Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 486/2012

of 30 March 2012

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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/EC[(1)], and in particular Articles 5(5) and 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 in detail information which must be included in a prospectus for different kinds of securities in order to comply with Article 5(1) of Directive 2003/71/EC.

(2) As a consequence of 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[(3)], the requirement for the issuer to provide annually a document containing or referring to all information published in the 12 months preceding the issuance of the prospectus as laid down in Article 10 of Directive 2003/71/EC was deleted 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[(4)]. This amendment should be reflected in Regulation (EC) No 809/2004.

(3) The threshold relating to the obligation to publish a prospectus established by Article 3 of Directive 2003/71/EC was increased from EUR 50 000 to EUR 100 000 by Directive 2010/73/EU. This change should also be introduced in Regulation (EC) No 809/2004.

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(4) Directive 2010/73/EU introduced new provisions 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, which makes it necessary to adopt amendments to Regulation (EC) No 809/2004 in relation to the format of the final terms of a base prospectus, the format of the summary of the prospectus, and the detailed content and specific form of the key information to be included in the summary.

(5) In order to avoid that the final terms of a base prospectus contain information that needs to be approved by the competent authorities, the base prospectus should contain all information which the issuer knew at the time of drawing up the prospectus.

(6) It should be provided that the base prospectus may contain options in relation to all information required for the relevant securities note schedules and building blocks. Final terms should then state which of those options are applicable to the individual issue by referring to the relevant sections of the base prospectus or by reproducing such information. It should be allowed to include certain additional information which does not relate to the securities note in the final terms, if it is considered useful for the investors. That additional information should be specified in this Regulation.

(7) The final terms should not amend or replace any information contained in the base prospectus as any new information which may affect the investor's assessment of the issuer and of the securities is to be included in a supplement or a new base prospectus, which is subject to prior approval by the competent authority. Accordingly, the final terms should not include any new description of any new payment conditions which was not included in the base prospectus.

(8) The summary should provide the investors with key information as required by Article 5(2) of Directive 2003/71/EC. For that purpose, the summary specific to the individual issue should combine that information in the summary of the base prospectus which is only relevant to the individual issue with the relevant parts of the final terms. The summary of the individual issue should be annexed to the final terms.

(9) For securities linked to or backed by an underlying asset, the base prospectus should disclose all information about the type of underlying asset already known at the date of its approval. Therefore, only issue specific details in relation to this underlying asset should be included in the final terms as the choice of the relevant underlying asset may be influenced by market conditions.

(10) Provisions on the format and the content of the summary of the prospectus should be laid down so that equivalent information appears in the same position in the summaries and that similar products can be easily compared. Accordingly, where an element is not applicable to a prospectus, that element should appear in the summary with the mention 'not applicable'.

(11) A summary should be a self-contained part of the prospectus. Where an issuer, an offeror or a person asking for admission to trading on a regulated market is not under an obligation to include a summary in a prospectus but wishes to produce an overview section in the prospectus, this section should not be entitled 'Summary' unless

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the overview section complies with all the disclosure requirements for summaries. Summaries should be drafted in plain language, presenting the information in an easily accessible way.

(12) In order to improve the efficiency of the Union's securities markets and reduce the administrative costs for issuers when raising capital, a proportionate disclosure regime, as required by Article 7(2)(g) of Directive 2003/71/EC, should be introduced for offers of shares to existing shareholders who can either subscribe the shares or sell the right to subscribe the shares.

(13) As required by Article 7(2)(e) of Directive 2003/71/EC, a proportionate disclosure regime should adequately take into account the size of issuers, in particular credit institutions issuing non-equity securities referred to in Article 1(2)(j) of Directive 2003/71/EC, which chose to opt into the regime of Directive 2003/71/EC, small and medium-sized enterprises and companies with reduced market capitalisation. However, such issuers should be allowed to choose between schedules with proportionate requirements and the full disclosure regime.

(14) The proportionate disclosure regimes should take into account the need to improve investor protection and the amount of information already disclosed to the markets.

(15) Advertisements should inform investors when no prospectus is required in accordance with Directive 2003/71/EC unless the issuer, the offeror or the person asking for admission to trading on a regulated market chooses to publish a prospectus that complies with the requirements of Directive 2003/71/EC and this Regulation.

(16) 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.

(17) 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 1, point 3 is deleted;

(2) in Article 2, the following point 13 is added:

13. "Rights issue", means any issue of statutory pre-emption rights which allow for the subscription of new shares and is addressed only to existing shareholders. Rights issue also includes an issue where such statutory pre-emption rights are disabled and replaced by an instrument or a provision conferring near identical rights to existing shareholders when those rights meet the following conditions:

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(a) shareholders are offered the rights free of charge;

(b) shareholders are entitled to take up new shares in proportion to their existing holdings, or, in the case of other securities giving a right to participate in the share issue, in proportion to their entitlements to the underlying shares;

(c) the rights to subscribe are negotiable and transferable or, if not, the shares arising from the rights are sold at the end of the offer period for the benefit of those shareholders who did not take up those entitlements;

(d) the issuer is able, as regards the entitlements referred to in point (b), to impose limits or restrictions or exclusions and make arrangements it considers appropriate to deal with treasury shares, fractional entitlements and requirements laid down by law or by a regulatory authority in any country or territory;

(e) the minimum period during which shares may be taken up is the same as the period for the exercise of statutory pre-emption rights laid down in Article 29(3) of Council Directive 77/91/EEC[(5)];

(f) the rights lapse at the expiration of the exercise period.;

(3) in Chapter I, the following Article 2a is added:

Article 2a

Categories of information in the base prospectus and the final terms

1 The categories set out in Annex XX shall determine the degree of flexibility by which the information can be given in the base prospectus or the final terms. The categories shall be defined as follows:

a "Category A" means the relevant information which shall be included in the base prospectus. This information cannot be left in blank for later insertion in the final terms;

b "Category B" means that the base prospectus shall include all the general principles related to the information required, and only the details which are unknown at the time of the approval of the base prospectus can be left in blank for later insertion in the final terms;

c "Category C" means that the base prospectus may contain a reserved space for later insertion for the information which was not known at the time of the approval of the base prospectus. Such information shall be inserted in the final terms.

2 Where the conditions of Article 16(1) of Directive 2003/71/EC apply, a supplement shall be required.

Where those conditions do not apply, the issuer, the offeror or the person asking for admission to trading on a regulated market shall publish a notice of the change.;

(4) Article 3 is replaced by the following:

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Article 3

Minimum information to be included in a prospectus

A prospectus shall be drawn up by using one or a combination of the schedules and building blocks set out in this Regulation.

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

In order to ensure conformity with the obligation referred to in Article 5(1) of Directive 2003/71/EC, the competent authority of the home Member State, when approving a prospectus in accordance with Article 13 of that Directive, may, on a case-by-case basis, require the information provided by the issuer, the offeror or the person asking for admission to trading on a regulated market to be completed, for each of the information items.

Where the issuer, the offeror or the person asking for the admission to trading on a regulated market is required to include a summary in a prospectus, in accordance with Article 5(2) of Directive 2003/71/EC, the competent authority of the home Member State, when approving the prospectus in accordance with Article 13 of that Directive, may, on a case-by-case basis, require certain information provided in the prospectus, to be included in the summary.;

(5) Article 4a is amended as follows:

(a) in paragraph 2, the introductory phrase of the first subparagraph is replaced by the following:

> The competent authority shall base any request pursuant to the first subparagraph of paragraph 1 on the requirements set out in item 20.1 of Annex I, item 15.1 of Annex XXIII, item 20.1 of Annex XXV, item 11.1 of Annex XXVII and item 20.1 of Annex XXVIII as regards the content of financial information and the applicable accounting and auditing principles, subject to any modification which is appropriate in view of any of the following factors:;

(b) in paragraph 4, point (a) is replaced by the following:

> (a) its entire business undertaking at the time that the prospectus is drawn up is not accurately represented in the historical financial information which it is required to provide under item 20.1 of Annex I, item 15.1 of Annex XXIII, item 20.1 of Annex XXV, item 11.1 of Annex XXVII and item 20.1 of Annex XXVIII;;

(c) paragraph 6 is replaced by the following:

> 6. For the purposes of paragraph 5 of this Article, and of item 20.2 of Annex I, item 15.2 of Annex XXIII and item 20.2 of Annex XXV, a significant gross change means a variation of more than 25 %, relative to one or more indicators of the size of the issuer's business, in the situation of an issuer.;