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Committee of European Securities Regulators

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Response to Consultation: Level 3 - Third Set of CESR guidance and information on the common operation of the Market Abuse Directive (CESR/08-274)

Dear Sirs,

Standard & Poor's Ratings Services ("S&P") welcomes this opportunity to comment on CESR's Draft Guidance and information on the operation of the Market Abuse Directive ("CESR's Draft Guidance").

S&P is a business unit of Standard & Poor's, which is a division of The McGraw-Hill Companies, Inc., a global provider of information in the fields of financial services, education and business information. We confine our comments to the issues relating to insider lists, which raise some important questions for credit rating agencies like S&P ("CRAs") and how they operate across the EU.

In summary, we consider CRAs are not persons "*acting on behalf of or for the account of*" issuers; rather, we have an independent, non fiduciary arm's length relationship. Thus we strongly urge CESR to recognise that the rules relating to preparation and maintenance of insider lists do not apply to CRAs.

Nevertheless we emphasise that we take extremely seriously the importance of maintaining the confidentiality of inside information, and have policies and procedures that employees must follow that address the receipt and proper use of this information. One of these policies is S&P's version of the IOSCO Code of Conduct Fundamentals for Credit Rating Agencies ("IOSCO Code"). Furthermore, the Market Abuse Directive addresses the importance of confidentiality..

CRAs are not persons "*acting on behalf of or for the account of*" issuers

Article 6(3) of the Directive states that Member States shall require that issuers and "*persons acting on their behalf or for their account*" draw up lists of insiders, i.e. persons with access to inside information on a regular or occasional basis. CESR's Draft Guidance states that CRAs are "*professionals acting on behalf of the issuers*" and therefore should be subject to the rules on preparing and maintaining insider lists.

We do not consider it appropriate to label CRAs as persons acting on behalf of issuers or for their account and, thus, subject to the duty to prepare and maintain insider lists. CRAs do not act

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on behalf or for the account of issuers when preparing analysis and issuing their rating opinions. S&P acts independently of issuers and considers that being labelled as acting on behalf of issuers or for their account would be inconsistent with the relationships that exist, contrary to the facts and inconsistent with the role of independent CRAs. S&P considers that CRAs act as a bridge between issuers and investors: S&P's reputation as an independent provider of credit rating opinions is critical to serving this role. The CRAs' role contrasts with that played by parties such as, for example, legal and financial advisors and accountants that legally do act on issuers' behalf or for their account.

The relationship between a CRA and an issuer is an arm's length relationship. CRAs provide objective and independent analysis and ratings to the public. They form their own judgment on the issuer's creditworthiness, which may well not be in accordance with the issuer's own views, and the terms on which they deal with issuers make clear that they owe no fiduciary duties or duties of care to issuers. We furthermore note that CRAs retain sole editorial responsibility for their rating actions. This is a point reinforced by section 1.18 of S&P's Code of Conduct¹.

The fact that CRAs may routinely receive non-public information about issuers does not mean that they are acting on behalf or for the account of issuers – as is recognised by, for example, the UK authorities. Indeed, the Market Abuse Directive contemplates that there can be legitimate reasons why issuers may give inside information to a number of contractual or other counterparties. However, the fact that a counterparty (like a CRA) takes steps not to disclose confidential information does not mean that it is acting on behalf of or for the account of the issuer. The Directive does not require (or indeed permit) the imposition of a duty to prepare and maintain insider lists on every category of person to whom disclosure is permitted under article 6(3) of the Directive.

Different Member States treat CRAs differently

Whilst we do not consider that the rules apply to CRAs, we note that at present different Member States take different approaches to the question of whether CRAs must prepare and maintain insider lists. As noted above, some Member States, such as the UK, already recognise that CRAs are not ordinarily "*persons acting on an issuer's behalf or on its account*" and thus are not subject to the duties to prepare insider lists². Other Member States appear to regard CRAs as subject to the duty to prepare and maintain insider lists (in some cases, such as in Germany, only where the rating is solicited by the issuer).

¹ Section 1.18 provides that "*In order to maintain Ratings Services' independence, objectivity and credibility, Ratings Services shall maintain complete editorial control at all times over Rating Actions and all other materials it disseminates to the public, including, but not limited to, rating definitions and criteria, reports, research updates, studies, commentaries, media releases, rating opinions or any other information relating to its ratings. Ratings Services' editorial control shall include decisions as to when, or even if, any Rating Actions and such other materials and information should be disseminated.*"

² Please see FSA UKLA Publications – List ! Issue No 12 February 2006, paragraph 8.4

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These divergences of view cause practical problems for CRAs and these problems are exacerbated by the differences of implementation regarding the language and content of insider lists across Member States.

S&P has business operations in six Member States³, however, it is potentially subject to the differing and conflicting insider lists requirements of all 27 EU Member States (as well as those of the Member States of the EEA) because it provides ratings on entities in every Member State. CESR members should adopt a harmonised approach to the application of the Market Abuse Directive that gives effect to the requirements of the Directive.

In the event CESR does not accept our recommendation to remove CRAs from the insider list requirements, we observe that CESR's recommendation that Member States should recognise insider lists prepared according to the requirements of the Member State where the issuer has its registered office does not resolve these issues. It still means that third parties (which on CESR's proposed analysis include CRAs) that become subject to duties to prepare insider lists because of their relationship with issuers are potentially subject to multiple, conflicting sets of rules where they have relationships with issuers in multiple Member States. CESR should recommend that Member States should recognise insider lists prepared according to the requirements of the Member State where the person subject to the requirement has its registered office or establishment.

Insider lists rules are difficult to comply with

In addition, it is in many cases impractical and unduly burdensome for CRAs that issue and maintain ratings on a large number of issuers to prepare and maintain the insider lists contemplated by the Directive. Issuers may not always notify CRAs that they are imparting information to the CRAs that is non-public price sensitive information. CRAs would frequently find it difficult to identify when they have become subject to the duty due to the volume of information received from issuers and others.

In addition, CRAs often have longstanding and ongoing relationships with issuers in which information is regularly disclosed to the CRA so as to enable it to form and monitor its credit rating opinion. That information must be shared internally with a number of people to obtain the comparative input and experience of a variety of different professionals. Furthermore, information that is not price sensitive when it is imparted may become price sensitive at a later stage because of changing circumstances. Therefore, it is more challenging to comply with these requirements than it is for a financial adviser that works on discrete projects in identifiable teams.

There are other adequate protections against misuse of information

It is essential that S&P can receive complete and accurate information as part of the credit rating process. Protecting confidential information is a fundamental part of S&P's processes and

³ S&P has offices in France, Germany, Italy, Spain, Sweden and the UK.

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business. There are a number of safeguards providing adequate protection against the abuse of inside information by CRAs. Issuers would not make such information available to CRAs if they had concerns that its confidentiality was not addressed.

The IOSCO Code at section 3.14 makes clear that CRAs should protect the confidential information they receive and prohibit their employees from engaging in transactions in securities when they possess confidential information concerning the issuer of those securities. S&P, in common with other CRAs, has put in place policies to protect client information. We also note that CRA analysts are subject to the provisions of the Market Abuse Directive if they misuse inside information e.g. by dealing on that information or improperly disclosing it to others. Furthermore, the competent authorities have all the necessary powers under the Directive to obtain access to information in connection with the investigation of potential misuse.

Given the arguments made above, S&P would recommend that CESR include specific language to the effect that CRAs which routinely have access to non-public information should safeguard the use of non-public information in accordance with each CRA's policies.

We hope that our views are helpful. Please contact Christopher Lake (telephone 0044 (0)207 176 3176) or me with any questions you may have or to otherwise discuss this submission.

Yours faithfully,



Vickie Tillman