STANDARD &POOR'S

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Mr. Fabrice Demarigny
Secretary General
Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France

Dear Mr. Demarigny :

Market Abuse: Additional Level 2 Implementing Measures - Insiders' Lists

Standard & Poor's is pleased to have this opportunity to respond to the consultation paper issued by the Committee of European Securities Regulators (CESR) on additional Level 2 Implementing Measures under the Market Abuse Directive (April 2003). In particular, we wish to comment on the proposed advice on insiders' lists in section V of that paper, as these proposals are of particular concern to Standard & Poor's Ratings Group.

In this regard, we do not consider that it is appropriate for the advice to label rating agencies as "persons acting on behalf of or for the account of the issuer" and thus subject to the duty to maintain insiders' lists. In any event, we consider the proposed requirements on issuers and relevant third parties to prepare and maintain lists by reference to particular events or matters as they occur to be impractical and unduly burdensome and as going beyond the requirements imposed by the Directive.

1. Rating agencies are not persons acting on behalf of or for the account of issuers

We have particular concerns about the way in which the proposed advice suggests that rating agencies are "persons acting on behalf of or for the account of the issuer" and, thus, subject to the duty to prepare and maintain insiders' lists (see paragraph 62, third bullet point, of the CESR paper). In our view, the final advice to the European Commission should not include this reference to rating agencies. Credit rating agencies, such as Standard & Poor's, do not act on behalf of or for the account of issuers when preparing and issuing their ratings.

The relationship between a rating agency and an issuer is an arm's length relationship, quite unlike that of an adviser to or an agent of the company. Rating agencies, such as Standard & Poor's, provide objective and independent analysis and ratings to the public. They form their own judgment on the issuer's credit standing, 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. The fact that agencies derive some of their remuneration from issuers does not alter these facts.

Similarly, the fact that rating agencies may receive non-public price sensitive information about issuers does not mean that they are "persons acting on behalf of or for the account of the issuer". The Directive contemplates that there can be legitimate reasons why issuers may give inside information to a number of contractual or other counterparties under a duty of confidentiality. However, the fact that a counterparty (like a rating agency) accepts a duty of confidentiality 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 Commission to impose a duty to maintain insiders' lists on every category of person to whom disclosure is permitted under Article 6.3 of the Directive.

However, we would expect the competent authorities to have the power to require rating agencies (like other third parties) to provide information about the possession of inside information in the context of an investigation of suspected insider dealing. The Directive envisages that the competent authorities will have the power to demand information from any person (Article 12.2(b)), which could be used to require a broad range of third parties to produce lists, after the fact, of who knew or had access to particular information.

2. The proposals for maintaining lists are impractical and unduly burdensome

In any event, we consider that the proposed requirements as to how issuers, and those persons who do in fact act on their behalf or for their account, should maintain lists are impractical and unduly burdensome. In particular, we consider it is unrealistic to require, as proposed, issuers and others to prepare and maintain lists by reference to particular identified events or matters which amount to inside information as those events or matters occur. We also consider that the proposed requirements go beyond the requirements of the Directive.

CESR's proposed advice assumes that issuers are able to identify that particular matters or events actually amount to inside information as they occur - and that issuers are at that time able to record who had access to that particular piece of information and when that was the case. While it may be possible to prepare such a list after the event in response to a request made by the competent authority in the context of an investigation, it is unrealistic to expect issuers to do this in "real time". For example, it is often very difficult to determine, on a contemporaneous basis, when information passes over the threshold of materiality and becomes inside information (for instance, in the case of information as to a possible future acquisition or information that may have implications for future financial performance).

In practice, issuers usually control the risks of misuse of information by imposing duties of confidentiality and dealing restrictions on those who are likely to possess information that might amount to inside information, regardless of whether in fact this is the case. Particularly where the information relates to matters under negotiation or future developments there may be no requirement for a specific decision not to announce that information which might form the occasion for creating a list of the kind proposed.

It is even more unrealistic to expect third parties, such as rating agencies, that interact with and receive information from issuers under duties of confidentiality, to be able to identify and record information in this way. Even if it were able to do so, an issuer is under no obligation to identify that particular information amounts to "inside information" when it imparts that information to a third party under a duty of confidentiality. Indeed, in some cases, confidential information may not be "inside information" when imparted but may become "inside information" at a later stage.

Again, third parties, such as rating agencies, that regularly receive information on a confidential basis from issuers typically control the risks of misuse of information by imposing duties not to disclose the

information outside the organization or the relevant part of the organization and imposing dealing restrictions on staff, regardless of whether the information in fact amounts to "inside information". For example, Standard & Poor's Ratings Group has specific procedures to ensure that rating reports do not disclose non-public information disclosed to it on a confidential basis, as well as general requirements on staff to maintain the confidentiality of non-public issuer (and ratings related) information and personal account dealing rules.

In any event, it seems to us that the Directive does not impose requirements of the kind outlined in paragraphs 58 to 60 of the proposed advice. The Directive requirements appear more apt to require an issuer (and each relevant third party - but not, for the reasons mentioned above, rating agencies) just to maintain a single list of those who regularly have access to inside information, i.e. permanent insiders of the kind contemplated in paragraph 61 of the proposed advice. At most, it might be construed to require lists of those who have access to information that is likely to be inside information.

We would welcome an opportunity to discuss these issues with you further. Please contact me if you have any questions in relation to this submission.

Yours sincerely,

Rita M. Bolger

RMB/rr
cc: Francois Ververka,
Executive Managing Director,
Standard & Poor’s Credit Market Services (Europe)