

January 31, 2005

**BY HAND AND E-MAIL**

Ms. Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Ave, N.W.  
Washington, DC 20551

Re: Comments of Banca Intesa S.p.A. on Proposed Revisions to Annual  
Report of Foreign Banking Organizations on Form FR Y-7 (OMB Control  
Number 7100-0125)

Dear Ms. Johnson:

Under wver of this letter, we are submitting the attached comments (the "Comments") of Banca Intesa S.p.A., Milan, Italy ("Intesa"), on the proposal of the Board of Governors of the Federal Reserve System (the "Board") to revise the Annual Report of Foreign Banking Organizations on Form FR Y-7 (the "FR Y-7"). See 69 Fed. Reg. 62,269 (October 25, 2004). In addition, as indicated in the Comments, there are aspects of Intesa's specific situation vis-à-vis the FR Y-7 that Intesa believes are more appropriately addressed directly with staff of the Board than in the general comment process. Accordingly, representatives of this firm will be contacting staff shortly to request a meeting. In the meantime, please do not hesitate to contact the undersigned if you have any questions.

Sincerely,

  
Robert E. Mannion

cc: Ms. Stephanie Wolfson  
Federal Reserve Bank of  
New York  
Dott.ssa Elisabetta Lunati  
General Counsel  
Banca Intesa S.p.A.

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# ARNOLD & PORTER LLP

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Dott. Eduardo Bruno Bombieri  
Senior Vice President and General Manager  
Banca Intesa New York Branch  
Avv. Prof. Alberto Santa Maria  
Studio Santa Maria, Milan, Italy

## BANCA INTESA S.P.A.

### **Comments to the Board of Governors of the Federal Reserve System on the Reporting Requirements for Top-Tier Foreign Banking Organizations under the Proposed Revisions to the Annual Report of Foreign Banking Organizations on Form FR Y-7**

#### **1. Introduction**

Banca Intesa S.p.A. ("Intesa") is writing to the Board of Governors of the Federal Reserve System (the "Federal Reserve") to comment on one of the proposed revisions to the Federal Reserve's Annual Report of Foreign Banking Organizations on Form FR Y-7 (the "FR Y-7"). Intesa is a foreign banking organization ("FBO"), organized under the laws of Italy, that operates a state-licensed bank in New York City. Both as a general matter and as a result of its own recent experience, Intesa believes that the Federal Reserve should not revise the FR Y-7 to require that it only be filed by the top-tier FBO. Intesa sees two fundamental issues with the proposed revision. First, because "control" is defined in the FR Y-7 at a level far lower than the standard for being a subsidiary under applicable U.S. or international legal or accounting principles, a top-tier FBO simply may not have access to the necessary information to complete the form. The Federal Reserve has explicitly recognized this possibility in the current FR Y-7, which permits substitution of certain information when obtaining the requested information would be unduly burdensome or expensive. Second, under the present reporting regime, the Federal Reserve already can obtain sufficient information about the activities of FBOs in this country as long as those activities are the subject of FR Y-7 filings. As described more fully below, this is the case with *Intesa*, which files the FR Y-7 and other forms as a result of its U.S. operations.

For example, one minority investor in Intesa is Credit Agricole, S.A. ("Credit Agricole"). Intesa's recent experience with Credit Agricole offers an excellent demonstration of why the FR Y-7 should not be revised to require that it can only be completed by a top-tier FBO. On the one hand, Credit Agricole would not ordinarily have access to the necessary information to complete the form properly. On the other hand, the Federal Reserve can obtain the information it needs about Intesa from Intesa's own reports. Under applicable law, Intesa is not controlled by Credit Agricole and Credit Agricole cannot compel Intesa to provide information. Indeed, under Italian law there are certain types of information that Intesa is prohibited from providing to Credit Agricole, even though it could provide such information if it were a Credit Agricole subsidiary, rather than a competitor. Furthermore, in light of Intesa's commitment to compliance with U.S. regulatory requirements, including the filing of periodic reporting forms, the Federal Reserve would derive no meaningful benefit from receiving information about Intesa filtered through Credit Agricole that it had already received from Intesa directly. The remainder of these comments substantiate these basic points.



information, in some cases it is prohibited from even obtaining it

#### 4. Absence of Control of Intesa by Credit Agricole

As an Italian company, Intesa is subject to the applicable laws of that country, including laws that go to the existence and implications of control of one entity by another. Pursuant to Italian laws concerning banking organizations and consolidated financial statements of banks, Crédit Agricole does not exercise control over Intesa<sup>1</sup>; in this respect, regardless of whether Credit Agricole is treated independently or as part of the Syndicate Agreement.

Indeed, only sole control is contemplated as relevant by the Italian banking laws and by Italian laws concerning consolidated financial statements of banks, whereas joint control is only referred to for very limited and specific purposes or only in a few, specific sectors, namely in the antitrust legislation<sup>2</sup> and, in any case, for the purposes specified thereby. Under Italian law a bank may provide specific price sensitive information only and exclusively to its ultimate parent company for purposes of consolidated banking supervision of banking groups pursuant to Article 61, paragraph 4 of the Banking Act<sup>3</sup>.

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<sup>1</sup> For purposes of the definition and supervision of banking groups, Italian banking laws (see Articles 59 and 23 of the Banking Act. Legislative Decree September 1, 1993, No. 385 and Article 2359 of the Italian Civil Code) provide that controlled companies are those in which:

- 1) another company holds the majority of the voting rights in the ordinary shareholders' meetings (so called *de jure* control);
- 2) another company holds voting rights which are sufficient to ensure that it will exercise a dominant influence in the ordinary shareholders' meetings (so called *de facto* control). Control, in the form of dominant influence, shall be deemed to exist in any of the following cases:
  - i) where, pursuant to agreements with other shareholders, one single person (both natural or juridical) is entitled to appoint or remove a majority of the directors or controls alone a majority of the voting rights in the ordinary shareholders' meetings;
  - ii) where one single person owns a holding which would allow him to appoint or remove a majority of the members of the board of directors;
  - iii) where there exist financial or organizational relationships, including those between shareholders, which are likely to produce one of the following effects:
    - (a) the transfer of profits or losses;
    - (b) the coordination of the management of the company with the management of other companies for the purpose of pursuing a common scope;
    - (c) the attribution of powers larger than those deriving from the shares or capital parts owned;
    - (d) the attribution of powers in the choice of directors or managers of undertakings to persons other than those entitled to exercise such powers on the basis of the ownership structure;
  - iv) where companies are subject to common management arising from the composition of the administrative bodies or other concurrent factors.

Such definition of control is applied with reference to consolidated financial statements of banks. In this regard, it should be noted that Article 4, paragraph 3. of Legislative Decree January 27, 1992, No. 87 calls for the application of the definition above.

<sup>2</sup> See Articles 5 and 7 of Law October 10, 1990, No. 287 (Italian Antitrust Act).

<sup>3</sup> Article 61, paragraph 4. provides for that the parent company, in carrying out its activity of management and coordination, shall issue roles to the components of the group for the implementation of the instructions

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Such provision only applies to banks and financial companies that are controlled by an Italian bank or by an Italian financial company as ultimate parent of the banking group subject to the consolidated supervision! In this respect, it has to be emphasized that Credit Agricole is not even enrolled as ultimate parent of Intesa banking group in the register of the banking groups held by the Bank of Italy pursuant to article 64 of the Banking Act. On the contrary, Intesa is indeed enrolled in such register as ultimate parent of Intesa banking group, which represents a further confirmation of the assumptions elaborated herein.

The lack of control over Intesa by Crédit Agricole under Italian law is confirmed by the fact that Credit Agricole's investment in Intesa is reflected on the former's financial statements under the "equity method" (*"metodo del patrimonio netto"*), rather than by the consolidation of Intesa with Crédit Agricole. The equity method is used for accounting (not consolidating) shareholdings in companies over which another company is able to exercise a significant influence but not to control its operational and financial policies<sup>5</sup>.

The fact that Crédit Agricole cannot be viewed as controlling Intesa under Italian laws has a very significant bearing on Credit Agricole's request for information from Intesa. For example, in the absence of control, Intesa, as a listed company in Italy, is not allowed to disclose to Crédit Agricole any corporate information that might be regarded

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issued by the Bank of Italy in the interest of the stability of the banking group. The directors of the companies belonging to the banking group shall supply all figures and information needed for the issuing of such rules and shall cooperate in complying with the provisions on consolidated supervision.

<sup>4</sup> See Article 61, paragraph 1 of the Banking Act which states that the banking group's ultimate parent has to be an Italian bank or a financial company having its registered office in Italy which controls the companies belonging to the banking group and which is not, in turn, controlled by another Italian bank or by another financial company having its registered office in Italy which can be considered a parent undertaking. As a consequence of such provision, even if Credit Agricole actually controlled Intesa, it could not be regarded as ultimate parent of Intesa Banking Group and, therefore, it would not be entitled to receive any information from Intesa for the purposes of consolidated banking supervision pursuant to Article 61, paragraph 4, above.

<sup>5</sup> See Article 36 of Legislative Decree January 27, 1992, No. 87 (implementing Article 14, paragraph 1, Article 32, paragraph 3 and Article 33 of EEC Directive 83/349 of June 13, 1983 on consolidated accounts of undertakings). Such provision provides for accounting methods of shareholdings not consolidated defined as those shareholdings in affiliated companies on which another undertaking or its controlled companies are able to exercise a significant influence which is deemed to exist in case such companies hold at least 20% of the voting rights in the ordinary shareholders' meeting of the participated company. On the contrary, where control over a company subsists, the shareholding in such company has to be consolidated respectively through the *full* consolidation method (applicable when *exclusive* control is exercised by a company over the financial and operational policies of another company) or through the *proportional* consolidation method (to be used when *joint* control is exercised over a company operated jointly by a limited number of shareholders in such a manner that the financial and operational policies of the controlled company are the result of the agreement between the jointly controlling companies) (see also Crédit Agricole's consolidated financial statements as at December 31, 2003, 2002 and 2001).

as price sensitive pursuant to the Italian provisions concerning disclosure of information by listed companies". This prohibition is designed to assure to the market and to any shareholders of listed companies equal access to price sensitive information concerning the issuing company, and its securities and to prevent the selective provision of information in ways that could encourage conflict of interests, insider trading and market manipulation. In essence, supplying information on a preferential basis would breach fundamental principles of equal treatment of shareholders.

Accordingly, in the case at issue, supply of information to Credit Agricole on a privileged basis and in the absence of a proper legal obligation under Italian law would expose Intesa to liability and the related sanctions under the Financial Services Act and other provisions above, as well as to serious economic and reputational damage<sup>7</sup>. In addition, even where there were no legal proscriptions on providing certain types of information, Intesa might wish to preserve the confidentiality of such information with respect to a competitor such as Credit Agricole.

Moreover, even if Crédit Agricole could request information, and Intesa could provide it, because of the absence of control under Italian law, Credit Agricole would still have no right to such information for reporting under the revised FR Y-7 requirements because Credit Agricole does not "control" Intesa for Federal Reserve purposes. This was made clear in the context of Intesa's 1999 application to establish a branch in New York and representative offices in Chicago and San Francisco. In the course of the application process, the Federal Reserve raised issues about Credit Agricole and its investment in Intesa. At that time, this investment amounted to approximately 23.5% of Intesa's issued and outstanding shares. Intesa responded to the Federal Reserve's inquiry with information showing that Credit Agricole did not "control" Intesa for applicable regulatory purposes. Faced with this response, the Federal Reserve did not take any action indicating that it questioned the conclusion of non-control. Since 1999, the only material change in Credit Agricole's position with respect to Intesa is that Crédit Agricole's ownership of Intesa stock has dropped by more than five percentage points.

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<sup>6</sup> Article 114 of the Financial Services Act and Articles 65 and ss. of Consob Regulation May 14, 1999, No. 11971 provide that listed issuers and the persons that control them are obliged to promptly inform the public of events occurring in their or their subsidiaries' sphere of activity that have not been made public and that if were made public would be likely to have a significant effect on the price of the listed financial instruments. The information to be disclosed to the public include also the issuer's accounting statements to be reported in the annual financial statements, in the consolidated financial statement and in the semi-annual and quarterly report when they are disclosed to third parties and, in any case, as soon as they have become sufficiently certain (see Article 66, paragraph 6, letter a), of the Consob Regulation No 11971 above). All the above disclosure obligations prevent Intesa from supplying the relating information only to Crédit Agricole (which, although it is a shareholder, is a third party for the purposes at issue) but they would not prevent such supply of information directly from Intesa to the Federal Reserve as the latter is a public supervisory authority which, where required, is subject to confidentiality obligations.

<sup>7</sup> Article 193 of the Financial Services Act states that persons performing administrative, managerial or control functions in listed issuers required to effect the notifications referred to in Article 114 shall be liable to a pecuniary administrative sanction of between Euro 5,164 and Euro 103,291 for non-compliance with such article or the related implementing provisions.

Accordingly, Credit Agricole should not be deemed to control Intesa and should not be considered Intesa's top-tier holding company even under the proposed FR Y-7 revisions.

Finally, as significant as the absence of control is as a legal matter, it also reflects a larger, practical issue. Notwithstanding Credit Agricole's investment in Intesa, the two simply are not strategically linked. Requiring that Intesa be part of a Credit Agricole FR Y-7 filing creates confusion by implying the existence of such a linkage even where none is present. Nor is this point unique to Intesa. If the reporting requirements of the FR Y-7 are revised, the same confusion will arise with respect to many companies that are passive investors in FBOs<sup>1</sup>. The need to comply with a reporting form may give rise to suggestions of common operations where none exists, either as a legal or business matter.

## 5. Conclusion

Even if the proposed revisions to require that the FR Y-7 only be completed by a top-tier FBO are adopted, Intesa believes Crédit Agricole would not be considered a parent holding company of Intesa and would not need to file an FR Y-7 with Intesa information. In any case, since in the absence of the proposed revisions this issue would not even need to be addressed, Intesa's recent experience with Crédit Agricole offers an excellent demonstration of why the FR Y-7 should not be revised. On the one hand, the top-tier FBO may not be able to obtain the necessary information to complete the form properly. On the other hand, the Federal Reserve can obtain the information it needs from a company that might be considered a lower-tier FBO where that company files its own reports.

Intesa appreciates the opportunity to provide these comments. However, because of Intesa's specific circumstances, as described herein, management of Intesa would appreciate the opportunity to meet with staff of the Federal Reserve to discuss these matters directly. Accordingly, Intesa hereby requests such a meeting at a mutually agreeable time. Counsel for Intesa will be contacting Federal Reserve staff shortly in connection with this request. In the interim, if the Federal Reserve has any questions about any of the points discussed in these comments it should not hesitate to contact Robert E. Mannion of Arnold & Porter LLP, counsel to Intesa, at 202-942-5946.

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<sup>1</sup> Another potential source of confusion may arise in the present case where, as the Federal Reserve has recognized, Intesa is subject to comprehensive supervision and regulation by the banking authorities of one country (Italy), while Credit Agricole is subject to comprehensive supervision and regulation by the banking authorities of another (France). Reflecting both FBOs in a single FR Y-7 may create the possibility for conflicting legal standards where none would otherwise exist.