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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

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Subject: Commission delegated Regulation (EU) No .../.. of 21.12.2011 amending
Regulation (EC) No 1569/2007 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

Delegations will find attached Commission document C(2011) 9585 final.

Encl.: C(2011) 9585 final



EUROPEAN COMMISSION

Brussels, 21.12.2011
C(2011) 9585 final

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

of 21.12.2011

amending Regulation (EC) No 1569/2007 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

(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 scope of this delegated act covers the update of the equivalence mechanism. The definition of equivalence is maintained. Prolonging the mechanism would give more time to countries which had committed to converge to or adopt IFRS and have made important progress towards that goal. It would also enable the Commission to pursue discussions with other third countries in order to encourage the use of IFRS throughout the global financial markets.

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 relevant countries with their respective programmes to converge their GAAP with IFRS. The latest 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").

this series of reports took the form of a staff working paper and was published in the end of 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. The rationale for the present delegated Regulation is to maintain in place the equivalence test, while supporting the efforts of countries which have decided to converge towards or adopt IFRS and while continuing to ensure that EU issuers are not subject to restatement obligations on major markets outside the EU.

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

This Commission delegated Regulation has a dual legal basis because the information required under Directive 2004/109/EC is closely connected to the information required under Directive 2003/71/EC. Thus, it is appropriate that the same criteria for determination of equivalence apply in the framework of both Directives.

Between the time Regulation (EC) No 1569/2007 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). Both the Prospectus and the Transparency Directives have been amended to reflect this distinction. Consequently, the Articles which serve as a legal basis for the determination of equivalence have 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 4 of Regulation (EC) No 1569/2007 in order to update and prolong in time the conditions for acceptance of third country accounting standards. The Commission has established that, apart from countries which have already

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.

received an equivalence status, some countries have recently adopted IFRS in their national systems and others are still working in that direction. It is proposed, therefore, to maintain the equivalence mechanism in order to allow third country issuers to use the GAAP of the participating countries when reporting in the EU.

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

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

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(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 the first subparagraph of Article 20(3) thereof,

Having regard to 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/EC⁹, and in particular the fourth subparagraph of Article 23(4) thereof,

Whereas:

- (1) Article 23(4) of Directive 2004/109/EC requires the Commission to set up a mechanism for the determination of the equivalence of the information required under this Directive. The Commission is required to adopt measures to establish general equivalence criteria regarding accounting standards relevant to issuers of more than one country. Article 23(4) of Directive 2004/109/EC also requires the Commission to take decisions in relation to the equivalence of accounting standards used by third country issuers, and enables the Commission to allow the use of third country accounting standards during an appropriate transitional period. Given the close interconnection of the information required under Directive 2004/109/EC with the information required under Directive 2003/71/EC, it is appropriate that the same criteria for determination of equivalence apply in the framework of both Directives.

⁸ OJ L 345, 31.12.2003, p. 64.

⁹ OJ L 390, 31.12.2004, p. 38.

- (2) Accordingly, Commission Regulation (EC) No 1569/2007¹⁰ laid down the conditions for acceptance of third country accounting standards for a limited period expiring on 31 December 2011.
- (3) The Commission evaluated the usefulness and functioning of the equivalence mechanism and concluded that it should be extended for a period of three years until 31 December 2014. Since the period for which the Commission had put in place conditions for granting equivalence to the Generally Accepted Accounting Principles (GAAP) of third countries 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 the relevant third countries listed in the Union and avoid the risk that they might have to reconcile their financial statements with International Financial Reporting Standards (IFRS). The provision of retroactivity thus alleviates any potential additional burden on the issuers concerned.
- (4) In order to ensure that a determination of the equivalence of third country accounting standards is made in all cases that are relevant to the Union markets, the Commission should assess the equivalence of third country accounting standards either upon a request from the competent authority of a Member State or an authority responsible for accounting standards or market supervision of a third country, or on its own initiative. The Commission should consult the European Securities and Markets Authority (ESMA) with regard to the technical aspects of the assessment of equivalence of the accounting standards in question. The Union issuers should also be permitted to use IFRS adopted pursuant to Regulation (EC) No 1606/2002¹¹ in the third country concerned.
- (5) Regulation (EC) No 1569/2007 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Article 4 of Regulation (EC) No 1569/2007 is replaced by the following:

"Article 4

**Conditions for the acceptance of third country accounting
standards for a limited period**

1. Third country issuers may be permitted to use financial statements drawn up in accordance with the accounting standards of a third country in order to comply with obligations under Directive 2004/109/EC and, by derogation from Article 35(5) of Regulation (EC) No 809/2004, to provide historical financial information under that Regulation for a period commencing any time after 31 December 2008 and expiring no later than 31 December 2014 in the following cases:

¹⁰ OJ L 340, 22.12.2007, p. 66.

¹¹ OJ L 243, 11.09.2002, p. 1.

- (a) the third country authority responsible for the national accounting standards concerned has made a public commitment to converge these standards with International Financial Reporting Standards at the latest by 31 December 2014 and both the following conditions are met:
 - (i) the third country authority responsible for the national accounting standards concerned has established a convergence programme that is comprehensive and capable of being completed before 31 December 2014;
 - (ii) the convergence programme is effectively implemented, without delay, and the resources necessary for its completion are allocated to its implementation;
 - (b) the third country authority responsible for the national accounting standards concerned has made a public commitment to adopt International Financial Reporting Standards before 31 December 2014 and effective measures are taken in the third country to secure their timely and complete implementation by that date.
2. Any decision under paragraph 1 to permit the continued acceptance of financial statements drawn up in accordance with the accounting standards of a third country shall be made in accordance with the procedure referred to in Article 24 of Directive 2003/71/EC and Article 27(2) of Directive 2004/109/EC.
 3. Where the Commission permits the continued acceptance of financial statements drawn up in accordance with the accounting standards of a third country in accordance with paragraph 1, it shall review regularly whether the conditions specified in point (a) or (b) (as the case may be) continue to be met, and shall report accordingly to the European Parliament.
 4. If the conditions in point (a) or (b) of paragraph 1 are no longer met, the Commission shall take a decision in accordance with the procedure referred to in Article 24 of Directive 2003/71/EC and Article 27(2) of Directive 2004/109/EC amending its decision under paragraph 1 in respect of these accounting standards.
 5. When complying with this Article, the Commission shall first consult ESMA on the convergence programme or the progress towards adoption of IFRS, as the case may be."

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