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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 17 January 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

No Cion doc.: C(2011) 9591 final

Subject: Commission delegated Regulation (EU) No .../.. of 21.12.2011 amending
Regulation (EC) No 809/2004 implementing Directive 2033/71/EC of the
European Parliament and of the Council as regards elements related to
prospectuses and advertisements

Delegations will find attached Commission document C(2011) 9591 final.

Encl.: C(2011) 9591 final



EUROPEAN COMMISSION

Brussels, 21.12.2011
C(2011) 9591 final

COMMISSION DELEGATED REGULATION (EU) No .../..

of 21.12.2011

amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards elements related to prospectuses and advertisements

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Prospectus¹ and Transparency² Directives provide that the financial information contained (1) in the prospectuses filed by third country issuers seeking to list their securities in the EU and (2) in the financial statements prepared by third country issuers whose securities are already listed in the EU, is to be prepared in accordance with International Financial Reporting Standards (IFRS) or any other standard which has been declared equivalent to IFRS.

In order to ensure that a determination of the equivalence of third country accounting standards is made in all cases that are relevant to EU markets, a mechanism³ to determine the equivalence of the Generally Accepted Accounting Principles (GAAP) from third countries was established in 2007. Accordingly, the Commission adopted a Decision⁴ and a Regulation⁵ which identified as equivalent to IFRS the US GAAP, the Japanese GAAP, and accepted financial statements using the GAAP of China, Canada, India, and South Korea within the EU on a temporary basis, until 31 December 2011.

The objective of this delegated act is to deal with the expiry of the transitional period for which the Commission granted equivalence to China, Canada, Korea and India under Commission Regulation (EC) 809/2004 implementing Directive 2003/71/EC of the European Parliament and the Council as regards elements related to prospectuses and advertisements.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the relevant EU legislation⁶ the European Commission has been updating the European Parliament (EP) at regular intervals on the progress made by the participating countries with their respective programmes to converge their GAAP with IFRS. The latest of this series of reports took the form of a staff working paper and was published in the end of

¹ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC; OJ L 345, 31.12.2003, p. 64.

² Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC; OJ L 390, 31.12.2004, p. 38.

³ Commission Regulation (EC) No 1569/2007 of 21 December 2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council (the "Equivalence Mechanism Regulation").

⁴ Commission Decision 2008/961/EC of 12 December 2008 on the use of third countries' issuers of securities of certain third country's national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements, OJ L 340, 19.12.2008, p. 112.

⁵ Commission Regulation (EC) No 1289/2008 of December 2008 amending Commission Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards elements related to prospectuses and advertisements, OJ L 340, 19.12.2008, p. 17.

⁶ Commission Regulation (EC) No 1787/2006 of 4 December 2006, and Commission Decision (EC) No 2006/891 of 4 December 2006 (the "Decision under the Transparency Directive").

July 2011⁷. In June 2010, the Commission services requested the then Committee of European Securities Regulators (CESR), now European Securities and Markets Authority (ESMA), to provide an update on developments towards IFRS in the countries that had received a transitional period by the EU: China, Canada, India, and South Korea. The abovementioned staff paper provided an update on the progress of these countries towards adoption of or convergence with IFRS accordingly. It took due account of the input provided by CESR in November 2010 and the updates on China and India, received from ESMA in April 2011 following an on-the-spot investigation which it undertook in January 2011.

In addition, the Commission undertook a thorough desk research and consulted all European Union Delegations in the countries concerned as to the accuracy and precision of the evaluation of the current situation in the accounting field. Various national authorities, such as for instance the Chinese Ministry of Finance, were also approached with the view to confirming the collected information on the progress of the countries towards IFRS and provided their views.

On the basis of all findings and input, the Commission services drafted three legal acts designed to update and prolong the equivalence mechanism and the related measures which expire at the end of 2011. During the process of drafting, the text has been brought to the attention of the Experts Group of the European Securities Committee and the consulted national experts did not express any objections or reservations.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Between the time Regulation (EC) No 1289/2008 amending Regulation (EC) 809/2004 was initially adopted and this amending act was drafted, the Treaty of Lisbon entered into force and brought a clear distinction between delegated and implementing acts (Articles 290 and 291 respectively). The Prospectus Directive has been amended to reflect this distinction. Consequently, the Article which serves as a legal basis for the determination of equivalence has also been amended and provide for the adoption of delegated acts. Therefore, the present amending Regulation takes the form of a delegated act.

This delegated Regulation amends Article 35 of Regulation (EC) 809/2004 in order to take due account of the changes in the situation in the respective countries concerned and to deal with the expiry of the transitional period granted to them. It is proposed to acknowledge the adoption of IFRS in Canada and South Korea, grant an equivalent status to China for an indeterminate period and extend the transitional equivalence status of India for a maximum period of three years in order to allow the latter to complete the adoption process they have started and become fully compliant with IFRS by the expiration of that period.

Any possible costs for the EU budget, including costs for ESMA, resulting from these provisions are already covered by the appropriations included in the official financing

⁷ Commission Staff Working Paper on the state of play on convergence between International Financial Reporting Standards (IFRS) and third country national Generally Accepted Accounting Principles (GAAP); SEC(2011) 991 final, 28.07.2011.

programming 2012-2013 and these envisaged in the new Multiannual Financial Framework (2014-2020).

COMMISSION DELEGATED REGULATION (EU) No .../..

of 21.12.2011

amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards elements related to prospectuses and advertisements

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC⁸, and in particular Article 7(1) thereof,

Whereas:

- (1) Commission Regulation (EC) No 809/2004⁹ requires third country issuers to prepare the historical financial information in prospectuses for offer of securities to the public or the admission of securities to trading on a regulated market in accordance with International Financial Reporting Standards (IFRS) or with the national accounting standards of a third country provided they are equivalent to these standards.
- (2) In order to assess the equivalence of the Generally Accepted Accounting Principles (GAAP) of a third country with adopted IFRS, Commission Regulation (EC) No 1569/2007¹⁰ provides for the definition of equivalence and establishes a mechanism for the determination of equivalence of the GAAP of a third country. According to the conditions of the equivalence mechanism third country issuers could be permitted to use the GAAP of third countries which were converging or committed to adopt IFRS for a transitional period ending on 31 December 2011. It is important to assess the efforts of those countries which have taken steps to converge their accounting standards to or adopt IFRS. Therefore, Regulation (EC) No 1569/2007 has been amended to extend this transitional period until 31 December 2014. The Commission took account of the report provided by the European Securities and Markets Authority (ESMA) in November 2010 on China, Canada, India, and South Korea, which had received a transitional period by Commission Decision 2008/961/EC of 12 December 2008 on the use by third countries' issuers of securities of certain third country's

⁸ OJ L 345, 31.12.2003, p. 64.

⁹ OJ L 149, 30.04.2004, p. 1.

¹⁰ OJ L 340, 22.12.2007, p. 66.

national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements¹¹ and Commission Regulation (EC) 1289/2008 of 12 December 2008 amending Commission Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards elements related to prospectuses and advertisements¹², as well as the updates on China and India from April 2011.

- (3) In April 2010 the Ministry of Finance of China issued a "Roadmap for Continuing Convergence of the Accounting Standards for Business Enterprises with IFRS" (ASBE) which reiterated China's commitment to continue the process of convergence to IFRS. As of October 2010 all current standards and interpretations issued by International Accounting Standards Board have been implemented in the ASBE. The level of convergence has been reported by ESMA as being satisfactory and the differences do not amount to non-compliance with IFRS. Therefore, it is appropriate to consider the Chinese ASBE equivalent to adopted IFRS as of 1 January 2012.
- (4) The Accounting Standards Board of Canada made a public commitment in January 2006 to adopt IFRS by 31 December 2011. It has approved the incorporation of IFRS into the Canadian Institute of Chartered Accountants Handbook as Canadian GAAP for all publicly accountable profit-oriented enterprises starting in 2011. Therefore, it is appropriate to consider the Canadian GAAP equivalent to adopted IFRS as of 1 January 2012.
- (5) The Korean Financial Supervisory Commission and the Korean Accounting Institute made a public commitment in March 2007 to adopt IFRS by 31 December 2011. The Korean Accounting Standards Board has adopted IFRS as Korean IFRS (K-IFRS). K-IFRS are identical to IFRS and are required for all listed companies in South Korea since 2011. Unlisted financial institutions and state-owned companies are also required to apply K-IFRS. Other unlisted companies may choose to do so. Therefore, it is appropriate to consider the GAAP of South Korea equivalent to adopted IFRS as of 1 January 2012.
- (6) The Indian Government and the Indian Institute of Chartered Accountants made a public commitment in July 2007 to adopt IFRS by 31 December 2011 with the aim that Indian GAAP would be fully IFRS compliant by the end of the programme. However, following an on-the-spot investigation in January 2011, ESMA observed that the Indian GAAP appear to have a number of differences from IFRS which could be significant in practice. Uncertainties remain about the timetable for the implementation of an IFRS-compliant reporting system. As there are no issuers in India who have taken advantage of the voluntary early application of IFRS, there is no experience regarding IFRS enforcement.
- (7) Accordingly, it is appropriate to extend the transitional period for no more than three years, until 31 December 2014, in order to allow third country issuers to prepare their annual and half-yearly financial statements in accordance with the GAAP of India in the Union.

¹¹ OJ L 340, 19.12.2008, p. 112.

¹² OJ L 340, 19.12.2008, p.17.

- (8) Since the transitional period for which equivalence was granted to the GAAP of China, Canada, South-Korea and India under Regulation (EC) No 809/2004 expired on 31 December 2011, this Regulation should apply from 1 January 2012. This is necessary in order to provide legal certainty to issuers from these third countries listed in the Union and avoid the risk that they might have to reconcile their financial statements with IFRS. The provision of retroactivity thus alleviates any potential additional burden on the issuers concerned.
- (9) Regulation (EC) No 809/2004 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Article 35 of Regulation (EC) No 809/2004 is amended as follows:

- (1) in paragraph 5, the second subparagraph is added:

"In addition to standards referred to in the first subparagraph, from 1 January 2012, third country issuers may present their historical financial information in accordance with the following standards:

- (a) Generally Accepted Accounting Principles of the People's Republic of China;
- (b) Generally Accepted Accounting Principles of Canada;
- (c) Generally Accepted Accounting Principles of the Republic of Korea."

- (2) paragraph 5a is replaced by the following:

"5a. Third country issuers are not subject to a requirement, under Annex I, item 20.1; Annex IV, item 13.1; Annex VII, item 8.2; Annex X, item 20.1 or Annex XI, item 11.1, to restate historical financial information, included in a prospectus and relevant for the financial years prior to financial years starting on or after 1 January 2015, or to a requirement under Annex VII, item 8.2.bis; Annex IX, item 11.1; or Annex X, item 20.1.bis, to provide a narrative description of the differences between International Financial Reporting Standards adopted pursuant to Regulation (EC) No 1606/2002 and the accounting principles in accordance with which such information is drawn up relating to the financial years prior to financial years starting on or after 1 January 2015, provided that the historical financial information is prepared in accordance with the Generally Accepted Accounting Principles of the Republic of India."

Article 2

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2012.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21.12.2011

For the Commission
The President
José Manuel BARROSO