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Date: 4th December 2003

Dear Sirs,

Market Abuse: Commission working document on second set of implementing measures

The International Swaps and Derivatives Association (ISDA) welcomes the opportunity to comment on the Commission's latest working document, published on 17 November 2003, on the second set of implementing measures under the market abuse directive. ISDA is an international organisation whose members include more than 600 of the world's largest commercial, universal and investment banks as well as other companies and institutions with extensive activities in the area of swaps and other individually negotiated derivatives transactions. Additional information on ISDA can be found at our website (<http://www.isda.org/>).

ISDA welcomes the fact that the Commission's proposed text closely follows the advice given by the Commission of European Securities Regulators (CESR) on 1 September 2003. That advice sought to take into account the comments made by many respondents, including ISDA, in the course of the consultation.

Protection from liability for reporting suspicious transactions

However, ISDA would recommend one change to the text of the proposed implementing measure. The implementing measure should include, as a recital, a statement that member states should consider providing firms with protection from liability in respect of notifications to the competent authority in respect of suspicious transactions (see attached proposed draft text).

While the market abuse directive requires firms to notify suspicious transactions to the competent authority, it does not explicitly require member states to provide protection from liability in respect of any such disclosure (compare article 9 of the money laundering directive 91/308/EEC which provides protection for disclosures in good faith). It would better serve the public policy objectives of article 6(9) of the directive if firms were not constrained from making reports by the fear of liability to customers or other third parties. Third parties affected by a disclosure might argue that the firm is liable for losses or costs incurred as a result of the disclosure on the basis that, although it was made in good faith, disclosure was not strictly required by law having regard to all the circumstances. It would be entirely appropriate, and consistent with the objectives of the market abuse directive, if member states provided firms with protection from these risks.

Other issues

In summary, ISDA made the following additional points in response to the CESR consultation, which were largely reflected in CESR's advice:

- ***Accepted market practices:*** ISDA agreed that the guidelines should follow a high level approach, rather than attempting to detail particular practices and the process should remain flexible to deal with the circumstances of individual cases and to respond to innovation. In particular, we stressed that it is not practicable to catalogue or describe all the acceptable market practices and the question of whether to accept a particular practice is usually best made in the context of individual cases having regard to the circumstances of the case and practices reasonably expected at the time.
- ***Inside information in relation to commodities:*** ISDA emphasised that the definition should cover only information that is routinely the subject of public announcement or where there was a requirement to disclose information in accordance with relevant laws, rules or customs applicable to the commodity or commodity derivatives market, although we did also recommend that the advice make clear that market users only have an expectation of equal access to information that is of some degree of significance or materiality.
- ***Duty to report suspicious transactions:*** We considered that there was no real need to spell out in greater detail the meaning of "reasonable suspicious" - the words of the directive could largely speak for themselves.

Please contact me (tel: +32 2 401 87 60) or Mark Harding, Chairman of ISDA's European Regulatory Committee (tel: +44 20 7699 5000), if you have any questions on the comments in this letter.

Yours faithfully,

Daniela Marilungo
Director of European Policy

Proposed text of recital:

(9) It is important to ensure that the persons responsible for notifying competent authorities of suspicious transactions in financial instruments are not deterred from doing so by legal risks. Member States should consider ensuring that the disclosure in good faith of information by persons subject to this Directive, or their directors or employees, does not constitute a breach of any restriction on disclosure imposed by contract or by any legislative, regulatory or administrative provision and does not involve the person or its directors or employees in liability of any kind.