounting. BaFin has set up its own central contact point where whistleblowers can submit tips.\(^4\)

The FREP decides independently which companies are to be examined without cause. It does this in accordance

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\(^1\) Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 9 August 2017 – case ref.: WpÜG 1/16, WpÜG 2/16.

\(^2\) www.frep.info.

\(^3\) Bundestag printed matter 15/3421, p. 14.

\(^4\) https://www.bafin.de/DE/Aufsicht/Uebergreifend/Hinweisgeberstelle/hinweisgeberstelle_node.html.
with its “Principles for Random Sampling pursuant to Section 342b (2) sentence 3 No. 3 of the HGB”, which it drew up pursuant to section 342b (2) sentence 5 of the HGB. These principles are based on a mixed model that combines a risk-based approach with random sampling and the principle of rotation. Condensed sets of financial statements and their related interim management reports and payments reports are not examined on the basis of random sampling (section 342b (2) sentence 4 of the WpHG).

Since the FREP has been recognised pursuant to section 342b (1) of the HGB, BaFin only conducts its own financial reporting enforcement procedures if:

- it is informed by the Enforcement Panel that a company refuses to cooperate in an examination or does not agree with the result of the examination (section 108 (1) sentence 2 no. 1 of the WpHG); or
- there are substantial doubts with regard to the accuracy of the result of the Enforcement Panel’s examination or with regard to the proper performance of the examination by the Enforcement Panel (section 108 (1) sentence 2 no. 2 of the WpHG).

Without prejudice to this, BaFin may assume responsibility for the examination at any time if it itself is also conducting or has conducted an audit pursuant to section 44 (1) sentence 2 of the German Banking Act (Kreditwesengesetz – KWG), section 14 sentence 2 of the KAGB or section 306 (1) no. 1 of the Insurance Supervision Act (Versicherungsaufsichtsgesetz – VAG) and the subject of the audit and the examination are the same.

### I.3.1.1 Refusal to cooperate

Since it has not been vested with public authority, the Enforcement Panel depends on the cooperation of the company to be examined. If the company in question is not willing to cooperate, the Enforcement Panel informs BaFin of this fact. BaFin then conducts the examination itself and can also enforce the investigations required for the examination using the powers granted to it under its public authority. Consequently, a refusal to cooperate will lead at the most to the procedure being delayed without having any effect on whether the examination will be performed in the first place. In addition, it may result in the costs of the procedure being directly imposed on the company concerned pursuant to section 17c of the Act Establishing the Federal Financial Supervisory Authority (Finanzdienstleistungsaufsichtsgesetz – FinDAG).

### I.3.1.2 Public interest

In the case of examinations with cause, a public interest in such an examination must exist for this to be performed by either BaFin or the Enforcement Panel. This means that even where there are indications of accounting errors, no examination will be performed if the impact of the errors are manifestly insignificant – for example because, even assuming that the indications are correct, the errors are clearly immaterial.

### I.3.1.3 Obstacles to examinations

Pursuant to section 107 (3) of the WpHG and section 342b (3) of the HGB, no examination will conducted by BaFin or, as the case may be, by the Enforcement Panel, as long as an action to declare the financial statements void is simultaneously pending pursuant to the provisions of the AktG specified therein or if a special auditor has simultaneously been appointed to audit the subject matter of the examination pursuant to section 107 (3) sentence 2 of the WpHG or section 342b (3) sentence 2 of the HGB. The motivation behind this is to avoid redundant examinations and audits, and divergent decisions.

### I.3.2 Error identification procedure

**I.3.2.1 Error identification procedure at the FREP**

**I.3.2.1.1 Initiation and performance of the examination**

Prior to the examination, the Enforcement Panel ascertains that the legal requirements for an examination have been satisfied, i.e. in particular that none of the grounds for exclusion described in I.3.1.3 exists. In accordance with the Enforcement Panel’s Code of Procedures, the Panel’s committees decide whether to initiate an enforcement procedure and the panel then notifies BaFin pursuant to section 342b (6) sentence 1 no. 1 of the HGB of its intention to conduct an examination. In accordance with the Code of Procedures, the company is asked before the examination starts to state whether it will cooperate in the examination pursuant to section 342b (4) of the HGB. If the company indicates to the FREP that it is willing to cooperate, the company’s legal representatives and the persons appointed by it to provide information are obliged to submit accurate and complete documents and to provide accurate and complete information. Failure of the company as a whole to provide documents and information constitutes a refusal to cooperate unless a person subject to the obligation to provide information duly avails himself or herself of their right of refusal pursuant to section 342b (4) sentence 2 of the HGB.

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5 http://www.frep.info/docs/rechtliche_grundlagen/20161215_grundsaezetze_stichprobenartige_pruefung.pdf.
I.3.2.1.2 Conclusion of the examination and identification of errors

The FREP notifies the company of the result of the examination. In the event that the accounting is found to contain errors, the reasons for the result of the examination are stated; at the same time, the company is requested to state whether it agrees with the result of the examination and a reasonable deadline is set for its reply. The Presidential Board of the FREP then informs BaFin of the result of the examination and, where applicable, of whether the company has indicated its agreement with the result of the examination. This ends the examination procedure for the Enforcement Panel. The company can only agree with or reject the Panel’s findings as a whole; no “partial declaration of agreement” is possible. This is because, pursuant to the wording of section 108 (1) sentence 2 no. 1 of the WpHG, the decisive criterion is whether the company agrees with the result of the examination, and this comprises the Enforcement Panel’s entire findings. Therefore, if the company does not agree with specific error findings, it does not agree with the result of the examination as such.

I.3.2.2 Error identification procedure at BaFin

I.3.2.2.1 Initiation of the examination

BaFin initiates its examinations by formally ordering an examination pursuant to section 107 (1) sentences 1 to 3 of the WpHG. This constitutes an inculpatory administrative act (belastender Verwaltungsakt), the formal legal remedy against which is an objection (Widerspruch). Pursuant to section 107 (1) sentence 3 of the WpHG, the scope of each individual examination should also be defined in the examination order. In practice, the examinations by both BaFin and the FREP will, for capacity reasons, consistently only cover selected parts of the financial statements and reports to be examined. Normally, these are the areas in which indications of accounting errors have been found or, where appropriate, in which the Enforcement Panel has already identified accounting errors at the first tier of the enforcement procedure. Where a random sampling examination by the FREP is being continued by BaFin, areas of emphasis that have already been defined may also be used. However, there is nothing to stop BaFin from expanding the scope of the examination if the need for this becomes clear in the course of the examination because additional indications of accounting errors by the company being examined come to light.6 BaFin also decides on the possible publication of the examination order and the grounds for this pursuant to section 107 (1) sentence 5 of the WpHG; there must be a direct chronological relationship between this decision and the examination order. This is possible in cases in which the company refused to cooperate with the Enforcement Panel or did not agree with the result of the examination. Since such facts of themselves can represent an important warning signal for the capital market, publication may already be justified. However, in such cases the capital market’s interest in the information must also be weighed up against the company’s interest in not being brought into disrepute prematurely.

I.3.2.2.2 Performance of the examination

BaFin starts its second-tier examination with an initial analysis of the documents from the FREP’s examination procedure; the latter forwards these to BaFin pursuant to section 342b (6) sentence 1 no. 3 of the HGB and, where applicable, section 108 (1) sentence 3 of the WpHG. After BaFin, building on the FREP’s findings, has familiarised itself with the previous examination procedure, it focuses its efforts to the extent necessary on further clarifying the case, e.g. by issuing requests for information and documents. Section 107 (5) of the WpHG requires not only the company itself, the members of its governing bodies and its employees, but also the auditors of its financial statements to provide information and submit documents to the extent that this is required for the examination. This obligation on the part of the auditors also includes the duty to submit working documents to the extent these are needed to further clarify the matter.7

I.3.2.2.3 Conclusion of the examination and identification of errors

BaFin ends its examination either by notifying the company that the examination did not give rise to any objections (section 109 (3) of the WpHG) or by identifying the accounting error (section 109 (1) of the WpHG). If BaFin comes to the (preliminary) conclusion that the company’s accounting contains errors, it will normally conduct a hearing with the company first and so give the latter the opportunity to state its position. The identification of errors constitutes a declaratory administrative act (feststellender Verwaltungsakt) which must be communicated to the company together with the reasons for this.

An error within the meaning of this provision exists if the accounting violates the statutory provisions, including the German Accepted Accounting Principles or the other accounting standards permitted by law. The lawmakers

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6 Bundestag printed matter 15/3421, p. 17.
7 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 29 November 2007 – case ref.: WpÜG 2/07.
have made clear that the underlying accounting also falls within the scope of the examination and accounting errors can be identified with regard to this, too. The fact that the legal position relating to individual accounting standards may be unclear or contested does not on its own prevent BaFin from identifying accounting errors. This is because – as is the case with other areas of the law – questions relating to the interpretation of accounting legislation are not at the “discretion” of the body applying the law but must, in case of dispute, be resolved in a binding manner by the competent courts. Consequently, BaFin is responsible – including given the need to enforce uniform accounting procedures in Europe – for deciding legal questions until they are finally resolved on by the administrative courts.

The identification of accounting errors presupposes that the violations are material, either on their own or in the aggregate. This is the case where investors and capital market institutions consider such errors to be of relevance to them, i.e. where these are capable in particular of influencing the presentation of the company’s performance and the assessments of its future performance that can be derived from them. This case-by-case assessment must be based on both qualitative and quantitative aspects. It is therefore not possible to define generally applicable limits; neither the identification of the error nor the order to publish the error is confined to violations affecting profit or loss. Multiple relatively minor cases of non-compliance may also lead to an accounting error having to be identified where these compromise the overall presentation of the accounting.

Error identification is important, firstly, because pursuant to section 109 (2) sentence 1 of the WpHG it is a precondition for the order to publish the error that is issued by BaFin. In addition, error identification specifies in a binding manner for future accounting periods as well that the audited financial statements and reports do not comply with the statutory requirements including the German Accepted Accounting Principles or the other accounting standards permitted by law. This means that the company is obliged to correct the error in accordance with material accounting rules. Consequently, continuing accounting practices that have been identified as containing errors in a later reporting period where the facts have not otherwise changed can automatically lead to accounting errors being identified once again. This also applies in those cases in which the company concerned has filed an objection but this has not been granted suspensive effect with respect to the identification of the errors. If the identification of the errors subsequently becomes final and absolute, this also applies to the complaints proceedings before the Securities Acquisitions and Takeovers Division of the Frankfurt am Main Higher Regional Court (the competent court).

I.3.3 Section 109 (2) of the WpHG – Publication of errors

I.3.3.1 Basic principles

The order to publish the error pursuant to section 109 (2) of the WpHG makes the latter known to the capital market. The goal is to inform the capital market of violations of accounting practice that have occurred, and hence to strengthen investor trust. In addition, publishing the errors also serves to sanction the company concerned. For this reason, the period after the enforcement procedure was introduced saw frequent discussions with companies wanting to avoid publication. In the meantime, the Frankfurt am Main Higher Regional Court has clarified a number of questions of doubt and a consistent administrative practice has been established.

I.3.3.2 Order to publish an error

As an inculpatory administrative act, the order to publish an error must be made by BaFin; this applies without exception, including in cases in which the company agreed with the findings of the Enforcement Panel and BaFin for this reason did not take any second-tier action. Section 109 (2) sentence 1 of the WpHG sets out the legal basis for the order to publish the error. It specifies that BaFin shall order the company to publish the error identified by BaFin or the Enforcement Panel in agreement with the company, together with the material parts of the reasons given for its identification. The use of the word “orders” shows that BaFin is not permitted to exercise any discretion in this area; it is required to issue an order unless one of the exemptions described below applies.

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8 cf. in both cases Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 7 January 2016 – case ref.: WpÜG 1/15 and WpÜG 2/15.
9 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 22 January 2009 – case ref.: WpÜG 1/08 and WpÜG 3/08.
10 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 22 January 2009 – case ref.: WpÜG 1/08 and WpÜG 3/08.
11 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 9 August 2016 – case ref.: WpÜG 1/16 and WpÜG 2/16.
12 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 9 August 2016 – case ref.: WpÜG 1/16 and WpÜG 2/16.
13 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 9 August 2016 – case ref.: WpÜG 1/16 and WpÜG 2/16.
I.3.3.3 Public interest

BaFin must examine ex officio (i.e. without being requested to do so by the company) whether there is a public interest in the error being published. Such public interest is not defined solely in terms of the capital market’s interest in being made aware of the information concerned rather than the accounting error. Rather, general preventative aspects such as legal uncertainty or the danger of errors being repeated at other companies must also be taken into account.\textsuperscript{14} If there is no such public interest BaFin will not order publication pursuant to section 109 (2) sentence 2 of the WpHG. The wording of the legislation and the goal of the enforcement procedure – to inform the capital market of errors that have been identified – mean that errors will normally be published.\textsuperscript{15} According to the explanatory memorandum for section 109 (2) of the WpHG, no public interest may exist, for example, in trivial cases that clearly represent insignificant violations of the accounting rules.\textsuperscript{16} However, public interest cannot be excluded merely because an extended period of time has passed since the year of the audited financial statements, since examination procedure are regularly lengthy because of the two-tier procedure provided for them. Equally, public interest in the publication of the error does not cease to exist because the financial statements objected to have just been granted a qualified audit opinion, even if the error identified is limited to precisely this qualification.\textsuperscript{17} Similarly, public interest in an error being published generally does not cease to exist simply because the capital market has been informed by other means than the statutory procedure set out in section 109 (2) of the WpHG. In particular, it is not sufficient for the identified error to have been taken into account and corrected in a subsequent set of financial statements, even if such financial statements have already been published. This is because the spirit and purpose of the financial reporting enforcement procedure require that information be expressly provided on the accounting error that has been identified, including the material reasons for it, and this is something that cannot be achieved by a reference that is “hidden” in another publication. The Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main) has also ruled that the correction of accounting violations to which objection has been made and the subsequent provision of omitted disclosures in the next financial statements do not on their own at any rate constitute sufficient grounds for an order to publish an error to be waived.\textsuperscript{18} Finally, an ad hoc disclosure pursuant to Article 17 (1) (1) of the Market Abuse Regulation (MAR) also does not dispense with the need for publication pursuant to section 109 (2) of the WpHG. As a matter of principle, ad hoc disclosures and financial reporting enforcement are separate and independent procedures. It is, however, conceivable that the initiation of an examination with cause or the identification of a significant error in a financial reporting enforcement procedure may constitute information covered by the publication requirement pursuant to Article 17 of the MAR.

I.3.3.4 Application for waiver of publication

In addition to the requirements to be examined ex officio, BaFin may waive issuing an order for publication on application by the company pursuant to section 109 (2) sentence 3 of the WpHG if such publication is likely to damage the company’s legitimate interests. This is a discretionary decision in which BaFin is required to weigh up the capital market’s interest in publication against the legitimate interests advanced by the company. As a matter of principle, priority must be given to informing the capital market, since this is the objective of the enforcement procedure. At any rate, unavoidable consequences which typically result from the publication of an error cannot be successfully asserted as legitimate interests: a loss of confidence in the company’s accounting and the related adverse effects for its reputation and for the valuation of its securities are typical consequences of financial reporting enforcement which the German legislature has deemed to be acceptable, and are therefore not unreasonable for the company. Equally, objections based on the argument that similar errors have been committed by other companies (or on the company’s small size) do not qualify as legitimate interests that constitute a reason for waiving a publication order. Also irrelevant are subjective factors falling within the company’s area of responsibility, such as tight pressure when preparing the financial report, or the company’s particularly active assistance in the examination procedure.

\textsuperscript{14} Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main) decision of 31 May 2012 – case ref.: WpÜG 2/12 and 3/12, and decision of 9 August 2016 – case ref.: WpÜG 1/16, WpÜG 2/16.
\textsuperscript{15} Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main) decision of 14 June 2007 – case ref.: WpÜG 1/07; Frankfurt am Main Higher Regional Court decision of 22 January 2009 – case ref.: WpÜG 1/08 and 3/08.
\textsuperscript{16} Explanatory memorandum for the government draft of the BiKoG, Bundestag printed matter 15/3421, p. 18.
\textsuperscript{17} Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 31 May 2012 – case ref.: WpÜG 2/12 and WpÜG 3/12.
\textsuperscript{18} Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 22 January 2009 – case ref.: WpÜG 1/08 and WpÜG 3/08.
1.3.3.5 Content of the error publication and of the order by BaFin

Pursuant to section 109 (2) sentence 1 of the WpHG, the error publication must contain the error and the material reasons why it has been identified as such. In line with this, the operative part of BaFin’s publication order gives a description of the error plus the material reasons for this, which the company is also required to publish. This applies regardless of whether the FREP or BaFin itself identified the accounting error. This section is then followed by the explanatory part of the order proper by a description of the facts of the case and a legal assessment.

A merely partial publication of accounting violations is not permitted. The publication of an error pursuant to an overall assessment that accounting errors exist. Therefore, no language may be used in the publication that conflicts with this purpose or undermines the publication’s role in sanctioning such behaviour – an objective that was definitely intended by German lawmakers. Equally, no additional information may be included that gives the impression of having been reviewed by the FREP or BaFin. Specifically, that means that the company may not use any comments or qualifying or otherwise mitigating statements that detract from or conceal the content of the error identified. In particular, this includes additions that dispute the existence of an error or play down its significance.

Consequently, language which the company has added on its own initiative, such as a statement that “the error identified has almost no impact given the company’s outstanding business performance over the past year”, is not permitted. The publication of an error pursuant to section 109 (2) of the WpHG must not be used to make advertising statements. Also not permitted in the publication are comments to the effect, for example, that the error in question is not even an error in the company’s view and that the Enforcement Panel or BaFin were mistaken in this regard. The same can apply if a company expresses the error using the subjective or in another manner so that the capital market cannot clearly ascertain whether an accounting error actually occurred or not. In this context, the inclusion in the error publication of references to the status of the proceedings, e.g. a reference to the fact that the company in question has filed an objection or a complaint against the identification of the error, also qualifies the publication of the error in an impermissible manner.

1.3.3.6 Publication in the intended media without undue delay

Pursuant to section 109 (2) sentence 4 of the WpHG, the company is required to publish the information cumulatively in two different media: in the Federal Gazette and additionally either in a national newspaper for statutory stock exchange announcements or via an electronic information system that is widely used in the financial industry. Moreover, the publication must be made without undue delay, i.e. without culpable delay (section 121 of the German Civil Code (Bürgerliches Gesetzbuch – BGB)).

1.3.3.7 Enforcement of a publication order

Where a company fails to comply with a publication order, or where a publication does not comply with the publication order (for example because of impermissible additions to it), BaFin may enforce publication using the administrative enforcement measures available to it. These include threatening and, where necessary, imposing a coercive fine of up to €2.5 million or performing the publication itself at the company’s expense. Such non-compliance also constitutes an administrative offence which is punishable by a fine of up to €50,000.

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19 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 9 August 2016 – case ref.: WpÜG 1/16 and WpÜG 2/16.

20 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 31 August 2010 – case ref.: WpÜG 3/10.

21 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main), decision of 31 August 2010 – case ref.: WpÜG 3/10.
II Cooperation between BaFin and other public authorities in Germany regarding the enforcement procedure (sections 17, 21, 110 of the WpHG)

Within the scope of the financial reporting enforcement procedure, BaFin is authorised and obliged to cooperate with other authorities and public entities. This cooperation primarily consists of exchanging information needed by BaFin or the other authorities and entities to perform their duties. The objective pursued by such cooperation is to make both BaFin’s enforcement supervision and the work of the other authorities and entities more effective than would be the case if they acted in isolation. However, such cooperation is limited where the confidentiality of information and the protection of personal data take precedence. For the parties involved in a financial reporting enforcement procedure it is important to know to what extent and with what authorities and entities BaFin exchanges enforcement-related data and what further consequences this may have for the companies concerned.

II.1 Cooperation with prosecuting authorities – section 110 (1), section 21 (1) sentence 3 no. 1 of the WpHG

If, in the course of financial reporting enforcement, BaFin becomes aware of facts giving reason to suspect a criminal offence has been committed "in relation to the company’s accounting", it must inform the competent prosecuting authority so that the latter may initiate proceedings to investigate and sanction this criminal offence, where applicable. Such criminal offences include, for example, the misrepresentation of a corporation’s or group’s situation pursuant to section 331 of the HGB or section 400 of the AktG. Falsification of documents, fraud and criminal offences relating to insolvency are also covered if they are committed to enable, or designed to facilitate, false accounting.

BaFin will suspect a criminal offence whenever it considers that a criminally sanctioned prohibition may have been specifically violated, based on its factual findings and experience. Although it need not yet have potentially identified a specific offender, mere speculations that are not supported by any factual evidence are not sufficient to trigger an obligation to report the case to the public prosecutor’s office pursuant to section 110 (1) of the WpHG.

In addition to the obligation to report cases in which a specific suspicion exists, the Act provides for the possibility of authorised disclosure of information to the public prosecutors’ offices: section 21 (1) sentence 3 no. 1 of the WpHG stipulates that BaFin does not infringe its normal duty of confidentiality by informing the public prosecutors’ offices or the competent courts for criminal cases and administrative fines of facts of which it gained knowledge in the course of its supervisory activity and which such authorities need to perform their duties. BaFin shall exercise due discretion when deciding when to make such a disclosure.

The Act expressly permits personal data to be forwarded as well in the case of both mandatory notifications and other authorised disclosures of information.

BaFin will not investigate potential criminal offences any further, since this is the task of the prosecuting authorities. Its role thus solely consists of making the knowledge it gains in performing its duties available for use by the public prosecutors, and does not including performing investigative work for the prosecuting authorities.

The initiation of investigations by the public prosecutor does not influence the continuation of an enforcement procedure in other respects. The two procedures have different objectives: capital market transparency on the one hand and sanctioning personal misconduct on the other.

II.2 Cooperation with the Auditor Oversight Body – section 110 (2) sentence 1, section 21 (1) of the WpHG

BaFin’s obligation to inform the Auditor Oversight Body (AOB – Abschlussprüferaufsichtsstelle/APAS) at the Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle – BAFA) about facts “indicating the violation of professional obligations by the auditor” is expressly set out in section 110 (2) sentence 1 of the WpHG. Personal data relating to the persons suspected of the offence, or persons who may be required to act as witnesses, may also be forwarded in such cases. Whether such facts exist is examined from BaFin’s perspective. According to the explanation supplied by the government, the main application for this provision is where an error has been
identified in audited financial statements for which an auditor has issued an unqualified auditors’ report. However, BaFin may already have a duty of notification even before a financial reporting enforcement procedure has been concluded. The decisive factor here is that the duty to forward information is intended to enable auditors to be monitored as effectively as possible by making the FREP and BaFin findings available for use in their supervision. On the other hand, notifications by BaFin can only be used in a meaningful way if they actually provide indications that can serve as a basis for further investigations by the AOB. Moreover, an exaggerated notification requirement would put an undue strain on the resources of BaFin and possibly also on wrongly suspected auditors above and beyond what is justified given the spirit and purpose of the provision. Conversely, the AOB can also provide BaFin with confidential information where this is required to fulfil the latter’s tasks.

II.3 Cooperation with the exchange supervisory authorities and trading surveillance units – section 110 (2) sentence 2, section 17 (2) of the WpHG, section 21 (1) sentence 3 no. 2 of the WpHG

In the course of a financial reporting enforcement procedure, BaFin may discover facts suggesting that the company being examined has potentially violated the provisions of stock exchange law. BaFin is unable to further pursue such suspicions because supervision of the exchanges and the settlement of exchange trading in accordance with the provisions of the BörsG and the Stock Exchange Admission Regulation (Börsenzulassungsverordnung – BörsZulV) are the responsibility of the exchange supervisory authorities, which are administered by the federal states (Länder). The exchange supervisory authorities are vested with the powers needed to investigate stock exchange law matters and to issue orders intended to enforce proper exchange trading and the proper settlement of exchange transactions to stock exchanges and trading participants. BaFin’s notification of suspected cases with implications under stock exchange law helps the exchange supervisory authorities to ensure orderly exchange trading and to better supervise the companies that are required to meet the requirements of stock exchange law in their capacity as issuers or market participants. To this end, BaFin may also forward personal data relating to suspects or potential witnesses. Apart from its obligation to report suspicious cases, BaFin is required by section 17 (2) of the WpHG to inform the exchange supervisory authorities and the stock exchanges’ trading surveillance units of all observations and findings that are needed by the latter for their supervisory activity. This comprehensive duty of cooperation also extends to personal data. At the request of the exchange supervisory authority, BaFin must (and may) forward information it has gained, for example, in a financial reporting enforcement procedure. Conversely, the exchange supervisory authorities and the trading surveillance units are also authorised and obliged to make available to BaFin any information and data to which they have gained access if BaFin needs such information and data for a financial reporting enforcement procedure or in performance of one of its other duties. Despite its duties of confidentiality with regard to business and trade secrets and personal data, BaFin is not prohibited by section 21 (1) sentence 3 no. 2 of the WpHG from sharing such information with all bodies that are entrusted by law or as part of a public mandate with the supervision of stock exchanges or other markets on which financial instruments are traded.

II.4 Cooperation with the Bundesbank, the Federal Cartel Office, labour inspection offices and other bodies – section 17 (2), section 21 of the WpHG

As in all areas of its supervisory activity, BaFin is also required as part of its financial reporting enforcement activities to share all information with the Bundesbank, the Federal Cartel Office (Bundeskartellamt) and the labour inspection offices (Gewerbeaufsichtsämter) supervising insurance brokers and sellers of investment units that the other body in question needs to perform its duties. This represents a comprehensive duty to cooperate and provide mutual assistance in the interest of ensuring effective state control of the financial markets, as also prescribed by European Community law. BaFin’s duty of confidentiality with respect to information which normally must be kept secret in the interest of a third party also no longer takes precedence if data – including data from financial reporting enforcement procedures – are disclosed to other capital market supervisory authorities, to the European Central Bank or other central banks, or to entities entrusted with the liquidation, or with conducting the insolvency proceedings relating to the assets, of an investment services enterprise or of an organised market, provided that such institutions need the data to perform their duties.
III Judicial relief from measures taken by BaFin in financial reporting enforcement procedures

III.1 Measures taken by the FREP

The German procedure for monitoring companies’ financial statements is a two-tier model. In the first tier, the FREP examines companies’ financial statements on the basis of random sampling, at BaFin’s request or where there are specific indications that accounting rules have been violated. As a private-law entity, the Enforcement Panel depends in this context on the willingness of companies to cooperate in this examination, since otherwise it cannot take any legally binding decisions. If the company initially cooperates and the FREP establishes the result of its examination, the company is once again free to decide whether to agree with this result or to refuse to do so. By not co-operating in an examination by the FREP from the outset or by simply refusing to agree with the result, the company can prevent the first-tier enforcement procedure or can end it without adverse consequences without having to seek formal judicial relief. The legislation therefore does not provide for any appeal against measures taken by the Enforcement Panel.

III.2 Measures taken by BaFin

A statutory examination procedure can only be initiated by BaFin during the second tier of the enforcement procedure. This is because BaFin is only vested with such powers if a company refuses to cooperate in an examination by the FREP or if it does not agree with the result of this examination, or if BaFin has substantial doubts as to the result of the examination or the way in which the examination was conducted during the first tier of the enforcement procedure (section 108 (1) sentence 2 of the WpHG). BaFin is vested with statutory powers to order an examination of the financial statements (section 107 (1) sentences 1 and 2 of the WpHG), to publish the examination order (section 107 (1) sentence 5 of the WpHG), to seek information from companies or require the submission of documents (section 107 (5) of the WpHG), to enter properties and business premises (section 107 (6) of the WpHG), to require the FREP to explain its examination and to submit an examination report or to initiate an examination (section 108 (1) sentence 3 and section 108 (2) of the WpHG), to identify errors in companies’ financial statements (section 109 (1) of the WpHG) and to order publication of identified errors (section 109 (2) sentence 1 of the WpHG); the latter task must still be performed by BaFin even if no second-tier enforcement procedure takes place. Moreover, pursuant to section 17 (1) of the FinDAG it may enforce any administrative acts it has taken using the means provided for this purpose under administrative enforcement law, e.g. by imposing a coercive fine or ordering substitute performance at the expense of the company that has to comply with its obligations, or by publishing information pursuant to section 6 (14) of the WpHG at the company’s expense.

III.2.1 Objections

The company concerned or the FREP may defend itself against administrative acts performed by BaFin pursuant to sections 107, 108 and 109 of the WpHG by filing an objection pursuant to section 112 of the WpHG. Unless otherwise provided for in the WpHG, such objections are also governed by the general rules for preliminary proceedings pursuant to sections 68–73 and section 80 (1) of the Rules of the Administrative Courts (Verwaltungsgerichtsverordnung – VwGO).

By contrast, what are known as “simple statutory administrative activities” by BaFin, which do not involve any binding orders or prohibitions, may not be challenged by way of objection. Also inadmissible are objections filed with the aim of pre-emptively challenging an (expected) administrative act even though this has not yet been effectively issued, for example because it has not yet been made known to the addressee in the manner prescribed by law. Furthermore, section 112 (1) sentence 2 of the WpHG clarifies that no additional preliminary proceedings are allowed in cases in which the original administrative act has already been examined in objection proceedings and the remedial decision or the objection notice contains, for the first time, additional negative provisions against which the complainant would like to take action.

III.2.1.1 Competent authority for objections

An objection aimed at setting aside an administrative act must be filed with BaFin as the competent authority for objections. This is because section 73 (1) no. 2 of the VwGO provides that the authority that issued the administrative act is also required to rule on the objections if the next higher authority is a supreme federal authority (oberste Bundesbehörde). The Federal Ministry of Finance, which supervises BaFin at a legal and technical level, is therefore not responsible for handling
III.2.1.2 Right of objection

Objections may only be filed by the person or entity to which the order issued by BaFin was addressed. As a rule, this will be the company that was the subject of the enforcement examination. However, members of its governing bodies, employees of the company or its auditors may also have the right to object if BaFin requests them to provide information or submit documents.

Third parties other than the person or entity to whom the administrative act was addressed do not have any right of objection even if they are indirectly affected by the act (for example as shareholders). Since the identification of an error only has a binding effect on the parties to the procedure (i.e. BaFin and the company that has been examined), third parties – such as the auditor – cannot claim any infringement of their own rights. Equally, third parties may not bring actions for issuance of an administrative act (Verpflichtungsklage) against BaFin with the aim of identifying an error. This is because financial reporting enforcement, like BaFin’s entire supervisory activity, is performed exclusively in the public interest.

III.2.1.3 Deadline

Objections must reach BaFin within a period of one month starting from the date on which the administrative act was made known to the person or entity to which it was addressed. Pursuant to section 70 (1) sentence 2 in conjunction with section 58 (2) of the VwGO, the deadline can only be extended to one year if no instructions were given in the original notice as to how to file an appeal correctly, or if the instructions given were incorrect. When calculating the deadline, the rules governing public holidays at BaFin’s offices in Bonn and Frankfurt must be taken into account; in all other respects, the deadline is calculated in accordance with the provisions set out in sections 187 et seq. of the BGB. In the event of culpable failure to observe the deadline, the order issued by BaFin becomes non-appellable.

III.2.1.4 Form

The objection may be submitted in writing by post, fax or computer fax, or dictated for the record at BaFin. The use of German is mandatory for this.

BaFin offers a means of transmitting electronic documents in a legally effective manner within the meaning of section 3a of the Administrative Procedures Act (Verwaltungsverfahrensgesetz – VwVfG). The following communication addresses – and only these – have been provided by BaFin for transmitting electronic documents in a legally effective manner within the meaning of section 3a of the VwVfG:

- for transmitting qualified electronically signed documents by e-mail: ges-posteingang@bafin.de
- for transmission by De-Mail: poststelle@bafin.de-mail.de

By contrast, objections may not be filed orally or by phone.

III.2.1.5 Review by BaFin

In each case, BaFin only reviews the individual order whose lawfulness has been called into question by the complainant. For example, if the complainant objects to BaFin’s request to provide certain information or submit documents, only the lawfulness and expediency of these fact-finding measures will be reviewed again. The question of whether or not ordering the financial reporting enforcement examination in the first place was permissible will not be re-examined. If the identification of an error has acquired legal force, the company concerned may subsequently file an objection against the order for publication. However, the objection may not use the argument that the underlying identification of the error was incorrect.

Subject to this restriction to the subject matter in dispute, BaFin reviews the lawfulness of the order that has been challenged in full. In this context it not only considers the new arguments submitted by the complainant but is also required to set aside the original administrative act if it acknowledges the act to be unlawful on grounds other than those criticised by the complainant. To the extent that the original order is based on a discretionary decision by BaFin (i.e. where the issuance of such an order is not prescribed by law), the way in which this discretion was exercised will also be re-examined in the objection proceedings.

The lawfulness and expediency of the administrative act is examined on the basis of the facts of the case and the legislation in force at the time when BaFin decides on the objection. In the event that the legal requirements or factual circumstances on which the administrative act was based change, this may work in favour of or against the complainant.

If BaFin finds that the original notice was unlawful, or that at the time of the decision on the objection the original order can no longer be upheld, it will remedy...
the objection. If, on the other hand, it considers the objection to be unfounded, it will dismiss it with costs by issuing an objection notice (Widerspruchsbescheid).

III.2.1.6 No suspensive effect

Pursuant to section 112 (2) of the WpHG, the orders as described above under III.2 that are issued by BaFin are immediately executable during financial reporting enforcement. Filing an appeal does not have the normal suspensive effect in this case. This means that orders must be observed as soon as they are made known to the person or entity to whom they are addressed, and that BaFin may enforce them by taking administrative compulsory execution measures (Verwaltungszwang) even if the deadline for objections has not yet expired or an objection has been filed within the deadline. This provision ensures that the capital market’s interest in achieving transparency as quickly as possible is not constrained by any appeal proceedings. However, persons or entities subject to a financial reporting enforcement order may apply to the Frankfurt am Main Higher Regional Court for an order granting their objection suspensive effect (see III.2.3).

III.2.2 Complaints

Persons or entities to whom administrative acts issued by BaFin as part of financial reporting enforcement are addressed may file a judicial complaint if BaFin has not (fully) remedied their objection or if the objection notice contains a complaint for the first time (see III.2.1). In principle, a complaint may also be brought if the dispute has been settled in the meantime but the complainant is able to assert a legitimate interest in a declaration to the effect that the order issued by BaFin was unlawful. Such complaints seeking a declaratory ruling on the unlawfulness of a previous administrative act (Fortsetzungsfeststellungsbeschwerden) pursuant to section 113 (2) of the WpHG in conjunction with section 56 (2) sentence 2 of the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpUG) may be filed, for example, where a request for information by BaFin that was directed to a company or its auditor is no longer applicable because the information has already been provided but the person or entity in question is concerned that further similar measures may be taken in future.

III.2.2.1 Competent court

Pursuant to section 113 (2) of the WpHG in conjunction with section 48 (4) of the WpUG, the Higher Regional Court in Frankfurt am Main is the sole competent court for decisions on financial reporting enforcement complaints. More specifically, decisions are taken by the Higher Regional Court’s Securities Acquisition and Takeover Division; the procedural rules set out in the WpÜG that are referenced in section 113 (2) of the WpHG apply with the necessary modifications. No further appeal is possible against rulings of the Frankfurt am Main Higher Regional Court; however, if the Frankfurt am Main Higher Regional Court wishes to depart from the case law of another Higher Regional Court or of the Federal Court of Justice (Bundesgerichtshof – BGH), it must refer the matter to the BGH for a decision (deviation referral (Divergenzvorlage) in accordance with section 56 (6) of the WpÜG).

III.2.2.2 Right of complaint

Persons or entities whose rights are directly affected by orders issued by BaFin within the scope of financial reporting enforcement (III.2), which generally take the form of objection notices, may file a complaint against such orders. As a general rule, this will be the company subject to the financial reporting enforcement procedure. However, complaints may also be filed, for example, by persons whom BaFin has requested to provide information, or by the FREP as the entity to which an order to initiate an examination was addressed. By contrast – in accordance with the objections procedure – indirectly affected third parties are not entitled to file appeals (III.2.1.2).

III.2.2.3 Deadlines and formal requirements

The complaint must be received by the court within one month of the objection notice being served; this deadline cannot be extended. After this, the complainant has a further deadline of one month to submit the grounds for the complaint. This time limit may be extended by the court on request. The grounds must state the extent to which the court is being asked to amend or set aside the administrative act. The complainant may restrict the subject matter in dispute to parts of the BaFin order, for example by contesting a request for information by BaFin only with respect to specific questions selected from a longer list, or by making not all but only certain errors identified by BaFin the subject matter of the proceedings. Moreover, the actual circumstances on which the complaint is based must be stated and substantiated by evidence.

III.2.2.4 Proceedings

The complainant must be represented in court by either a German lawyer or a teacher of law at a German
to protect themselves against immediate execution. Neither the WpHG nor the WpÜG (whose procedural rules apply to the complaint proceedings) provide that BaFin can itself set aside the immediate executability of its orders.

On application, the appellate court (see III.2.2.1) may grant suspensive effect to an objection or a complaint pursuant to section 113 (2) of the WpHG in conjunction with section 50 (3) of the WpÜG. A precondition for this is that the applicant must submit credible factual evidence leading the court to entertain serious doubts as to the lawfulness of the contested administrative act by BaFin, or to reach the conclusion that execution of the administrative act would result in undue hardship that is not justified by an overriding public interest. The criteria that the Frankfurt am Main Higher Regional Court requires to be met before serious doubts can be assumed are substantial. They can be considered if the court, based on a summary review of the prospects for success of the objection or the complaint (i.e. a review made on the basis of less extensive checks), reaches the conclusion that the contested administrative act is more likely than not to be set aside in the subsequent main proceedings. In this context, it is not enough for the legal situation on which the decision turns to be unresolved.23

IV.1 Introduction

Sections 114 to 118 of the WpHG set out the content of financial reports pursuant to the WpHG, the associated publication and archiving obligations, and the relevant exemption options. Within the meaning of these provisions, financial reports are annual financial reports (section 114 of the WpHG), half-yearly financial reports (section 115 of the WpHG) and payments reports (section 116 of the WpHG).

23 Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main) decision of 7 January 2016 – case ref.: WpÜG 1/15 and 2/15; Frankfurt am Main Higher Regional Court decision of 9 August 2016 – case ref.: WpÜG 1/16 and 2/16.
If a parent company is required to prepare consolidated financial statements and a group management report, the requirements of sections 114 and 115 of the WpHG on financial reporting are modified pursuant to section 117 of the WpHG. The provisions governing group payments reports are set out in section 116 of the WpHG.

Finally, section 118 of the WpHG provides for exemptions to the financial reporting obligation pursuant to the WpHG.

**Legal basis and legislative history**

The primary legal basis for sections 114 et seq. of the WpHG is provided by the requirements of the Transparency Directive (Directive 2004/109/EC). The relevant provisions are mainly contained in Articles 4 to 8 of the Transparency Directive.

In Germany, these requirements were transposed into law by the German Act Implementing the Transparency Directive (Transparenzrichtlinie-Ümsetzungsgesetz – TUG), which implemented the directive’s requirements in the WpHG and the Securities Trading Reporting and Insider List Regulation (Wertpapierhandelsanzeigeverordnung – WpAV). The authority to issue regulations created by the TUG was also used in connection with the Regulation Implementing the Transparency Directive (Transparenzrichtlinie-Durchführungsverordnung – TranspRLDV)\(^\text{24}\). The Directive Amending the Transparency Directive (Transparenzrichtlinie-Änderungsrichtlinie), which came into force on 27 November 2013 (Directive 2013/50/EU), revised the Transparency Directive. Its provisions were transposed into national law with effect from 26 November 2015. The Directive Amending the Transparency Directive abolished the previous requirement on issuers of shares to prepare and publish interim management statements or quarterly financial reports (section 37x of the old version of the WpHG). It introduced a new requirement for companies in certain raw materials sectors to publish a payments report or group payments report (section 116 of the WpHG).

**IV.2 Scope**

The obligations set out in sections 114 et seq. of the WpHG apply only to domestic issuers pursuant to section 2 (14) of the WpHG. An additional restriction in scope is that the obligations only apply to companies. This means that they do not extend, for example, to the German government and to the federal states (Länder) in their capacity as issuers. Further restrictions on the personal scope of application result directly from sections 115 and 116 of the WpHG.

When determining whether a company qualifies as a domestic issuer, the point in time at which the securities are or were admitted to trading on an organised market is material. In this context it should be noted that it is the time of actual admission and not the time when admission is or was applied for that is decisive. A reporting obligation exists for the current and all following reporting periods as from the time of admission. A reporting obligation also applies to a preceding reporting period to the extent that admission takes place before the end of the publication period in question. The reporting obligation ends on the date on which the revocation of admission takes effect. No report is required for the period in which a revocation of admission takes effect, in contrast to the report on the immediately preceding reporting period.

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\(\text{Example}\)

An issuer’s securities are admitted to trading on 1 August (financial year = calendar year). Since the admission took place before the end of the relevant publication period, the issuer also has an obligation to prepare and publish a half-yearly financial report.

In contrast, if admission to the exchange is effectively revoked on 1 August, the issuer is still required to prepare and publish the half-yearly financial report (because this reporting period has been concluded), but it no longer has to meet the reporting requirements set out in section 114 of the WpHG.

In the case of a short financial year, sections 114 et seq. of the WpHG apply as follows: at the end of a short financial year, the financial reporting requirements pursuant to section 114 of the WpHG must be met. Moreover, no special requirements apply in principle for interim financial reporting in the case of a short financial year; however, there is no requirement for additional interim reporting if the end of the reporting period coincides with the end of the short financial year.

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\(\text{24 Regulation Implementing Commission Directive 2007/14/EC of 8 March 2007 EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.}\)
Applicability of sections 114 et seq. of the WpHG to insolvent companies
The obligations pursuant to sections 114 et seq. of the WpHG must also be observed by issuers for which a request to open insolvency proceedings has already been opened. The (temporary or permanent) insololvency administrator is required to assist such issuers in fulfilling their capital market law obligations, particularly with regard to the funds required for this (section 24 of the WpHG).

Scope exemptions pursuant to section 118 of the WpHG
Section 118 of the WpHG provides for a number of exceptions from the scope of application of sections 114 et seq. of the WpHG that relieve issuers from the need to apply individual obligations or the rules in their entirety.

IV.3 Financial reporting requirements pursuant to sections 114 to 117 of the WpHG

IV.3.1 Publication of the annual financial report

IV.3.1.1 Section 114 of the WpHG – annual financial report
Section 114 of the WpHG requires companies that issue securities as domestic issuers to prepare an annual financial report as of the end of each financial year and to publish it no later than four months after the end of the financial year in question, unless the company is already required by commercial law to disclose the accounting documents specified in section 114 (2) of the WpHG.

The Federal Office of Justice is the competent supervisory authority for overseeing the obligation to publish the accounting documents pursuant to section 114 (2) of the WpHG in the case of domestic issuers domiciled in the Federal Republic of Germany (section 114 (1) sentence 1 half-sentence 2 of the WpHG; see also the decision of Frankfurt am Main Higher Regional Court (OLG Frankfurt am Main) of 28 June 2012 – case ref.: WpÜG 8/11).

Domestic issuers domiciled outside Germany must publish the annual financial report on a website no later than four months after the end of each financial year. Additional publication by other means is permissible but not necessary. It is also not necessary for the report to be posted on the website of the company concerned. Rather, it is sufficient if the report is posted on another website, although publication on the company’s website is preferable for reason of transparency since this is more closely related.

IV.3.1.1.1 Content of the annual financial report
Pursuant to section 114 (2) of the WpHG, the annual financial report must contain the following information at a minimum:
- the audited annual financial statements (no. 1);
- the audited management report (no. 2);
- the responsibility statement pursuant to sections 264 (2) sentence 3 and 289 (1) sentence 5 of the HGB (no. 3) and,
- where appropriate, a certificate of registration for the auditor issued by the Chamber of German Public Auditors (Wirtschaftsprüferkammer) pursuant to section 134 (2a) of the Act Regulating the Profession of Wirtschaftsprüfer (Wirtschaftsprüferordnung – WPO) or a certification of exemption from the obligation to register issued by the Chamber of German Public Auditors pursuant to section 134 (4) sentence 8 of the WPO (no. 4).

Further content may be added to the scope of the report, provided that the report contains the minimum components specified in section 114 (2) nos. 1 to 3 of the WpHG.

Audited annual financial statements (section 114 (2) no. 1 of the WpHG)
Domestic issuers domiciled in a member state of the European Union or in a state that is a signatory to the Agreement on the European Economic Area must prepare their annual financial statements, have them
audited and have them issued with an audit report or a non-affirmative audit report in accordance with the rules applicable in their country of domicile (in the case of domestic issuers domiciled in the Federal Republic of Germany these are the audited financial statements pursuant to sections 242 and 264 (1) sentence 1 of the HGB). Domestic issuers domiciled in a third country must prepare their annual financial statements, have them audited and have them issued with an audit report or a non-affirmative audit report in accordance with the provisions of the HGB.

**Audited management report (section 114 (2) no. 2 of the WpHG)**

The management reports of domestic issuers domiciled in a member state of the European Union or in a state that is a signatory to the Agreement on the European Economic Area must be prepared and audited with the rules applicable in their country of domicile (in the case of domestic issuers domiciled in the Federal Republic of Germany this is the audited management report pursuant to section 289 of the HGB). Domestic issuers domiciled in a third country must have their management report prepared and audited in accordance with the provisions of the HGB.

**Responsibility statement pursuant to sections 264 (2) sentence 3 and 289 (1) sentence 5 of the HGB – so-called balance sheet oath**

In the responsibility statement, the statutory representatives of the company provide an assurance that the annual financial statements give a true and fair view of the company’s assets, liabilities, financial position and profit or loss, and that the management report includes a fair review of the development and performance of the business and the position of the company, together with a description of the material opportunities and risks associated with the expected development of the company. The statement is made subject to the qualification that the statutory representatives give such assurance to the best of their knowledge. If, due to exceptional circumstances, the annual financial statements do not give a true and fair view of the company’s assets, liabilities, financial position and profit or loss, a statement must be made to the effect that additional information is contained in the notes to the financial statements. The responsibility statement may be worded to conform to German Accounting Standard No. 16 for Consolidated Financial Statements (announcement of the amendment of German Accounting Standard No. 16 [GAS 16] – Half-yearly Financial Reporting – by the German Accounting Standards Committee, Berlin, pursuant to section 342 (2) of the HGB dated 21 June 2016).

**Certificate of registration or certification of exemption issued by the Chamber of German Public Auditors pursuant to section 134 of the WPO (section 114 (2) no. 4 of the WpHG)**

Annual financial reports must contain a certificate of registration for the auditor issued by the Chamber of German Public Auditors pursuant to section 134 (2a) of the WPO or a certification of exemption from the obligation to register issued by the Chamber of German Public Auditors pursuant to section 134 (4) sentence 8 of the WPO; this applies in particular if an auditor from a third country has issued the auditors’ report for the financial statements of a company domiciled in that country. It does not apply in the case of publicly appointed auditors in Germany.

**IV.3.1.1.2 Group**

Where a parent undertaking is required to prepare consolidated financial statements and a group management report, section 114 of the WpHG is modified by section 117 of the WpHG to the effect that the annual financial report must also contain the audited consolidated financial statements prepared in accordance with Regulation (EEC) No 1606/2002, the group management report, a statement in accordance with the provisions of section 297 (2) sentence 4 and section 315 (1) sentence 6 of the HGB and, where appropriate, a certificate of registration for the auditor issued by the Chamber of German Public Auditors pursuant to section 134 (2a) of the WPO or a certification of exemption from the obligation to register issued by the Chamber of German Public Auditors pursuant to section 134 (4) sentence 8 of the WPO. These items must be disclosed in addition to the components of the annual financial report already mentioned, and together with it form the annual financial report within the meaning of section 114 of the WpHG. Consequently, there is only one single financial report. The consolidated financial statements must be prepared in accordance with Regulation (EEC) No 1606/2002, i.e. in accordance with the IASs/IFRSs as adopted by the EU. The WpHG sets out an audit obligation for the consolidated financial statements but not for the group management report. However, in the case of issuers domiciled in Germany such an obligation derives from section 316 (2) sentence 1 of the HGB. Additionally, section 315 of the HGB sets out requirements for the content of the group management report.

**IV.3.1.2 Section 115 of the WpHG – Half-yearly financial report**

Section 115 of the WpHG requires companies which, as domestic issuers, issue shares or debt securities within
the meaning of section 2 (1) of the WpHG to prepare a half-yearly financial report for the first six months of each financial year and to publish it no later than three months after the end of the reporting period in question. However, issuers of securities comparable to shares and certificates of deposits representing shares (section 2 (1) no. 2 of the WpHG) as well as issuers of debt securities that grant at least a contingent right to acquire securities pursuant to section 2 (1) no. 1 or no. 2 of the WpHG are exempt from this requirement. The group of entities subject to the reporting obligation is thus narrower than that in the case of the annual financial reporting. The half-yearly financial report must be made available publicly on the web. Additional publication by other means is permissible but not necessary. It is also not necessary for the report to be posted on the website of the company concerned. Rather, it is sufficient if the report is posted on another website, although publication on the company’s website is preferable for reason of transparency since this is more closely related.

IV.3.1.2.1 Content of the half-yearly financial report
Pursuant to section 115 (2) of the WpHG, the half-yearly financial report must contain the following information at a minimum:
- a condensed set of financial statements (no. 1);
- an interim management report (no. 2); and
- a statement made in accordance with the provisions of sections 264 (2) sentence 3 and section 289 (1) sentence 5 of the HGB (no. 3).

Condensed financial statements (section 115 (2) no. 1 of the WpHG)
Pursuant to section 115 (3) sentence 1 of the WpHG, the condensed financial statements must contain at a minimum a condensed balance sheet, a condensed income statement and notes to the financial statements. The condensed financial statements must be prepared in accordance with the accounting standards applicable to the annual financial statements. This does not apply if the annual financial statements are replaced on publication by separate financial statements within the meaning of section 325 (2a) of the HGB. In this case, the IASs/IFRSs as adopted by the EU are applicable to the condensed financial statements pursuant to section 115 (3) sentence 3 of the WpHG.

Interim management report (section 115 (2) no. 2 of the WpHG)
The minimum content of interim management reports is defined in section 115 (4) sentence 1 of the WpHG. According to this, reports must include at a minimum the key events that occurred during the reporting period and their impact on the condensed set of financial statements, as well as a description of the material opportunities and risks for the six months of the financial year following the reporting period. In other words, both past and future events must be reported. In addition, issuers of shares are required to disclose material transactions with related parties; these disclosures may also be made in the notes. The decision as to what information must be included in the interim management report is taken by the issuer’s statutory representatives. However, GAS 16 provides assistance regarding the content of interim reports.

Responsibility statement (section 115 (2) no. 3 of the WpHG)
As regards the responsibility statement, the remarks made in relation to the annual financial report apply with the necessary modifications. Its wording may also be adapted to conform to the template provided by GAS 16 for consolidated financial statements.

Review by an auditor (section 115 (5) of the WpHG)
Section 115 (5) sentence 1 of the WpHG does not mandate a review of the condensed financial statements and interim management report. However, if a review is performed this must be done in such way that, where professional diligence is exercised, the possibility of the condensed financial statements and the interim management report being materially inconsistent with the applicable accounting standards can be ruled out. In line with this, the auditor is only required to arrive at a negatively formulated statement, which must be published in the form of a certificate together with the half-yearly financial report.
The issuer may also instruct the auditor to perform an audit in accordance with section 317 of the HGB. If this is the case, the auditor’s report or the non-affirmative auditor’s report must be reproduced in full and published together with the half-yearly financial report (section 115 (5) sentence 5 of the WpHG).
If neither an auditor’s review nor an audit in accordance with section 317 of the HGB is performed, this fact must be stated in the half-yearly financial report (section 115 (5) sentence 6 of the WpHG).

IV.3.1.2.2 Group
Where a company is required as a parent to prepare consolidated financial statements and a group management report, section 115 of the WpHG is modified by section 117 no. 2 sentence 1 of the WpHG to the effect that the half-yearly financial report must be prepared and published for the parent undertaking and all subsidiaries to be included. No separate half-yearly financial report is required for the parent undertaking.
IV.3.1.3 Section 116 of the WpHG – Payments report

Section 116 of the WpHG requires companies that issue securities as domestic issuers and that are active, either themselves or via a subsidiary, in the extractive industry within the meaning of section 341r no. 1 of the HGB or the logging of primary forests within the meaning of section 341r no. 2 of the HGB to publish a payments report no later than six months after the end of the reporting period, to the extent that they are not already required by commercial law to publish a payments report. The Federal Office of Justice is the competent supervisory authority for overseeing the obligation to publish the payments report in the case of domestic issuers domiciled in the Federal Republic of Germany (section 116 (1) sentence 1 no. 2 of the WpHG).

This obligation applies for the first time to payments reports for financial years commencing after 26 November 2015.

The payments report must be made available publicly on the web. Additional publication by other means is permissible but not necessary. It is also not necessary for the report to be posted on the website of the company concerned. Rather, it is sufficient if the report is posted on another website, although publication on the company’s website is preferable for reasons of transparency since this is more closely related.

Pursuant to section 116 (3) sentences 1 and 2 of the WpHG, BaFin can require an undertaking to state whether it is active in the extractive industry within the meaning of section 341r of the HGB or in the logging of primary forests, and may set an appropriate deadline for the undertaking to issue this statement. If the undertaking does not issue a statement within this period, it is presumed that it falls within the scope of section 116 (1) sentence 1 no. 1 of the WpHG. Section 116 (3) sentences 1 and 2 of the WpHG shall apply, with the necessary modifications, if BaFin has reason to presume that a subsidiary of the company is active in the extractive industry or the logging of primary forests.

IV.3.1.3.1 Content of the payments report

The payments report must be prepared in accordance with the provisions of sections 341r to 341v of the HGB.

In the payments report, the corporation is required pursuant to section 341t of the HGB to state among other things what payments it made in the reporting period to governments in connection with its activities in the extractive industry or the logging of primary forests. Other payments may not be included in the payments report. If a corporation did not make any payments to governments, it must only report the fact that it is active in these areas in the payments report. Payments which individually or in total do not exceed €100,000 in the reporting period and governments to which a total of less than €100,000 was paid in the reporting period do not have to be included in the payments report. Payments and activities many not be artificially split or lumped together to avoid application of the provisions described here.

A payments report does not need to be prepared if the corporation is included in the group payments report prepared by it or another entity. In this case, the corporation must state in the notes to the annual financial statements the company that has included it in its group payments report and where the latter can be obtained.

In the case of an undertaking required to prepare a payments report that is domiciled in another member state of the European Union or in another state that is a signatory to the Agreement on the European Economic Area, the provisions of national law enacted by its state of domicile to implement Chapter 10 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182 dated 29 June 2013, p. 19) shall apply in the place of sections 341s to 341v of the HGB.

IV.3.1.3.2 Group

If a parent undertaking or one of its subsidiaries is active in the extractive industry or the logging of primary forests, it must prepare an annual group payments report pursuant to section 341v of the HGB. Sections 341s to 341u of the HGB shall apply to the group payments report, with the necessary modifications. Consolidated information must be provided on all payments to governments made by the companies included in the report in connection with their activities in the extractive industry or the logging of primary forests.

No group payments report needs to be prepared if the parent undertaking is itself included as a subsidiary in a superordinate group payments report by a parent undertaking that is domiciled in a member state of the European Union or in a state that is a signatory to the Agreement on the European Economic Area, or if it is exempted pursuant to section 293 of the HGB from the duty to prepare consolidated financial statements.

IV.3.2 Publication of an announcement

All domestic issuers must publish an announcement for the annual financial report and/or the accounting documents set out in section 114 (2) (where appropriate in conjunction with section 117 no. 1) of the
WpHG, and for the half-yearly financial report and the (group) payments report pursuant to section 114 (1) sentence 2, section 115 (1) sentence 2 and section 116 (2) sentence 1 of the WpHG. Therefore, issuers who are required by the provisions of commercial law to disclose the documents set out in section 114 (2) (where appropriate in conjunction with section 117 no. 1) of the WpHG and a (group) payments report must also publish an announcement.

The announcement must state as of when the annual financial report and/or the accounting documents set out in section 114 (2) (where appropriate in conjunction with section 117 no. 1) of the WpHG, the half-yearly financial report and the (group) payments report are publicly available, and the Internet address for this. The exact path to the webpage on which the materials are published must be stated. A reference to a website (and especially a link to the company’s investor relations page from which a further search is necessary) does not satisfy the requirements of section 114 (1) sentence 2, section 115 (1) sentence 2 and section 116 (2) sentence 1 of the WpHG. However, it is still acceptable if the path links to a page from which investors are able to select or find the report in question via a single additional click, without performing a further search.

The announcement must be published by the same deadline by which the financial report also has to be made publicly available or by which publication has to be made in accordance with the provisions of commercial law. In the case of the annual financial report and/or the accounting documents set out in section 114 (2) of the WpHG (where appropriate in conjunction with section 117 no. 1 of the WpHG), the announcement must be published no later than four months after the end of the financial year. In the case of the half-yearly financial report it must be published no later than three months after the end of the reporting period, and in the case of the (group) payments report it must be published no later than six months after the end of the reporting period. The announcement must be published before the annual financial report and/or the accounting documents set out in section 114 (2) of the WpHG (where appropriate in conjunction with section 117 no. 1 of the WpHG), the half-yearly financial report and the (group) payments report are made publicly available for the first time.

A lead time of one week is recommended to enable as many market participants as possible to be informed in good time of the forthcoming publication of the accounting documents.

Group notifications satisfy the requirements of the Act provided that these already state in each case the correct point in time when, and the precise web address at which, the financial reports are to be made publicly available. A correction notification is required if the dates or paths stated change. It is recommended that group notifications be submitted no more than twelve months in advance so as to maintain the link to a specific time and to avoid a large number of subsequent changes.

**Content of the publication**

Pursuant to section 3a of the Securities Trading Reporting Regulation (Wertpapierhandelsanzeigenverordnung – WpAV), to which section 18 of the WpAV refers, publication must be made via the media pool. The announcement must be forwarded to media for publication, including those media for which it can be assumed that they will disseminate the information across the entire EU and the other signatory states to the EEA. According to the explanatory memorandum for the Act (Bundestag printed matter 16/2498 dated 4 September 2006), such media include at least one electronic information system along with news providers, news agencies, key national and European print media, and relevant financial market websites. Additional requirements to be met when publishing the information are set out in section 3a of the WpAV.

If the entity subject to the publication requirement commissions a third party to arrange publication, the duty to publish is not transferred to that third party; instead, the original entity remains responsible for fulfilling its duty of publication. However, the requirements of section 3a (1) to (3) of the WpAV must then be fulfilled by the third party. In this context care should be taken to ensure that the duty to retain information continues to exist even if the third party commissioned to perform publication ceases to exist (e.g. as a result of insolvency or because it discontinues operations) or is replaced by another third party. In the event that the third party ceases to exist, the responsibility for ensuring that the requirements are met reverts back to the issuer.

**IV.3.3 Notification of the announcement to BaFin**

BaFin must be notified of the announcement for the annual financial report or the accounting documents set out in section 114 (2) (where appropriate in conjunction with section 117 no. 1 of the WpHG, and for the half-yearly financial report and the (group) payments report pursuant to section 114 (1) sentence 3, section 115 (1) sentence 3 and section 117 (2) sentence 2 of the WpHG simultaneously to its publication. For this purpose, simultaneously is taken to mean if the messages are sent in immediate succession. The notification sent to BaFin informing it of publication must contain the text of the publication, the media to which the information was sent, as well as the exact time and date it was sent to the media (section 19 in conjunction with section 3c of the WpAV).
IV.3.4 Forwarding of the announcement to the company register for archiving

The obligation to forward the announcement to the company register is derived from section 8b (2) no. 9, (3) sentence 1 no. 2 of the HGB. Pursuant to section 114 (1) sentence 3, section 115 (1) sentence 3 and section 116 (2) sentence 2 of the WpHG, the announcement regarding the annual financial report or the accounting documents set out in section 114 (2) (where appropriate in conjunction with section 117 no. 1) of the WpHG, the half-yearly financial report and the (group) payments report must be forwarded without undue delay; however, this may not take place before the announcement is published. The requirement to forward the announcement without undue delay is governed by section 121 (1) sentence 1 of the BGB, i.e. this must be done without culpable delay.

IV.3.5 Forwarding of the financial report to the company register for archiving

The company is obliged to forward the annual financial report, the half-yearly financial report and the (group) payments report pursuant to section 114 (1) sentence 4, section 115 (1) sentence 4 and section 116 (2) sentence 3 of the WpHG to the company register for archiving without undue delay; however, this may not take place before the announcement is published. Pursuant to section 20 of the WpAV, the financial report must be accessible to the public in the company register for a minimum period of ten years. Domestic issuers are required to forward the financial report to the company register either itself or via a service provider (section 8b (3) sentence 1 no. 2 of the HGB). Only where the accounting documents pursuant to section 114 (2) of the WpHG (where appropriate in conjunction with section 117 no. 1 of the WpHG) and the (group) payments report are disclosed pursuant to the provisions of commercial law will the operator of the electronic Federal Gazette forward these to the company register for inclusion therein (section 8b (2) no. 4, (3) sentence 1 no. 1 of the HGB). Details of how to forward documents to the company register are set out in the Company Register Regulation (Unternehmensregisterverordnung – URV).25 BaFin does not supervise performance of the duties set out in this regulation.

Pursuant to section 4 sentence 1 of the URV, documents shall be forwarded by way of remote data transfer; only in exceptional cases shall fax transmissions be used (section 4 sentence 2 of the URV). Pursuant to section 11 sentence 1 of the URV, data within the meaning of section 8b (2) no. 9 of the HGB must be forwarded to the company register without undue delay following publication, and data within the meaning of section 8b (2) no. 10 of the HGB must be forwarded without undue delay following the announcement. Pursuant to section 11 sentence 2 of the URV, section 10 sentence 2 of the URV applies with the necessary modifications. This specifies that data must be forwarded in a structured format that is defined by the operator and widely used in business circles, e.g. using Extensible Markup Language (XML).

IV.4 Language to be used for the financial report and the announcement

Section 3b of the WpAV, to which section 18 of the WpAV refers, sets out the language to be used for the financial report and the announcement.

1. Where the securities of an issuer whose home country is the Federal Republic of Germany pursuant to section 2 (13) of the WpHG are only admitted to trading on an organised market in Germany, section 3b (2) sentence 1 of the WpAV specifies that the information shall be published in German. Where the securities are admitted to trading on an organised market in Germany and in one or more other member states of the European Union or in one or more other states that are signatories to the Agreement on the European Economic Area, the information shall be published in German or in English and at the issuer’s choice in a language that is accepted by the competent authorities of the relevant member states of the European Union or the relevant states that are signatories to the Agreement on the European Economic Area, or in English.

2. A domestic issuer within the meaning of section 2 (14) no. 2 of the WpHG must publish the information in German or in English pursuant to section 3b (3) of the WpAV. An issuer who is domiciled in Germany and whose securities are not admitted to trading on an organised market in Germany but in more than one other member state of the European Union or state that is a signatory to the Agreement on the European Economic Area shall publish the information at the issuer’s choice in one of the languages accepted by the competent authorities of the relevant member states of the European Union or the relevant states that are signatories to the Agreement on the European Economic Area, or in English; in addition, the issuer may also publish the information in German.

3. Issuers who are domiciled outside Germany or issuers whose home country is the Federal Republic of Germany pursuant to section 2 (13) no. 2a of the

WpHG or who have filed an English prospectus with BaFin for the securities to which the information relates may publish the information exclusively in English pursuant to section 3b (1) of the WpAV. Moreover, special provisions apply to issuers who have been granted admission to trading for financial instruments with a minimum denomination per unit of €100,000 or the equivalent value or issuers who were granted admission to trading before 31 December 2010 for financial instruments with a minimum denomination per unit of €50,000 (cf. section 3b (4) and (5) of the WpAV).

### IV.5 Exemptions pursuant to section 118 of the WpHG

#### Exemptions pursuant to section 118 (1) to (3) of the WpHG

Pursuant to section 118 (1) of the WpHG, sections 114 to 117 of the WpHG do not apply to companies that only issue admitted debt securities pursuant to section 2 (1) no. 3 of the WpHG with a minimum denomination per unit of €100,000 – or €50,000 in the case of outstanding debt securities that were granted admission to trading before 31 December 2010 – or the equivalent value in another currency at the date of issue.

<table>
<thead>
<tr>
<th>Preconditions set out in section 118 (1) of the WpHG:</th>
<th>Consequence:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Issuance only of debt securities admitted to trading on an organised market (section 2 (1) sentence 1 no. 3 of the WpHG)</td>
<td>Exemption from the duties pursuant to sections 114 to 117 of the WpHG (financial reports in general) (section 118 (1) of the WpHG)</td>
</tr>
<tr>
<td>a. with a minimum denomination per unit of €100,000 or the equivalent value in another currency on the date of issue, or</td>
<td></td>
</tr>
<tr>
<td>b. that are still outstanding and that were already admitted prior to 31 December 2010, and that have a minimum denomination per unit of €50,000 or the equivalent value in another currency on the date of issue.</td>
<td></td>
</tr>
</tbody>
</table>

#### Preconditions set out in section 118 (2) of the WpHG:

1. Credit institution,
2. no shares admitted to trading on an organised market have been issued,
3. issuance, in a continuous or repeated manner, only of debt securities with a total principal amount of less than €100 million, and for which
4. no prospectus was published pursuant to the WpPG.

#### Preconditions set out in section 118 (3) of the WpHG:

1. Company already existed before 31 December 2003,
2. issuance only of debt securities admitted to trading on an organised market, and
3. these securities have been unconditionally and irrevocably guaranteed by the German government, one of the federal states (Länder) or a regional or local authority.

<table>
<thead>
<tr>
<th>Consequence:</th>
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<tbody>
<tr>
<td>Exemption from the duties pursuant to section 115 of the WpHG (half-yearly financial report) (section 118 (3) of the WpHG)</td>
</tr>
</tbody>
</table>

Section 118 (2) of the WpHG exempts credit institutions issuing securities as domestic issuers from the obligation to fulfil the provisions relating to half-yearly financial reports (section 115 of the WpHG) if the institutions’ shares are not admitted to trading on an organised market and they have (either in a continuous or repeated manner) only issued debt securities with a total principal amount of less than €100 million for which no prospectus under the German Securities Prospectus Act (Wertpapierprospektgesetz – WpPG) has been published. Also exempt from the obligations of section 115 of the WpHG are, pursuant to section 118 (3) of the WpHG, companies that issue securities as domestic issuers and that already existed as at 31 December 2003, provided that they exclusively issue debt securities that are admitted to trading on an organised market and that are unconditionally and irrevocably guaranteed by the German government, one of the federal states or a regional or local authority (e.g. Sparkassen and Volksbanken).

**Exemption pursuant to section 118 (4) of the WpHG on request in the case of equivalent rules of a third country**

Pursuant to section 118 (4) of the WpHG, BaFin may, on request, exempt companies that are domiciled in a third country and that issue securities as domestic issuers from the requirements of sections 114, 115 and 117 of
the WpHG. The precondition for this is that the company is subject (or submits) to equivalent rules in this third country.

Equivalence is determined pursuant to sections 12 to 17 of the TranspRLDV, which sets out specific criteria for determining whether the third-country requirements relating to the individual components of financial reports are equivalent. However, the TranspRLDV does not contain criteria for determining whether the accounting principles applied to the financial statements are equivalent. The European Commission has decided on the equivalence of the accounting principles used in certain third-country jurisdictions (Commission Decision 2008/961/EC of 12 December 2008 and amending decisions and subsequent jurisdictions (Commission Decision 2008/961/EC of 12 December 2008 and amending decisions and subsequent jurisdictions (Commission Decision 2008/961/EC of 12 December 2008 and amending decisions and subsequent jurisdiction).

BaFin uses the rules of the third country in question to examine the question of equivalence; the company’s individual reporting is not relevant in this respect. If BaFin comes to the conclusion that the criteria regarding equivalence have been satisfied, it may exempt the company from the requirements of sections 114 and 115 (where appropriate in conjunction with section 117) of the WpHG. The wording of the rule therefore gives BaFin a certain degree of discretion. If the European Commission has issued a decision on the equivalence of the accounting principles applicable to the financial statements, BaFin applies this decision without exercising its own discretion.

BaFin will only perform a review or take a decision on request. In practice, it has proven helpful for ensuring the smooth, speedy handling of the administrative procedure if the application already addresses the following questions:

1. What third-country law is to be used to prepare the individual components of the financial reports? Is this to be done because the company is subject to this third-country law (for example because of a listing in the third country concerned) or because it has submitted to it (for example as a result of a provision of its articles of association)?

2. What specific criteria in the third-country law are to be used to prepare the individual components of the financial reports? (For example, a blanket reference to an entire law would not be sufficient, since this would not permit the specific provisions applicable to the company’s financial reporting to be identified beyond doubt).

3. Why is the third-country law applicable to the issuer equivalent to the criteria applicable to the individual components of the financial reports under German law? This comparison must be performed in accordance with the requirements of the TranspRLDV mentioned above.

Even if an exemption is granted, the issuer still has certain financial reporting obligations in Germany. Thus it is required by section 118 (4) sentences 2 and 3 of the WpHG to disseminate both the information prepared in accordance with the third-country rules and an announcement pursuant to the relevant provisions of the WpHG and the WpAV. In addition, the announcement and the information prepared in accordance with the third-country rules must be forwarded to the company register for archiving.

IV.6 Supervisory measures applicable to violations of the financial reporting obligations pursuant to sections 114 et seq. of the WpHG

Where the financial reporting requirements pursuant to sections 114 et seq. of the WpHG are not observed, BaFin can take administrative measures (section 6 (2) of the WpHG in conjunction with section 17 of the FinDAG) with the objective of subsequently rectifying the performance of the duties (threat and, where appropriate, imposition of coercive fines of up to €2.5 million per violation) and/or institute administrative offence proceedings (section 120 of the WpHG) with the objective of sanctioning violations of the duties set out in sections 114 et seq. of the WpHG (administrative fines of up to €10 million or five per cent of total revenues for the preceding financial year or up to twice the economic benefit derived from the violation; in each case the highest variant will be used to determine the framework for the administrative fine). Should such measures and sanctions become necessary, they shall generally be announced pursuant to section 124 of the WpHG without undue delay on BaFin’s website, naming the persons responsible for the violation, among other things. An exception this may be made pursuant to section 124 (3) nos. 1 to 4 of the WpHG if the damage to the party involved resulting from such an announcement would be unreasonably large, or if this would endanger the stability of the financial markets or an ongoing investigation. In general, the lawmakers assume that the investing public has an interest in such an announcement; as a result, the latter could only be issued in anonymous form or delayed in the case of particular interests going clearly beyond the normal consequences of an announcement.

IV.7 Summary of general financial reporting requirements pursuant to sections 114 et seq. of the WpHG

The requirements for financial reporting pursuant to sections 114 et seq. of the WpHG comprise the following steps, which are performed in the sequence and chronological order shown in the following table:
<table>
<thead>
<tr>
<th>Duty</th>
<th>Entity subject to duty</th>
<th>Timing</th>
<th>Exemption</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual financial report</td>
<td>Publication of an announcement</td>
<td>Company that issues securities as a domestic issuer</td>
<td>No later than four months after the end of the financial year and before the report itself is made available to the public</td>
<td>Section 114 (1) sentence 2 of the WpHG</td>
</tr>
<tr>
<td></td>
<td>Notification to BaFin that announcement has been published</td>
<td>As above</td>
<td>Simultaneously with publication</td>
<td>Section 114 (1) sentence 3 half-sentence 1 of the WpHG</td>
</tr>
<tr>
<td></td>
<td>Forwarding of announcement to company register for archiving</td>
<td>As above</td>
<td>Without undue delay after publication</td>
<td>Section 114 (1) sentence 3 half-sentence 2 of the WpHG in conj. with section 8b (2) no. 9 and section 8b (3) sentence 1 no. 2 of the HGB</td>
</tr>
<tr>
<td></td>
<td>Public availability of the annual financial report</td>
<td>As above</td>
<td>No later than four months after the end of the financial year</td>
<td>Duty of publication pursuant to section 325 of the HGB, but note that an announcement to this effect must be made! Section 114 (1) sentence 1 of the WpHG</td>
</tr>
<tr>
<td></td>
<td>Forwarding of annual financial report to company register for archiving</td>
<td>As above</td>
<td>Without undue delay after publication of the announcement</td>
<td>Forwarded pursuant to section 8b (2) no. 4 in conj. with section 8b (3) sentence 1 no. 1 of the HGB Section 114 (1) sentence 4 of the WpHG in conj. with section 8b (2) no. 9 and section 8b (3) sentence 1 no. 2 of the HGB</td>
</tr>
<tr>
<td>Half-yearly financial report</td>
<td>Publication of an announcement</td>
<td>Company that, as a domestic issuer, issues shares or debt securities within the meaning of section 2 (1) of the WpHG</td>
<td>No later than three months after the end of the reporting period and before the report itself is made available to the public</td>
<td>Company that, as a domestic issuer, issues either only debt securities pursuant to section 2 (1) no. 2 of the WpHG or debt securities that grant at least a contingent right to acquire securities pursuant to section 2 (1) no. 1 or no. 2 of the WpHG Section 115 (1) sentence 2 of the WpHG</td>
</tr>
<tr>
<td></td>
<td>Notification to BaFin that announcement has been published</td>
<td>As above</td>
<td>Simultaneously with publication</td>
<td>As above Section 115 (1) sentence 3 half-sentence 1 of the WpHG</td>
</tr>
<tr>
<td></td>
<td>Forwarding of announcement to company register for archiving</td>
<td>As above</td>
<td>Without undue delay after publication</td>
<td>As above Section 115 (1) sentence 3 half-sentence 2 of the WpHG in conjunction with section 8b (2) no. 9 and section 8b (3) sentence 1 no. 2 of the HGB</td>
</tr>
<tr>
<td></td>
<td>Public availability of a half-yearly report</td>
<td>As above</td>
<td>No later than three months after the end of the reporting period.</td>
<td>As above Section 115 (1) sentence 1 of the WpHG</td>
</tr>
<tr>
<td></td>
<td>Forwarding of half-yearly financial report to company register for archiving</td>
<td>As above</td>
<td>Without undue delay after publication of the announcement</td>
<td>As above Section 115 (1) sentence 4 of the WpHG in conjunction with section 8b (2) no. 9 and section 8b (3) sentence 1 no. 2 of the HGB</td>
</tr>
<tr>
<td>Duty</td>
<td>Entity subject to duty</td>
<td>Timing</td>
<td>Exemption</td>
<td>Rule</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------</td>
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</tr>
<tr>
<td><strong>Payments report</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Publication of an announcement</td>
<td>Company that issues securities as a domestic issuer and that is active itself or via one of its subsidiaries in the extractive industry or the logging of primary forests</td>
<td>No later than six months after the end of the reporting period and before the report itself is made available to the public</td>
<td></td>
<td>Section 116 (2) sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Notification to BaFin that announcement has been published</td>
<td></td>
<td>Simultaneously with publication</td>
<td></td>
<td>Section 116 (2) sentence 2 half-sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Forwarding of announcement to company register for archiving</td>
<td>As above</td>
<td>Without undue delay after publication</td>
<td></td>
<td>Section 116 (2) sentence 2 half-sentence 2 of the WpHG in conjunction with section 8b (2) no. 9 and section 8b (3) sentence 1 no. 2 of the HGB</td>
</tr>
<tr>
<td>Public availability of a payments report</td>
<td>As above</td>
<td>No later than six months after the end of the reporting period</td>
<td>Duty of publication pursuant to sections 341r to 341w of the HGB, but note that an announcement to this effect must be made!</td>
<td>Section 116 (1) sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Forwarding of payments report to company register for archiving</td>
<td>As above</td>
<td>Without undue delay after publication of the announcement</td>
<td>Forwarded pursuant to section 8b (2) no. 4 in conj. with section 8b (3) sentence 1 no. 1 of the HGB</td>
<td>Section 116 (2) sentence 3 of the WpHG in conjunction with section 8b (2) no. 9 and section 8b (3) sentence 1 no. 2 of the HGB</td>
</tr>
</tbody>
</table>
V Cooperation of BaFin with foreign agencies as part of the supervision of periodic financial reporting including the enforcement procedure (sections 18 and 111 of the WpHG)

BaFin cooperates internationally, including in the supervisory areas assigned to it pursuant to Part 16 of the WpHG, with agencies from other EU member states and third countries that are responsible for investigating potential violations of the periodic financial reporting requirements (including the accounting standards). Where securities trading law has been harmonised by European Union law, such cooperation is regulated in detail and requires the competent bodies to cooperate closely and to provide one another with mutual assistance in the cross-border investigation of matters and the prosecution of potential violations. Close cooperation between this network of agencies in the various member states aims to contribute to effective supervision of the EU’s internal market for financial services. ESMA, which is at the heart of this network, makes an important contribution to improved, harmonised supervision of periodic financial reporting on the EU’s internal market. Pursuant to section 19 (1) of the WpHG, BaFin shall make available to ESMA without undue delay all information required for it to perform its duties; the same applies to the Enforcement Panel pursuant to section 342b (9) of the HGB.

The WpHG sets out specific criteria for international cooperation in the enforcement area. Section 111 (1) of the WpHG starts by clarifying that BaFin is responsible for participating in international cooperation in this area as well. Pursuant to section 111 (3) of the WpHG, BaFin performs this task in consultation with the Enforcement Panel.

Specifically, section 111 of the WpHG grants BaFin discretion with respect to whether and how to cooperate with foreign agencies. Hence BaFin is authorised to forward even confidential information from financial reporting enforcement procedures to foreign enforcement agencies to the extent that this information serves to fulfil its tasks. By contrast, pursuant to section 18 of the WpHG – and hence also in the area of periodic financial reporting according to section 114 et seq. of the WpHG – information may as a matter of principal be used for all areas of supervision of stock exchanges, banks, financial services providers, investment companies and insurers. For the purpose of procuring information for foreign enforcement supervisory authorities, BaFin may request information only from companies admitted to trading on an organised market and the companies included in their consolidated financial statements; this includes in each case their governing bodies and employees as well as their auditors. By contrast, BaFin can request information and the submission of documents from anyone in the area of periodic financial reporting pursuant to sections 114 et seq. of the WpHG in accordance with the general provisions of the WpHG. These investigative powers also always include the right to enter the business premises of companies that have a duty to provide information. The law in Germany does not have to have been violated for investigations to be performed on behalf of foreign authorities.

Conversely, BaFin may also direct requests to foreign authorities with the aim of forwarding information needed by BaFin for its supervisory activity or of initiating an investigation against a foreign company. In addition to providing mutual assistance in clarifying individual issues and in prosecuting violations of the periodic financial reporting requirements (including the accounting standards) on a cross-border basis, BaFin maintains and promotes international cooperation at an abstract level. This involves developing international requirements and common administrative practices for ensuring the correct application of accounting standards and their enforcement together with other bodies within the context of international organisations – and in particular ESMA and the International Organization of Securities Commissions (IOSCO). A key part of this harmonisation work is to advise the European enforcement authorities at the meetings of the European Enforcers Coordination Sessions (EECS) on the application and oversight of compliance with the relevant accounting standards (primarily the IFRSs) and to share its experiences. This has also resulted in the development of a European database of sample enforcement decisions from various EU and EEA states. The EECS also develops annual European common enforcement priorities for all European enforcement authorities that are published on ESMA’s website. Moreover, ESMA has issued Guidelines on the enforcement of financial information (ESMA/2014/1293) for national supervisors, which are designed to create
coherent, efficient and effective supervisory practices. These guidelines came into force on 30 December 2014. In addition, ESMA has issued Guidelines on alternative performance measures (ESMA/2015/1415), which also apply to information contained in (group) management reports. These guidelines are addressed directly to the companies and have been in force since 3 July 2016. They are intended to ensure that, going forward, companies clearly define and consistently apply units of measurement for the earnings metrics such as EBIT (earnings before interest and taxes) that are not clearly defined in the relevant accounting standards. The ultimate goal is to contribute to investor protection. Both the Enforcement Guidelines and the Guidelines on alternative performance measures have been translated into all official EU languages and have been published on ESMA’s website; an overview of the implementation status of the guidelines can also be found there.