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## **Broad European Compliance to Sarbanes-Oxley Act Expected**

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*Citigate Financial Intelligence Survey Find Compliance  
Obstacles Limited to Specific Areas*

NEW YORK (November 6, 2002) — A survey of 50 of the 297 European companies listed in the US conducted by Citigate Financial Intelligence (CFI) shows a broad intention among Europe's US-listed companies to comply with the new Sarbanes-Oxley Act. Based on the survey, threats of non-compliance across Europe have been vastly overstated. In fact, many European companies already comply with major aspects of the new law.

During the first three weeks of October, CFI asked European companies listed in the US to determine their current thinking about compliance with the Sarbanes-Oxley Act overall and three specific provisions:

- CEO/CFO certification of results
- Creation of an independent audit committee
- Elimination of loans to officers and directors

CFI also asked if these European companies intend to adopt the proposal by the NYSE and NASDAQ that a majority of the Boards of Directors of listed companies be independent.

CFI found that 39 of 50 European companies (78%) intend to comply with the new US law. The remaining 11 companies had major compliance concerns regarding the new law's requirements and local regulations. These companies are mainly located in Germany, France, Switzerland and the Netherlands.

They indicated the following obstacles to compliance at this time:

- CEO/CFO certification when the Board as a whole must sign off on the results and cannot assign responsibility (4 of 9 German companies)

- CFO certification when the CFO does not sit on the Board of Directors that certifies the results for the local market, but the CFO would be legally responsible for them under US law (2 of 4 Swiss companies)
- the appointment and supervision of auditors (8 of 9 German companies; 1 UK company; 3 Other European companies)
- the creation of an independent audit committee that meets both local and US requirements (8 of 9 German companies; 2 of 9 French companies; 2 of 4 Dutch companies; 1 UK company)
- being able to meet the NYSE's proposed requirement to have a majority of the Board of Directors also be independent (8 of 9 German companies).

Clarification of the audit committee issue is crucial as the new law mandates that SEC direct US stock exchanges to delist companies that do not have an independent audit committee by April 26, 2003.

Echoing concerns voiced in the US, three Dutch companies also raised questions about the nature of what constitutes a “loan” to an officer or director.

These concerns are specific, but very narrow in scope. Highlights of the specific concerns from the companies interviewed appear on the following pages.

Of the 50 companies, 16 companies (32%) either said there were specific legal issues that would prevent full compliance with the new law or that they needed clarification to determine their companies’ ability to comply. Notably, each of these 16 companies said they would comply fully with the new law if the SEC granted them an exemption to the areas where they believe home country conflicts exist. The 16 companies come from Germany (8), France (3), the UK (2), and Switzerland, Finland, Belgium (1 each).

Finally, 40% of the participating companies expressed a desire that future US/European compliance issues be resolved primarily between the SEC and the EU, while another 40% told CFI they wanted the SEC to resolve these issues between countries and companies individually. The remaining 20% recommended both.

“Compliance is not an issue for most European companies,” said John McInerney, Senior Director, Citigate Financial Intelligence. “European companies are committed to this market and want to comply. In fact, many already do so.

“The SEC has historically shown a willingness to compromise in many areas where there are home market conflicts,” continued McInerney. “Participation in the public comment process will help non-US companies shape the regulations that affect them in a way that will create effective compliance. For its part, the SEC needs to help reduce rampant speculation and provide clarification about the areas in question similar to the clarifications it provided after the introduction of Regulation Fair Disclosure.”

## Methodology and Scope

In conducting this survey, CFI spoke to investor relations professionals at 50 participating companies. In some cases, members of the legal department answered the survey's questions. In all cases, respondents were given anonymity.

The CFI survey represents a significant cross-section of European companies. Of the 50 companies interviewed, CFI spoke to 15 UK companies, 9 each in France and Germany, 4 each in Switzerland and the Netherlands, and 9 other companies from Finland (3), Spain (2), Italy, Sweden, Belgium, and Hungary (Other Europe).

Measured by market capitalization, the percentage of companies both listed in the US and contained in the major domestic UK, German, French and Swiss indices is noteworthy:

- 74% of the DAX 30 (Germany)
- 73% of the FTSE-100 (UK)
- 53% of the CAC 40 (France)
- 52% of the Swiss index

In terms of market capitalization listed in both home country and the US, we spoke to 48% of the DAX, 35% of the CAC40, and 26% of the FTSE-100.

## Remarks from the Survey's Respondents

### Concerning the Independence of the Board of Directors

**A French Respondent:** We have a problem about this. Recent legislation in France – the new “Bouton” report – requires 2/3 of independent directors on the board. Today, we have 2/3 of independent directors. As soon as possible, we will change this to a completely independent board – that is, as long a management that accepts a completely independent board.

However, we have a problem on our hands of finding independent directors. In France, once you've been on the board for 12 years, you're no longer independent. Then, we have to re-certify new independent directors. So we have a problem of a lack of independent directors everywhere. We will also have an inflation problem in their salaries and we will have to hunt for independent directors. Today, we're unable to find independent directors who are qualified and who aren't already serving on too many boards.

So, it's almost impossible to find qualified independent directors and auditors who don't have an interest in the company. Of course, the ones who have been there for more than 12 years, then we have to find someone else. This isn't good because

someone who has served on the board for a long time will know the company and its strategy very well and his advice can be very important.

## Major German Concerns

**Respondent #1:** There are some legal reasons in Germany that prevent our company from complying with Sarbanes-Oxley, for example:

- **Final responsibility for appointing the auditor:** Under German law for stock corporations the shareholders (only in some cases the Supervisory Board) bear final responsibility for the election of the auditor. A delegation of this authority to any other body, such as an Audit Committee, is not permitted. Consequently the requirement pursuant to Sec. 301 of the Act would be in conflict with German corporate law.
- **Independence of the members of the Audit Committee:** Pursuant to German law employee representatives comprise a significant proportion of the members of the Supervisory Board. Therefore some members of the Audit Committee will be employee representatives and consequently they are not independent.
- **Confidentiality of client information:** In Germany the auditor will be subject to criminal proceedings if he violates his duty to maintain strict confidentiality with respect to client information. Therefore it would not be legally possible for the auditor to provide his work papers under Section 106(b) of the Act to the PCAOB [Public Company Accounting Oversight Board] or the SEC.

**Respondent #2:** Germany has a two-board system. If we view the Management Board as the equivalent of the Board of Directors, the member will never meet the definition of an independent director. This leads to issues with the creation of an Audit Committee comprised of independent directors.

**Respondent #3:** There are conflicts with German law on several counts. First, the Vorstand (Supervisory Board) is jointly responsible for approving the company's financial statements: it can't simply hand that over to two people. The co-determined board cannot be abandoned in Germany to meet these new laws. That would be against German law.

Second, the Supervisory Board must contain members of our unions and workers council. By definition, some of those are employees and receive a salary. In our case, they're also part of the audit committee and must be. They're not independent but must sit on that committee.

Third, there are as so many conflicting rules for auditors that they won't know which regulator to follow. For example, in Germany they're forbidden to hand over work papers. Under this law, they would have to do so if requested by US regulators. If the auditors don't know which rules to follow, they're not going to give the companies good advice.

**Respondent #4:** Yes, but there are only two: The first is the workers' representation on the Supervisory Board. That number is fixed and because they get a salary, they're not considered "independent" under the definition of the law.

The second is that the auditors are appointed by the shareholders. That can't be changed because it's part of German law, not at the company's discretion.

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Citigate Financial Intelligence is a strategic investor relations, market intelligence, data and analytics firm. CFI provides its comprehensive offering of strategic IR counsel in the Americas, market intelligence, data and technology to corporate investor relations professionals as well as investment banks and other third-party intermediaries. CFI works closely with other Incepta investor relations agencies in Europe and Asia to provide IR counsel related to the US market, as well as market intelligence, data and technology globally. For more information, please visit [www.citigatefi.com](http://www.citigatefi.com).