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**PUBLIC VERSION**

**COMMISSION DECISION**

**of 15.11.2011**

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the  
European Union and Article 54 of the EEA Agreement**

**(Case COMP/39.592 - Standard & Poor's)**

(Only the English text is authentic)

Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and shown thus [...]

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup>, in particular Article 9(1) thereof,

Having regard to the Commission decision of 6 January 2009 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 13 November 2009,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns<sup>2</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case<sup>3</sup>,

Whereas:

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

<sup>2</sup> OJ L 1, 4.1.2003, p.1.

<sup>3</sup> The final report of the Hearing Officer of 26 October 2011.

## 1. SUBJECT MATTER

- (1) This Decision is addressed to [McGraw-Hill Companies Inc.]\* ("McGraw-Hill") and concerns the charging of licensing fees for the supply of the US International Securities Identification Numbers ("ISINs") within the EEA by Standard & Poor's ("S&P").
- (2) In its Statement of Objections of 13 November 2009, which constitutes a preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003, the Commission came to the provisional conclusion that S&P had infringed Article 102 of the Treaty and Article 54 of the EEA Agreement by setting unfairly high fees for the supply of US ISINs.

## 2. THE PARTIES

- (3) S&P is a [division]\*\* of McGraw-Hill engaged in financial services. S&P is the only allocator of US ISINs and the only operator to receive first-hand information from all US securities issuers.
- (4) The initiation of proceedings against S&P originates from a complaint filed jointly by the European Fund and Asset Management Agency (EFAMA), which is the representative association for the European investment management industry, the French and German asset management associations (respectively, AFG<sup>4</sup> and BVI<sup>5</sup>) as well as the financial institution data user associations IPUG<sup>6</sup> (United Kingdom) and SIPUG<sup>7</sup> (Switzerland).

## 3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (5) On 16 July 2008 EFAMA and the other user associations mentioned in recital 4 above submitted a complaint against S&P.
- (6) On 6 January 2009 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003. On 13 November 2009 it adopted a Statement of Objections setting out its competition concerns.
- (7) The Statement of Objections was notified to McGraw-Hill by letter of 16 November 2009. Access to the file was granted to McGraw-Hill the same day.
- (8) On 7 April 2011, S&P submitted commitments (the "Commitments") to the Commission in response to the Statement of Objections while disagreeing with the Commission's provisional findings.

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\* Should read as "The McGraw-Hill Companies, Inc.".

\*\* Should read as "subsidiary".

<sup>4</sup> Association Française de la Gestion Financière (French Asset Management Association).

<sup>5</sup> BVI German Investment and Asset Management Association.

<sup>6</sup> Information Providers User Group.

<sup>7</sup> Swiss Information Provider User Group.

- (9) On 14 May 2011 a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting interested third parties to give their observations on the Commitments within one month following publication.
- (10) On [11 July 2011]<sup>\*</sup> and 26 July 2011 the Commission informed S&P of the observations received from interested third parties following the publication of the notice. On [14 September 2011]<sup>\*\*</sup> S&P submitted a revised proposal for commitments (the "Revised Commitments").
- (11) On 25 October 2011 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 26 October 2011 the Hearing Officer issued his final report.

#### **4. PRELIMINARY ASSESSMENT**

##### **4.1. Relevant markets**

###### *4.1.1. Product market*

- (12) The relevant market in these proceedings is the market for first-hand electronic distribution and licensing of US ISINs (records and numbers) via data feeds. Other companies which distribute ISINs are not first-hand distributors, as they are not the source of the ISINs. Beyond the ISIN itself, a very limited number of additional data elements are necessary in order to uniquely identify a specific security or other financial instrument. The ISIN and these minimum descriptive data elements are together referred to as the ISIN record. The ISIN record is normally comprised of the ISIN number, the issuer (long) name, and the issue description. Nominal value and Currency (for equity type instruments) and Interest and Maturity (for debt type instruments) should only be part of the record as additional elements if this information is not part of the issue description.
- (13) US ISINs are used by banks and other financial institutions in order to identify financial instruments issued in the US in inter-bank communications, asset and portfolio valuation, clearing and settlement, front office operations in particular in relation to bonds, custody issues, internal reporting and reporting to authorities, reference data management, etc.
- (14) Two groups of users of US ISINs can be distinguished. First, S&P distributes ISINs to Information Service Providers ("ISPs"), that is to say, financial data vendors, and to some financial institutions which wish to obtain their numbers directly from S&P (direct users). Most financial institutions, however, prefer to obtain ISINs from ISPs together with other data rather than directly from S&P (indirect users). S&P charges both direct and indirect users a license fee for the distribution and the use of ISINs.

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\* Should read as "12 July 2011".

\*\* Should read as "13 September 2011".

- (15) The ISIN system was developed by the International Organization for Standardization ("ISO") as ISO standard 6166, in response to the increase in securities transactions at international level. US ISINs are based on CUSIPs<sup>8</sup>, which are the securities identifiers developed first for the domestic market in the US.
- (16) The ISO standard 6166 is the only unique, standardised and internationally recognised identification system for securities. Designated national numbering agencies ("NNAs")<sup>9</sup> have the responsibility of allocating ISINs for their respective territories. To that effect, the issuer of a new security files a request with draft offering information and related documentation. The NNA reviews those documents and allocates one or several ISINs to the security or securities issued. Once allocated, the ISIN number is introduced into the NNA's database, together with additional elements collected by the NNA, and communicated to the issuer.
- (17) Securities issued in the US receive a CUSIP (9-digit code) together with a US ISIN (12-digit code). However, CUSIPs are national identifiers that cannot be used for international securities transactions, for which US ISINs are necessary. For example, CUSIPs cannot be used for international inter-bank communications and can neither be used for clearing and settlement nor for reporting purposes in the Union.
- (18) As regards other national identifiers, national securities identification systems only cover securities issued in their respective countries. Outside the US, those systems generally<sup>10</sup> do not cover securities issued in the US at all. National identifiers are thus not substitutes for US ISINs.
- (19) Certain service providers such as exchanges or global ISPs have developed their own securities identification systems (such as Bloomberg Tickers, Reuters Instrument Codes (RICs) or S&P's US stock Ticker symbols). However, those proprietary identifiers do not offer the same coverage as ISINs<sup>11</sup> in terms of types of securities covered. Moreover, there are a number of operations in which ISINs cannot be replaced by alternative identifiers. These are inter-bank communications, asset and portfolio valuation, clearing and settlement, front office operations in relation to bonds, custody issues, internal reporting or reporting to authorities, reference data management, and all other legally and economically sensitive operations which require the highest degree of security and accuracy. Also, only NNAs are required to allocate a number when approached by an issuer. In contrast, the allocation of proprietary identifiers is at the discretion of the system owner.

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<sup>8</sup> CUSIPs are the national identifiers on which the US ISINs are based by adding a country code and a control number. CUSIP stands for Committee on Uniform Security Identification Procedures.

<sup>9</sup> There is generally only one NNA per country. However, one NNA can operate in several countries. Indeed, in countries where no NNA is in operation, or where, for any reason, the NNA is not in a position to allocate an ISIN, a substitute NNA will allocate the ISINs to securities issued in the country concerned.

<sup>10</sup> In some exceptional cases though (SEDOLs in the United Kingdom and Ireland, Valoren in Switzerland for example) the local NNA has adapted its system in order to also attribute numbers to certain international securities. However, those codes are only attributed to the most important securities and/or those international securities traded on the national – United Kingdom or Swiss – market places.

<sup>11</sup> For instance, in the equities field, private securities can only be identified by ISINs, since no Bloomberg tickers or RICs are allocated to such securities. Also, ISINs cover all fixed income instruments whereas proprietary identifiers are typically limited to debt instruments issued by companies listed at a stock exchange.

- (20) The electronic distribution of US ISINs is distinct from the distribution of additional financial information. ISIN records and additional financial information<sup>12</sup> serve very different purposes. The ISIN record is used to identify a security whereas the additional financial information allows, for instance, traders to monitor the markets and asset managers to evaluate investment opportunities.
- (21) The electronic distribution of US ISINs by way of data feed, whereby data can be downloaded and stored, should be distinguished from other distribution methods, such as a manual "look-up" service. Indeed, electronic distribution by way of data feed is indispensable to meet the financial industry's modern requirements and in order to allow users to integrate the identifiers in their operations. As a consequence, a manual one-by-one look up service without the possibility to download is not a substitute for electronic distribution of data which can be downloaded and stored.

#### 4.1.2. *Geographic market*

- (22) US ISIN records are globally used by almost all players in the financial services industry, such as financial institutions, banks, brokers, fund managers and insurance companies but also a wide range of service providers such as ISPs, market places, clearing houses, Central Securities Depositories (CSDs) and custodians. To be able to operate and communicate with other stakeholders, they use US ISINs to identify securities in order to link the information collected from different sources and carry out certain operations.
- (23) On that basis, and since those securities are listed and/or traded globally, the geographic market that is relevant for the purpose of this Decision is global, and includes the whole territory of the EEA.

#### 4.2. **Position of the parties on the relevant market / Dominant position**

- (24) The ISO standard 6166 designates S&P as the responsible NNA for the US. As a consequence S&P is the only issuer of ISINs for US securities.<sup>13</sup> No other company or institution can issue US ISINs or become the NNA for US securities in the foreseeable future. As a result S&P has a monopoly on the market for the allocation of ISINs according to the ISO standard 6166.
- (25) Moreover, S&P, as the NNA for the US, has a dominant position for first-hand electronic distribution and licensing of US ISINs via data feeds. S&P is the only company which provides and is able to provide the first-hand electronic distribution of ISIN records for US securities. No other company or institution has the means to

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<sup>12</sup> Such as "security type", "underwriter", "counsel", "last update", etc.

<sup>13</sup> As a so-called substitute numbering agency ("SNA"), and in the absence of any primary NNA in operation, S&P is currently also the only issuer of ISINs for the following countries located in the Americas: American Samoa, Anguilla, Antigua and Barbuda, Aruba, Belize, Curaçao, Dominica, Grenada, Guarn, Guyana, Haiti, Marshal Islands, Mayotte, Micronesia, Northern Mariana Islands, Palau, Puerto Rico, Saint Barthélemy, St. Kitts and Nevis, Saint Lucia, Saint Martin, Saint Vincent and the Grenadines, Sint Maarten (Dutch part), South Georgia and the South Sandwich Islands, Suriname, Trinidad and Tobago, United States Minor Outlying, Uruguay, Virgin Islands (British), Virgin Islands (U.S.) (see pages 23 and 31 et seq. of the Association of National Numbering Agencies' ("ANNA") Annual Report 2010, available at [http://www.anna-web.com/files/ANNA\\_Annual\\_Report\\_2010.pdf](http://www.anna-web.com/files/ANNA_Annual_Report_2010.pdf) ). However, S&P's charging practices in relation to the ISINs for securities issued in those countries were not assessed by the Commission in the present proceedings.

first-hand distribute US ISIN records. Although other companies also distribute ISINs, for instance, the information service providers (ISPs), those "second" or "third" hand distributors are primarily users and redistributors but not the source of the ISINs. They themselves rely on the NNAs as the only generally recognised authorities to first-hand distribute ISINs. Entities which are not NNAs cannot duplicate or take over the function of first-hand distributing ISIN records.

### 4.3. Practices raising concerns

- (26) Article 102(a) of the Treaty states that an abuse of a dominant position may, in particular, consist in "*directly or indirectly imposing unfair purchase or selling prices*". Accordingly, Article 102 prohibits excessive pricing by an undertaking in a dominant position within the internal market – or a substantial part of it – in so far as it may affect trade between Member States.<sup>14</sup>
- (27) According to the Court of Justice of the European Union a price is excessive where it "*has no reasonable relation to the economic value of the product supplied*".<sup>15</sup> There is no single formula for determining whether a price is excessive. In *United Brands*, the Court envisaged a cost analysis. It held that the question to be asked is "*whether the difference between the price charged and the costs incurred is excessive, and, if the answer to this question is in the affirmative, ... whether the price is unfair in itself or when compared to competing products*."<sup>16</sup> The Court added, however, that "*other rules may be devised*" for determining whether a price is excessive.<sup>17</sup> Where a suitable comparator can be found, this can provide a basis for assessing whether a price charged by a dominant undertaking is excessive.<sup>18</sup> Demanding payment for services that have not been requested could be considered as unfair.<sup>19</sup> In addition, it may be possible to infer "*interpretative criteria*" for determining whether a price is excessive from sector-specific rules and regulations.<sup>20</sup>
- (28) In this case, the ISO cost recovery principle provides a strong and useful indication for the assessment whether the prices charged by S&P are unfair within the meaning of Article 102 of the Treaty.
- (29) The ISO standard 6166 was developed at international level as a public service to the financial services industry. Under ISO's cost recovery principle, NNAs must not charge, for the distribution of ISINs, more than necessary to recover the costs incurred for such distribution and only if they are the direct supplier of ISINs. Furthermore, according to the same principle, in the absence of a direct supply, NNAs should not charge for the mere use of ISINs. In other words, charges to direct users should observe the cost recovery principle and there should be no charges to indirect users.

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<sup>14</sup> Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 248.

<sup>15</sup> *United Brands*, paragraph 250.

<sup>16</sup> *United Brands*, paragraph 252.

<sup>17</sup> *United Brands*, paragraph 253.

<sup>18</sup> See, for instance, Case 226/84 *British Leyland v Commission* [1986] ECR 3263, paragraphs 25-30 and Case 30/87 *Bodson Pompes Funèbres* [1988] ECR 2479, paragraph 31.

<sup>19</sup> Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabriella SpA* [1991] ECR 5889, paragraph 19.

<sup>20</sup> Case C-66/86 *Ahmed Saeed* [1989] ECR 809, paragraph 43.



- (30) On that basis, the Statement of Objections expressed the concern that S&P's licensing fees for US ISINs are unfair for the reasons set out in sections 4.3.1. and 4.3.2. below.

4.3.1. *S&P's charging policy for indirect users*

- (31) S&P charges a licensing fee from indirect users, which is not in line with the aforementioned cost-recovery principle.
- (32) End users such as banks, brokers, fund managers and other users that need the standard identifier for their day-to-day business, are required to pay license fees to S&P for using US ISINs in their own databases. The Statement of Objections found that it was S&P's practice to approach users which, according to the information provided to S&P by the ISPs, used or downloaded US ISINs as part of the information retrieved from ISPs. S&P obliged those users to enter into license agreements and to pay license fees for the use of US ISINs.
- (33) The users within the Union surveyed by the Commission paid on average USD [...] in 2009, whereas, if the cost-recovery principle were applied, they should not have paid at all, as they did not receive US ISINs directly from S&P.

4.3.2. *S&P's charging policy for direct users*

- (34) Within its ISIN databases, S&P bundles two distinct products that belong to different markets, namely, ISIN numbers and ISIN records on the one hand, and additional commercial data elements on the other. The charges for the package are the same, regardless of whether the licensees use only the ISIN records or the additional data as well.
- (35) The Statement of Objections found that there is no objective reason why ISIN records and additional data should necessarily be provided together and why ISPs and end users such as banks and financial institutions should not be given the possibility to obtain ISIN records without the additional data.
- (36) As a consequence, the Commission, for the purposes of assessing whether the fees charged by S&P to direct users for US ISIN records are unfairly high, considered that the fees to be examined are those that S&P charges for the bundle of ISIN records and additional data, including CUSIPs. Indeed, given the lack of possibility for customers to choose to only pay for ISIN records if they so wish, the licensing fees for the bundle are, *de facto*, identical to the fees for the usage of the ISIN records.
- (37) According to the Commission's provisional analysis, the fees that S&P demands from direct users, such as ISPs, significantly exceed the costs incurred by S&P for providing US ISINs. For instance, the total fees ISPs paid in 2008 varied from USD [...] to over USD [...].
- (38) In its Statement of Objections, the Commission also noted that none of the NNAs in the Union charge customers simply for using ISIN records in their own databases, independently of the source of the data, as S&P does. This strengthens the provisional finding of unfair pricing on the part of S&P.

### 4.3.3. *Intellectual property rights in US ISINs*

- (39) S&P considers that it has copyright over US ISIN databases and on US ISIN numbers for the use of which it is entitled to claim licensing fees. In its Statement of Objections, however, the Commission took the preliminary view that S&P does not own copyrights in respect of US ISINs, either as a database or in respect of the individual numbers.
- (40) [...] The Commission also provisionally considered that S&P's US ISIN databases did not qualify for the "normal" database protection under Directive 96/9/EC because the intellectual effort invested in selecting and arranging its content has been made by the international financial community as a whole, that is to say, ISO and the Association of National Numbering Agencies ("ANNA")<sup>21</sup>, and not by S&P in particular.
- (41) As to the individual numbers, the Commission provisionally considered that the mere use of numbers for reference purpose is not capable of being subject to copyright. Relevant national precedents found that individual numbers are too trivial or not original enough to constitute material that can be subject to copyright<sup>22</sup>. Even if ISIN numbers could be protected by copyright, S&P would not be the owner of the copyright since the whole ISIN system is the intellectual creation of ISO and the community of NNAs as a whole, but not of S&P individually.
- (42) In the same vein, none of the Union NNAs [claim intellectual property rights over the ISINs that they issue and distribute.]\* Several NNAs explicitly stated that claiming intellectual protection rights over ISINs contradicts the objective of ISO standard 6166.

### 4.4. **Effect on trade between Member States**

- (43) In the Statement of Objections the Commission provisionally considered that trade between Member States is affected because S&P's dominant position covers the whole of the EEA and its behaviour of imposing unfair prices affects end users as well ISPs located in all Member States and Contracting Parties to the EEA Agreement.

## 5. **PROPOSED COMMITMENTS**

- (44) The key elements of the Commitments offered by S&P are set out in recitals 45 to 51.

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<sup>21</sup> The Association of National Numbering Agencies (ANNA) was created in 1992, that is to say, 14 years after the creation of the ISIN standard. The ISO Council appointed ANNA as the Registration Authority for the standard ISO 6166. ANNA also acts as a coordination vehicle for NNAs.

<sup>22</sup> For example, cases such as the so-called Einheitsfahrerschein judgement (Bundesgerichtshof, Decision I ZR 15/58 of 25 November 1958, published in GRUR 1959, page 251-253) or the Michel number case (Bundesgerichtshof, Decision I ZR 311/02 of 3 November 2005, published at [http://www.jusline.de/pdf/de/entscheidungen/I\\_ZR\\_31102.pdf](http://www.jusline.de/pdf/de/entscheidungen/I_ZR_31102.pdf), upholding the decision of the Oberlandesgericht München, published in Computer und Recht, 2003, page 564-566).

\* Should read as "demand licence fees on the basis of intellectual property right claims for the use of individual ISINs or ISIN Records in the absence of other data".

- (45) S&P committed to abolish all charges to indirect users for the use of US ISINs within the EEA. This implies, firstly, that all indirect users currently having a licensing agreement with S&P allowing them to use US ISINs within the EEA will no longer pay licensing fees. Secondly, S&P committed not to impose licensing fees on any indirect user which does not currently have a contract with S&P.
- (46) In respect of direct users and ISPs or Service Bureaus (that is to say, outsourced data management service providers) that decide to obtain US ISINs from S&P and not from ISPs, S&P commits to distribute US ISIN records separately from other added value information, via an FTP<sup>23</sup> delivery on a daily basis. Having regard to S&P's cost data, the initial price of that service will be set at USD 15, 000 per annum.
- (47) Direct and indirect users as well as ISPs which currently have a contractual relationship in place with S&P for the use and/or [distribution of US ISINs]\*, will, following notification from S&P, have a right to early termination of their existing contracts with S&P, effective from the Implementation Date<sup>24</sup>. As of the Implementation Date they will be able to choose between subscribing to the new US ISIN Record Service, continuing with their existing contracts or subscribing to any other product S&P offers.
- (48) The Commitments will be implemented within five months from the date when this Decision is notified to S&P. S&P will communicate the exact date (the "Implementation Date") to the Commission.
- (49) The effect of the Commitments is limited to the EEA. This means that direct and indirect users of the new service must be located within the EEA.
- (50) S&P committed to submit a yearly confidential report to the Commission on the implementation of the Commitments. The Commitments will apply for five years, starting from the Implementation Date.
- (51) However, S&P intends to impose certain restrictions on the use of US ISIN records. Both direct and indirect users will be required to conclude an agreement with S&P that prohibits the extraction of CUSIPs from the US ISIN data as well as the bulk redistribution and resale of US ISINs to companies other than affiliates located within the EEA. The agreements between indirect users and their ISPs will contain the same clauses. ISPs and Service Bureaus will have the right to redistribute US ISIN records in bulk format, but they may not extract CUSIPs from the US ISIN data. ISPs will be allowed to redistribute US ISIN records to their affiliates, but not to other ISPs.

## **6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)**

- (52) In response to the publication on 15 May 2011 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 (the "Market Test"), the Commission received around

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<sup>23</sup> File Transfer Protocol.

\* Should read as "distribution of US ISINs within the EEA".

<sup>24</sup> The date on which S&P will make available the US ISIN Record Masterfile in data feed format via FTP delivery.

70 responses from interested third parties. All respondents welcomed the fact that indirect end users will not have to pay any licensing fees to S&P for the use of ISIN records. The offering by S&P of a new service consisting only of ISIN records without any other data was also positively received. The price of USD 15, 000 per annum for the provision of the new service to ISPs and direct end users was not considered unfair.

- (53) However, respondents criticized a number of elements in the proposed Commitments. These are discussed in sections 6.1. to 6.7. below, together with the Commission's assessment.

### **6.1. Contracts between S&P and indirect end users**

- (54) Indirect users, who make up the vast majority of end users, objected to the requirement to sign any agreement with S&P at all. In their view, the use of ISINs should be totally free, not only of charges (indirect users will not pay any fees to S&P for the use of ISIN records) but of any contracts and restrictions. They submitted that signing those contracts represents a heavy administrative burden.

- (55) However, the Commission's competition concerns set out in the Statement of Objections did not relate to the fact that end users had to enter into contracts with S&P, but to the fee conditions attached to those contracts. Those concerns are fully addressed by S&P's commitment to eliminate all fees for end users.

- (56) Moreover, there are no indications that the burden entailed by the conclusion of the contracts between S&P and indirect end users would prevent the latter from benefiting from the Commitments. Indeed, the new contracts are likely to be considerably shorter than the current licensing contracts.

### **6.2. CUSIP non-extraction clauses**

- (57) Respondents submitted that it is unrealistic that they would extract CUSIPs from US ISINs and that, in any event, S&P could protect CUSIPs at any time through litigation. Furthermore they reasserted that the use of ISINs should be totally free of any restrictions, including one that prevents the extraction of CUSIPs from US ISINs.

- (58) The proceedings in this case do not cover S&P's behaviour in relation to CUSIPs. The Commission's competition concerns only relate to S&P's licensing fees for US ISINs. Those concerns are adequately addressed by the Commitments since fees are eliminated for indirect users and reduced to a fair level for direct users.

- (59) Moreover, in the course of its investigation, the Commission has verified that European Union users do not need CUSIPs in their operations. This was confirmed by the respondents themselves in their comments. It follows that there are no indications that the restriction imposed on them not to extract CUSIPs from US ISINs would prevent users from benefitting from the Commitments.

### **6.3. Restriction on the bulk redistribution of ISIN records by end users**

- (60) Several end users argued that they should be allowed to redistribute US ISIN records in bulk.

- (61) The Commission has found that there are no elements which indicate that end users, unlike ISPs and Service Bureaus, need to distribute US ISINs in bulk in their normal course of business. The restriction envisaged by S&P does thus not prevent end users from benefiting from the elimination of licensing fees for US ISINs.

#### **6.4. Limitation of the geographic scope of the Commitments to the EEA**

- (62) Both ISPs and end users claimed that the Commitments should be worldwide in scope. Given that many banks and other financial institutions operate worldwide, the free use of US ISINs should be worldwide, not only for financial institutions within the EEA, but also for their affiliates outside the EEA and even for financial institutions having no activities in the EEA at all. Some respondents considered that if the free use of US ISINs were to be limited to financial institutions within the EEA, there might be situations where S&P might compensate for the decrease of revenue within the EEA by increasing prices abroad for CUSIPs and/or US ISINs elsewhere.
- (63) ISPs also submitted that they and their customers distribute/use US ISINs worldwide in technological infrastructures, serving multiple locations throughout their corporate group. Therefore, they would be required to negotiate separate licenses for multiple jurisdictions. The implementation of a two-licence regime (free US ISIN record in the EEA and the current product outside the EEA), although possible, would involve costly adaptations of the data systems.
- (64) The geographic scope of the Commitments reflects the territorial scope of application of the Union competition rules. The Commission has jurisdiction to apply the Union competition rules to restrictive practices that are implemented in the EEA and have an effect upon inter-state trade within the EEA<sup>25</sup>. Accordingly, the Commission's competition concerns in this case relate to licensing fees paid by S&P's clients for use of US ISINs within the EEA (regardless of whether those clients have their headquarters within the EEA). The Commitments offered by S&P address those concerns.
- (65) In any event, the geographic limitation of the Commitments does not prevent financial institutions from benefiting from the Commitments. In some circumstances remedies may have to be worldwide in scope in order to ensure fair competition inside the EEA. That does not seem to be the case here. The fact that certain worldwide operators may have to conclude various licensing agreements with S&P does not, in itself, imply that the Commitments are inadequate with respect to the EEA. The Commission has found that, even at present, clients that operate worldwide usually conclude licensing agreements that are limited in territorial scope. As a result, those clients already use US ISINs under different licenses in their operations in different parts of the world. It would therefore appear that, in practice, worldwide operators are generally able to cope with licensing arrangements that vary according to the relevant territory.

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<sup>25</sup> Joined Cases 89/85, 104/85, 114/85, 115/85 and 125 to 129/85 *Ahlstrom Osekayhtio and others v Commission* ("Woodpulp I") [1988] ECR 5193; and Case T-102/96, *Gencor Ltd. v. Commission*, 1999 ECR II-753, paragraph 89 et seq.

**6.5. The commitments only refer to US ISINs and not to other ISINs issued and distributed by S&P as a substitute NNA**

(66) A number of respondents claimed that the Commitments should cover all the ISINs that S&P issues and distributes as a substitute NNA for certain countries<sup>26</sup>.

(67) However, S&P's behaviour in respect of those non-US ISINs falls outside the scope of the Commission's investigation in this case. The Commission has, in its discretion to set enforcement priorities, chosen to concentrate on US ISINs, given their tremendous practical importance to the financial services industry. The competition concerns identified in the Statement of Objections therefore related to US ISINs only. The Commitments accordingly address those concerns.

**6.6. The material scope of ISIN use is too narrow**

(68) Respondents submitted that the use of ISINs permitted under the Commitments is too narrow. Notably, ISIN records can be used by end users only internally and in a few external relations, such as drawing up research reports to clients or as is necessary for compliance with regulatory requirements (for example, for reporting to regulators).

(69) The Commission considers that, in order to meet the competition concerns expressed in the Statement of Objections, the Commitments should cover all uses of US ISINs by end users in their ordinary course of business. In particular it considers that the prices offered by S&P (no fees for indirect end users and USD 15,000 for direct users) are to be considered fair only if end users can use ISINs in all their daily operations without any reduction of the scope of such usage. The Market Test showed that the permitted use of US ISINs was not sufficient in order to allow end users to use US ISINs in all operations of their ordinary course of business.

(70) In response to the results of the Market Test, S&P expanded the scope of the permitted US ISIN use for end users. The new definition of the term "Use within the EEA" in the Revised Commitments covers all operations for which end users need ISINs in their ordinary course of business.

**6.7. The contracts attached to the commitments should be optional only**

(71) Respondents (ISPs in particular) submitted that the contracts attached to the Commitments contain clauses that are less favourable than those that could be achieved through arms-length negotiations with S&P. They submitted that the contracts, if attached to the Commitments at all, should thus only be optional.

(72) Other respondents, mostly end users, commented on certain clauses in the agreements, such as the stipulation of New York law and New York jurisdiction. The respondents argued that it would be more difficult for them to litigate in the US than in the Union and therefore expressed their wish that the agreements they sign with S&P should be subject to the laws of a Contracting Party to the EEA Agreement and to the jurisdiction of courts in the EEA.

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<sup>26</sup> See paragraph 24 and footnote 13 above.

- (73) In response to the results of the Market Test, S&P has removed the contract terms from the Revised Commitments. S&P commits to publish on its website model ISIN Record Subscription Agreements for ISPs, Service Bureaus and end users compliant with the Revised Commitments, which will have been sent to the Commission in advance, within one week of the date upon which S&P receives formal notification of this Decision (the "Effective Date").
- (74) This adequately addresses the concerns raised by the respondents to the Market Test. Financial institutions should not, as a result of the Commitments, be required to accept contractual terms that are less favourable than those which they could have achieved, in the absence of the Commitments, through negotiations with S&P.
- (75) The parties remain free to negotiate different terms and conditions, including the applicable law and jurisdictional clause, should they so choose. In any event, the Commission is currently not aware of any concrete indication that the application of the laws of the State of New York (United States) by courts located in the County of New York to disputes arising out of the subscription agreements is liable to undermine the effectiveness of the Commitments.

## 6.8. Conclusion

- (76) Overall, the observations received did not lead the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in its Statement of Objections.
- (77) The Revised Commitments proposed by S&P address the concerns expressed in the Statement of Objections.

## 7. PROPORTIONALITY OF THE REVISED COMMITMENTS

- (78) According to settled case law, the principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.<sup>27</sup> Although Article 9 of Regulation (EC) No 1/2003, unlike Article 7 of that Regulation, "*does not expressly refer to proportionality, the principle of proportionality, as a general principle of European Union law, is none the less a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority*"<sup>28</sup>. However, the "*application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties.*"<sup>29</sup>

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<sup>27</sup> See for instance, Case T-260/94, *Air Inter v. Commission*, 1997 ECR II-997, paragraph 144 and Case T-65/98, *Van den Bergh Foods v. Commission*, 2003 ECR II-4653, paragraph 201.

<sup>28</sup> Case C-441/07 P, *Commission v. Alrosa*, (2010), not yet reported, paragraph 36.

<sup>29</sup> *Commission v. Alrosa*, paragraph 41.

- (79) This Decision complies with the principle of proportionality as the Revised Commitments offered by S&P address the concerns expressed in the Statement of Objections. Moreover, S&P has not offered less onerous commitments that also address those concerns adequately.
- (80) The Revised Commitments should be made binding for a period of five years from the Implementation Date. The duration envisaged by the Revised Commitments is long enough to allow for a significant change in market practices, while at the same time ensuring that the effects of the Revised Commitments on the market are re-assessed within a reasonable period of time.

## **8. CONCLUSION**

- (81) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (82) In the light of the Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end,

HAS ADOPTED THIS DECISION:

### *Article 1*

The Commitments in the Annex shall be binding on Standard & Poor's for a period of five years following the Implementation Date, which is the date on which the US ISIN Record Masterfile becomes available in data feed format via File Transfer Protocole (FTP) delivery.

### *Article 2*

It is hereby concluded that there are no longer grounds for action in this case.

### *Article 3*

This Decision is addressed to:



The McGraw-Hill Companies, Inc, New York, c/o [McGraw Hill Companies, 20 Canada Wharf, London E14 5 LH, United Kingdom] \* .

Done at Brussels, 15.11.2011

*For the Commission*

*Joaquín Almunia  
Vice-President*

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\* Should read as "The McGraw-Hill Companies, 20 Canada Square London E14 5 LH, United Kingdom".

**ANNEX**

**THE REVISED COMMITMENTS**

## NON-CONFIDENTIAL VERSION

### *Case 39.592 - Standard & Poor's*

## COMMITMENTS TO THE EUROPEAN COMMISSION

In accordance with Article 9 of Council Regulation No 1/2003, The McGraw-Hill Companies, Inc. ("**MGH**") gives the following commitments ("**Commitments**") to address the preliminary competition concerns identified by the European Commission ("**Commission**") in Case 39.592 *Standard & Poor's*, which are expressed in the Commission's Statement of Objections dated 13 November 2009 ("**Statement of Objections**") and to enable the Commission to adopt a decision confirming that the Commitments meets its concerns ("**Commitments Decision**").

These Commitments are made without prejudice to MGH's position should the European Commission, MGH or any other party decide to open proceedings or to commence any other legal action involving MGH. MGH strongly disagrees with the Commission's preliminary assessment regarding both the factual and legal elements, and denies the allegations against it. Notwithstanding this disagreement and denial, MGH has, nevertheless, offered these Commitments pursuant to Article 9 of Regulation 1/2003, to meet the Commission's competition concerns. These Commitments are expressly offered without any admission by MGH of liability, and in particular, without any admission that it holds a dominant position within the EEA or any part of it or that it has engaged in abusive conduct contrary to Article 82 EC/Article 102 TFEU or any other aspect of Community competition law.

This text shall be interpreted in light of the Statement of Objections, the Commitments Decision, in the general framework of Community law, and in particular in the light of Article 82 EC/Article 102 TFEU and Regulation 1/2003.

## Section A. Definitions

For the purposes of the Commitments, the subsequently listed terms shall have the following meaning:

**"Additional Data"** means data and information, not including the ISIN Record, that S&P chooses to provide in a data product integrated with the ISIN Record.

**"Affiliate"** means with respect to a particular undertaking, another undertaking that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with such particular undertaking. For purposes hereof, "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a particular undertaking, whether through the ownership of more than fifty percent (50%) of either the voting securities or other equity interest, by contract or otherwise.

**"ANNA"** means the Association of National Numbering Agencies.

**"ANNA Service Bureau"** means the ANNA Service Bureau which disseminates certain ISIN data on behalf of the ANNA.

**"Bulk Distribution"** means the distribution or other dissemination to third parties of all, substantially all or any material portion of US ISINs or ISIN Records. Bulk Distribution is an example of usage of US ISINs or ISIN Records which would typically categorize the bulk distributor as a Service Bureau or an ISP.

**"CSB"** means the CUSIP Service Bureau, operated by S&P on behalf of the American Bankers Association.

**"CSB database"** means the compilations of CUSIP-based identifiers, identifiers and other value added information offered by S&P/CSB from time to time.

**"EEA"** means those countries participating in the European Economic Area as of the Effective Date and at any time thereafter during the term of these Commitments.

**"EEA Affiliate"** means any Affiliate (as defined above) that is: (a) incorporated within the EEA or has its registered seat or principal office within the EEA; and (b) specifically listed as an EEA Affiliate in the relevant ISIN Record Subscription Agreement.

**"Effective Date"** means the date upon which MGH receives formal notification of a decision pursuant to Article 9 of Regulation 1/2003 by which the Commission makes the Commitments binding on MGH.

**"End Users"** means those users (who are not ISPs or Service Bureaus as defined below) of US ISIN data receiving US ISINs or ISIN Records for Use within the EEA (as defined below). End Users shall not be entitled to redistribute, resell or otherwise make available all or any substantial portion of the ISIN Records to third parties, except to Affiliates as expressly permitted under these Commitments and the applicable ISIN Record Subscription Agreement, and except within the limits described in "Use within the EEA" (as defined below). End Users are generally entities who have historically entered into subscription agreements (as opposed to distribution agreements) with S&P/CSB. For the avoidance of doubt, entities that perform custodian, clearing and/or accounting services on behalf of third party retail customers, but for whom the bulk transmission of data is not a primary function of that business, shall be considered End Users (and not ISPs or Service Bureaus) for purposes of these Commitments.

**"Impacted ISPs, Service Bureaus and End Users"** means any End Users, Service Bureaus and ISPs who currently have contracts with CSB for access to the ISIN Records as part of a CSB database service which contracts provide such End Users, Service Bureaus or ISPs with the right to utilize and/or, in the case of ISPs or Service Bureaus, the right to distribute, or otherwise make available, ISIN Records within the EEA.

**"Implementation Date"** means the date on which the US ISIN Record Masterfile becomes available in data feed format via FTP delivery, as notified in writing by MGH to the Commission and confirmed by the latter to MGH.

**"Initial Price"** means a price of USD 15,000 per annum.

**"ISIN"** means International Securities Identification Number.

**"ISIN Record"** means the US ISIN number plus the issuer long name and issue description as listed at Annex A to these Commitments, covering those US securities which S&P/CSB provides to the ANNA Service Bureau as of the Effective Date.

**"ISIN Record Subscription Agreements"** means the contracts, substantially in the form of the model contracts that will be posted on S&P/CSB's website pursuant to Paragraph 2 of these Commitments, which will be offered by S&P/CSB to individual ISPs / Service Bureaus / End Users.

"**ISP**" means any entity that is in the business of collecting, aggregating and/or distributing information products and services for the benefit of third party customers.

"**NNA**" means National Numbering Agency.

"**Non-EEA Affiliate**" means any Affiliate (as defined above) that is: (a) not an EEA Affiliate (as defined above); and (b) specifically listed as a Non-EEA Affiliate in the relevant ISIN Record Subscription Agreement.

"**Service Bureau**" means any entity that is in the business of making available ISIN Records in a direct datafeed or file download to third parties (who are generally institutions and not retail customers) in their capacity of providing data processing services, software services and/or other outsourced data management services on behalf of such third parties (including for the avoidance of doubt custodian, accounting, paying agent, listing agent and similar services). Service Bureaus are generally entities who have historically entered into distribution agreements with S&P/CSB (not end user subscription agreements) as a result of their needs for broad data distribution rights to cover the bulk transmission of data to their own institutional customers.

"**S&P**" means Standard & Poor's Financial Services LLC, a wholly owned subsidiary of MGH.

"**S&P/CSB**" means Standard & Poor's, acting in its capacity as the manager of CSB.

"**US ISIN**" means the US international securities identification number as issued from time to time by S&P/CSB or any other MGH entity as the official NNA for the United States.

"**US ISIN Record Masterfile**" means the compilation of ISIN Records as maintained by S&P/CSB.

"**Use within the EEA**" means the use of US ISINs or ISIN Records received by an End User located within the EEA for any communications, contacts and information exchanges conducted in the normal course of such End User's business as at the date the relevant ISIN Record Subscription Agreement is concluded, provided that such communications, contacts or information exchanges do not include Bulk Distribution (except as is necessary to comply with applicable regulatory reporting requirements and/or central bank operations) or include other specific activities that would characterize such usage as a Service Bureau or ISP as defined in these Commitments. For the avoidance of doubt, "Use within the EEA" shall also permit the following activities: (a) communications, contacts and information exchanges with,

including Bulk Distribution to, any EEA Affiliate; and (b) communications, contacts and information exchange with, excluding Bulk Distribution to, any Non-EEA Affiliate, although this is without prejudice to S&P/CSB's right to require a subscription agreement with any Non-EEA Affiliate that wishes to use US ISINs or ISIN Records in its own business operations.

## SECTION B. COMMITMENTS

1. MGH commits to offering to deliver ISIN Records, via the US ISIN Record Masterfile, directly from S&P/CSB to both ISPs and Service Bureaus for distribution within the EEA and End Users for Use within the EEA. This shall not preclude ISPs, Service Bureaus or End Users from obtaining ISIN Records from sources other than through the direct delivery from S&P/CSB pursuant to Paragraph 2 below. S&P/CSB will make available the US ISIN Record Masterfile in a data feed format via an FTP delivery on a daily basis. The US ISIN Record Masterfile shall be made available as a standalone service separate and apart from any Additional Data.
2. S&P/CSB shall have the right to enter into contracts (collectively, the "**ISIN Record Subscription Agreements**") with ISPs, Service Bureaus and End Users who elect to receive the ISIN Records directly from S&P/CSB. The ISIN Record Subscription Agreements to be offered by S&P/CSB to individual ISPs / Service Bureaus / End Users will be substantially in the form of model contracts, compliant with the present Commitments, to be posted on S&P/CSB's website. S&P/CSB commits to posting the model ISIN Record Subscription Agreements, which will have been sent to the Commission in advance, on S&P/CSB's website within one week of the Effective Date.
3. The price of the US ISIN Record Masterfile to ISPs, Service Bureaus and End Users under the terms of these Commitments shall, for the first year following the Implementation Date, be the Initial Price. In subsequent years, during the term of these Commitments, annually with effect from each anniversary of the Effective Date, MGH may revise the price only in line with the Consumer Price Index for Urban Consumers, All Items, as issued by the Bureau of Labor Statistics, U.S. Department of Labor, over the prior twelve (12) month period.
4. If ISPs, Service Bureaus and End Users choose not to obtain ISIN Records directly from S&P/CSB, but from sources other than through the direct delivery from S&P/CSB pursuant to Paragraph 2 above (excluding the ANNA Service Bureau as contemplated under Paragraph 7 below), MGH commits to ensuring that S&P/CSB will not impose any contracts upon such ISPs or Service Bureaus for distribution within the EEA, and such End Users for the Use within the EEA, of ISIN Records (except as and to the

extent contemplated pursuant to the ISIN Record Subscription Agreements) and will not charge such ISPs or Service Bureaus for distribution within the EEA, or such End Users for the Use within the EEA, of ISIN Records. Service Bureaus shall be entitled to obtain ISIN Records from sources other than through the direct delivery from S&P/CSB (e.g., indirectly through ISPs) without having to pay the price of the US ISIN Record Masterfile to S&P/CSB for distribution of ISIN Records within the EEA, provided that such Service Bureau has entered into an ISIN Record Subscription Agreement substantially in the form of the applicable model contract which will be posted on S&P/CSB's website pursuant to Paragraph 2 above.

5. Within one (1) month after the Effective Date, S&P/CSB shall inform Impacted ISPs, Service Bureaus and End Users that they will have the right to early termination of their customer agreements (in the case where a customer agreement covers more than just the usage and/or distribution of US ISINs in the EEA, the right to early termination of only the EEA portion of their customer agreement) by providing written notice to S&P/CSB (such early termination to become effective on the Implementation Date, or such later date as mutually agreed between the customer and S&P/CSB). Impacted ISPs, Service Bureaus and End Users will then have the options to: (a) subscribe to the US ISIN Record Masterfile under the applicable ISIN Record Subscription Agreement; (b) continue their existing CSB database service; and/or (c) subscribe to other commercial database products as may be offered by S&P and/or S&P/CSB from time to time.
6. Nothing in these Commitments shall be interpreted to mean that a CSB customer will be excused or released from any obligation or liability, if any, accruing under its existing customer agreement(s) for services rendered by CSB prior to termination of a customer agreement pursuant to Paragraph 5 above. In the event of such termination, the post-termination rights and obligations of CSB and the customer will be as provided under the applicable law.
7. At its option, S&P/CSB shall have the right to fulfil its obligation under these Commitments of making the ISIN Record available directly to both ISPs and Service Bureaus for distribution within the EEA and End Users for Use within the EEA by providing the US ISIN Record Masterfile to ISPs, Service Bureaus and End Users: (a) directly from the existing facilities of S&P/CSB, (b) through a new ISIN Record service bureau that may be established by S&P/CSB or MGH, and/or (c) through the facilities of the ANNA Service Bureau.
8. For the avoidance of doubt, nothing in these Commitments shall in any way preclude MGH, S&P, S&P/CSB or any of their affiliates from offering or



distributing commercial database products consisting of the ISIN Record integrated with Additional Data, whether to ISPs, Service Bureaus, End Users or any other customer, on the basis of its existing distribution model or any other commercial model it may choose to adopt from time to time in its sole discretion.

9. Without prejudice to Paragraph 7 above, the remedies under these Commitments shall not apply to the ANNA Service Bureau. S&P/CSB shall continue to operate the ANNA Service Bureau on behalf of ANNA in accordance with its contractual obligations to ANNA in relation to the operation of the ANNA Service Bureau.

### **SECTION C. TERM AND REVIEW**

10. These Commitments shall be implemented by MGH within five (5) months of the Effective Date.
11. These Commitments will be applicable for a duration of five (5) years from the Implementation Date. These Commitments will automatically expire, with immediate effect, if MGH or S&P (or its S&P/CSB business) no longer operates as the US NNA.
12. Without prejudice to the general provision of Article 9(2) of Regulation 1/2003, MGH may request the Commission to reopen proceedings with a view to modifying these Commitments where there has been a material change in any of the facts on which the Commission's Decision pursuant to Article 9(1) of Regulation 1/2003 was based.
13. In addition, and without prejudice to the provisions of Article 9(2) of Regulation 1/2003, the Commission may, on its own initiative, review these Commitments if there has been a material change in any of the facts on which the Commission's Decision pursuant to Article 9(1) of Regulation 1/2003 was based.
14. On an annual basis following the Implementation Date, during the term of these Commitments MGH shall submit to the Commission a confidential report on the implementation of the Commitments. [...].

## ANNEX A

### Definition of ISIN Record

**Minimum descriptive elements for each category/issue type for inclusion with the US ISIN Record Masterfile Service**

Minimum Data Fields			
Equity Instruments		Debt Instruments	
Elements	M / C	Elements	M / C
ISIN	M	ISIN	M
Issuer Long Name	M	Issuer Long Name	M
Issue Description	M	Issue Description	M
Nominal Value	C	Interest	C
Currency	C	Maturity	C
<p>The conditional elements ("C") are only to be delivered if the information is not part of the issue description and so long as S&amp;P/CSB collects such conditional elements from the issuer/requester of the applicable ISIN identifier.</p>			
Legend			
M	Mandatory		
C	Conditional		