Commission Delegated Regulation (EU) No 862/2012 of 4 June 2012 amending Regulation (EC) No 809/2004 as regards information on the consent to use of the prospectus, information on underlying indexes and the requirement for a report prepared by independent accountants or auditors (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 862/2012

of 4 June 2012

amending Regulation (EC) No 809/2004 as regards information on the consent to use of the prospectus, information on underlying indexes and the requirement for a report prepared by independent accountants or auditors

(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 5(5) and 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 5(5) and Article 7(1) of Directive 2003/71/EC.

(2) Directive 2003/71/EC was amended by Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market[(3)] in order to enhance investor protection, reduce administrative burdens for companies when raising capital in the securities markets in the Union and increase efficiency in the prospectus regime. Regulation (EC) No 809/2004 should therefore be amended regarding the consent of the issuer or the person responsible for drawing up the prospectus to the use of the prospectus by financial intermediaries and the information to be included in the prospectus relating to underlying indexes and profit forecasts and estimates.

(3) For the purposes of the third subparagraph of Article 3(2) of Directive 2003/71/EC, Regulation (EC) No 809/2004 should specify what information is to be provided where

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the issuer or the person responsible for drawing up the prospectus consents by means of a written agreement to its use by financial intermediaries.

(4) In order to take account of technical developments on financial markets, and notably the increase in the use of indexes as underlying of structured securities, certain requirements of Regulation (EC) No 809/2004 should be reviewed and clarified. By conferring the responsibility to compose the index on another entity of the group, issuers could circumvent the requirement to include in the prospectus a description of the index composed by the issuer (item 4.2.2 of Annex XII) and thus avoid liability where the description is inaccurate. Accordingly, that requirement should also be extended to indexes composed by an entity belonging to the same group as the issuer.

(5) With a view to increasing efficiency and reducing administrative burdens, this Regulation should also lay down conditions under which a description of the index within the prospectus is not required when the index is composed by entities acting in association with or on behalf of the issuer. Moreover, as item 2.10 of Annex XV only refers to broadly based and recognised published index, a statement in the prospectus specifying where the information about the index can be found should be sufficient without a description of the composition of the index being necessary.

(6) In order to reduce the administrative costs for issuers when raising capital, this Regulation should lay down conditions under which the report prepared by independent accountants or auditors accompanying profit forecasts and estimates is not required, notably where independent accountants or auditors are not able to sign the audit report because the complete set of documents constitutive of annual financial statements are not available to them.

(7) Directive 2010/73/EU replaced the term ‘key information’ by the term ‘essential information’ in a number of provisions of Directive 2003/71/EC. The Annexes to Regulation (EC) No 809/2004 should therefore be adapted.

(8) In order to avoid any further inconsistent application of Directive 2003/71/EC, in particular for the purposes of the third subparagraph of Article 3(2) thereof, and to avoid additional delays in ensuring enhanced investor protection and reduction of administrative burdens for companies when raising capital in the securities markets in the Union it is essential to provide for an entry into force on the day of its publication in the *Official Journal of the European Union*.

(9) 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) the second paragraph of Article 3 is replaced by the following:

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A prospectus shall contain the information items required in Annexes I to XVII and Annexes XX to XXX depending on the type of issuer or issues and securities involved. Subject to Article 4a(1), a competent authority shall not require that a prospectus contains information items which are not included in Annexes I to XVII or Annexes XX to XXX.;

(2) the following Article 20a is inserted:

Article 20a

Additional information building block for consent given in accordance with Article 3(2) of Directive 2003/71/EC

1 For the purposes of the third subparagraph of Article 3(2) of Directive 2003/71/EC, the prospectus shall contain the following:

a the additional information set out in Sections 1 and 2A of Annex XXX where the consent is given to one or more specified financial intermediaries;

b the additional information set out in Sections 1 and 2B of Annex XXX where the issuer or the person responsible for drawing up the prospectus chooses to give its consent to all financial intermediaries.

2 Where a financial intermediary does not comply with the conditions attached to consent as disclosed in the prospectus, a new prospectus shall be required in accordance with the second paragraph of Article 3(2) of Directive 2003/71/EC.;

(3) the second subparagraph of Article 22(1) is replaced by the following:

A base prospectus shall contain the information items required in Annexes I to XVII, Annex XX and Annexes XXIII to XXX depending on the type of issuer and securities involved. Competent authorities shall not require that a base prospectus contains information items which are not included in Annexes I to XVII, Annex XX or Annexes XXIII to XXX.;

(4) the Annexes are amended in accordance with 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.

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Article 3

Entry into force

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

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

Done at Brussels, 4 June 2012.

For the Commission

The President

José Manuel BARROSO

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ANNEX

The Annexes to Regulation (EC) No 809/2004 are amended as follows:

(1) in Annex I, item 13.2 is replaced by the following:

13.2. A report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated, and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer.

Where financial information relates to the previous financial year and only contains non-misleading figures substantially consistent with the final figures to be published in the next annual audited financial statements for the previous financial year, and the explanatory information necessary to assess the figures, a report shall not be required provided that the prospectus includes all of the following statements:

(a) the person responsible for this financial information, if different from the one which is responsible for the prospectus in general, approves that information;

(b) independent accountants or auditors have agreed that this information is substantially consistent with the final figures to be published in the next annual audited financial statements;

(c) this financial information has not been audited.;

(2) in Annex III, the heading of Section 3 is replaced by the following:

3. **ESSENTIAL INFORMATION;**

(3) in Annex IV, item 9.2 is replaced by the following:

9.2. A report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated, and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer.

Where financial information relates to the previous financial year and only contains non-misleading figures substantially consistent with the final figures to be published in the next annual audited financial statements for the previous financial year, and the explanatory information necessary to assess the figures, a report shall not be required provided that the prospectus includes all of the following statements:

(a) the person responsible for this financial information, if different from the one which is responsible for the prospectus in general, approves that information;

(b) independent accountants or auditors have agreed that this information is substantially consistent with the final figures to be published in the next annual audited financial statements;

(c) this financial information has not been audited.;

(4) in Annex V, the heading of Section 3 is replaced by the following:

3. **ESSENTIAL INFORMATION;**

(5) Annex X is amended as follows:

(a) item 13.2 is replaced by the following: