Commission Delegated Regulation (EU) No 759/2013 of 30 April 2013 amending Regulation (EC) No 809/2004 as regards the disclosure requirements for convertible and exchangeable debt securities (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 759/2013

of 30 April 2013

amending Regulation (EC) No 809/2004 as regards the disclosure requirements for convertible and exchangeable debt securities

(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/EC[(1)], and in particular Article 7(1) thereof,

Whereas:

(1) Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements[(2)] sets out the minimum information to be included in a prospectus for different kinds of securities in order to comply with Article 7(1) of Directive 2003/71/EC.

(2) The share registration document schedule should be applicable to shares and other transferable securities equivalent to shares but also to other securities giving access to the capital of the issuer by way of conversion or exchange where the underlying shares are not already admitted to trading on a regulated market.

(3) Where the issuer of the underlying shares belongs to the same group as the issuer of the convertible or exchangeable debt securities but the underlying shares are not admitted to trading on a regulated market, information on the issuer is not easily available to investors. Therefore, the share registration schedule should be applicable to those underlying shares and should be added to the combinations used for drawing up the prospectus.

(4) Where securities with warrants or derivative securities give the right to acquire the issuer's or group's shares and those shares are not admitted to trading on a regulated market, the relevant information set out in the securities note schedule for derivative securities should be provided to investors.

(5) Where debt securities are exchangeable or convertible into shares already admitted to trading on a regulated market, information on the underlying shares is already available to shareholders and investors in general. Therefore, it should be clarified that it is

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sufficient to add a statement setting out the type of the underlying and details of where information on the underlying can be obtained in the combinations used for drawing up the securities note of the prospectus.

(6) Where debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group and these underlying shares are not already admitted to trading on a regulated market, investors should also be provided with a working capital statement and a statement of capitalisation and indebtedness of the issuer of the underlying shares. Those statements would provide investors in the securities note with the same information on the ability of the issuer of the underlying shares to continue as a going concern and on its indebtedness compared to its capitalisation as would be available when investing in shares directly.

(7) Where the underlying shares are issued by a third party and are not admitted to trading on a regulated market the investors do not have easy access to a description of those underlying shares. Therefore, the additional building block describing the underlying share should be added to the combinations used for drawing up the securities note of the prospectus.

(8) For reasons of legal certainty it is necessary to clarify, in the table set out in Annex XVIII to Regulation (EC) No 809/2004, how schedules and building blocks should be combined when drawing up a prospectus, including where only certain information items of schedules and building blocks are required, where certain information items may not be applicable due to specific combinations of schedules and building blocks in particular cases, and where the issuer, offeror or person asking for admission to trading on a regulated market may choose between different schedules and building blocks according to specific thresholds, such as the minimum denomination of debt securities, or conditions set out in Regulation (EC) No 809/2004.

(9) The term ‘bonds’ should be replaced by the term ‘debt securities’ in order to ensure consistency of terminology within Regulation (EC) No 809/2004.

(10) The application of the pro forma financial information building block set out in Annex II to Regulation (EC) No 809/2004 is conditional upon a significant gross change in the size of the issuer, therefore the words ‘(if applicable)’ should be added to the heading of the column entitled ‘BUILDING BLOCK’ applicable to the registration document in Annex XVIII to that Regulation to reflect the conditional applicability of Annex II to that Regulation.

(11) Convertible or exchangeable debt securities can provide access to issuer’s new shares when the right to subscribe is exercised by their holders. Accordingly, rights issues of convertible or exchangeable debt securities into issuer’s new shares should also be able to benefit from the proportionate disclosure regime set out in Article 26a of Regulation (EC) No 809/2004 provided that the underlying shares are new shares issued by the same entity issuing debt securities. The prospectus for the offer or admission to trading on a regulated market of debt securities convertible or exchangeable into issuer’s shares issued by small and medium sized enterprises and companies with reduced market capitalisation should also benefit from the proportionate disclosure regime set out in Article 26b of Regulation (EC) No 809/2004. Accordingly, the combination of

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schedules and building blocks applicable to rights issues of debt securities convertible or exchangeable into issuer's shares or to convertible or exchangeable debt securities issued by small and medium sized enterprises and companies with reduced market capitalisation should be included in Annex XVIII.

(12) In consideration of the need to provide issuers with a transitional period to adapt to the new requirements introduced by this Regulation, this Regulation should only apply to prospectuses and base prospectuses which have been approved by a competent authority on the date of or after its entry into force.

(13) Regulation (EC) No 809/2004 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EC) No 809/2004

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

(1) in Article 6, the following paragraph 3 is added:

3. Where shares with warrants give the right to acquire the issuer's shares and these shares are not admitted to trading on a regulated market, the information required by the schedule set out in Annex XII except item 4.2.2 shall also be given.;

(2) in Article 8, the following paragraphs 3, 4 and 5 are added:

3. Where debt securities are exchangeable or convertible into shares already admitted to trading on a regulated market, the information required by item 4.2.2 of the schedule set out in Annex XII shall also be given.

4 Where debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the debt security or by an entity belonging to its group and these underlying shares are not already admitted to trading on a regulated market, information on the issuer of the underlying shares shall also be given in accordance with items 3.1 and 3.2 of the schedule set out in Annex III or, as the case may be, of the proportionate schedule set out in Annex XXIV.

5 Where debt securities with warrants give the right to acquire the issuer's shares and these shares are not admitted to trading on a regulated market, the information required by the schedule set out in Annex XII except item 4.2.2 shall also be given.;

(3) in Article 15, paragraph 2 is replaced by the following:

2. The schedule shall apply to securities which are not in the scope of application of the other securities note schedules referred to in Articles 6, 8 and 16, except for the cases mentioned in Article 6(3), Article 8(3) and (5) and Article 16(3) and (5). The schedule shall apply to certain securities where the payment and/or delivery obligations are linked to an underlying.;

(4) in Article 16 the following paragraphs 3, 4 and 5 are added:

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3. Where debt securities are exchangeable or convertible into shares already admitted to trading on a regulated market, the information required by item 4.2.2 of the schedule set out in Annex XII shall also be given.

4 Where debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the debt security or by an entity belonging to its group and these underlying shares are not already admitted to trading on a regulated market, information on the issuer of the underlying shares shall also be given in accordance with items 3.1 and 3.2 of the schedule set out in Annex III or, as the case may be, of the proportionate schedule set out in Annex XXIV.

5 Where debt securities with warrants give the right to acquire the issuer's shares and these shares are not admitted to trading on a regulated market, the information required by the schedule set out in Annex XII except item 4.2.2 shall also be given.;

(5) in Article 17(2), point 2 is replaced by the following:

2. provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security, by an entity belonging to the group of that issuer or by a third party and are not yet traded on a regulated market or an equivalent market outside the Union at the time of the approval of the prospectus covering the securities, and that the underlying shares or other transferable securities equivalent to shares can be delivered with physical settlement.;

(6) the title of Annex XIV is replaced by the following:
Additional information building block on the underlying share;

(7) Annex XVIII is replaced by the text in the Annex to this Regulation.

Article 2

Transitional provision

1 This Regulation shall not apply to the approval of a supplement to a prospectus or base prospectus where the prospectus or base prospectus was approved before the date referred to in Article 3.

2 Where in accordance with Article 18 of Directive 2003/71/EC the competent authority of the home Member State notifies the competent authority of the host Member State with a certificate of approval in relation to a prospectus or a base prospectus approved before the date referred to in Article 3, the competent authority of the home Member State shall clearly and explicitly indicate in the certificate that the prospectus or base prospectus was approved before the date referred to in Article 3.

Article 3

Entry into force

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

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

Done at Brussels, 30 April 2013.

For the Commission

The President

José Manuel BARROSO