Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies (Text with EEA relevance)

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) The final report, published on 25 February 2009, of a High-Level group of experts chaired by Jacques de Larosière under a mandate of the Commission concluded that the supervisory framework of the financial sector within the European Union needed to be strengthened to reduce the risk and severity of future financial crises. It recommended far-reaching reforms to the supervisory structure. The group of experts also concluded that a European System of Financial Supervisors (ESFS) should be created, comprising three European Supervisory Authorities – one for the banking sector, one for the insurance and occupational pensions sector and one for the securities and markets sector – and recommended the creation of a European Systemic Risk Council.

(2) In its Communication of 4 March 2009 entitled ‘Driving European Recovery’, the Commission proposed to put forward draft legislation creating the ESFS, and in its Communication of 27 May 2009 entitled ‘European Financial Supervision’, it provided more detail about the possible architecture of such a new supervisory framework, highlighting the specificity of the supervision of credit rating agencies.

(3) The European Council, in its conclusions of 19 June 2009, recommended that the ESFS, consisting of a network of national financial supervisors working in tandem with three new European Supervisory Authorities, be established. The ESFS should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight

of cross-border groups through the setting up of supervisory colleges and establishing a European single rule book applicable to all financial market participants in the internal market. The European Council stressed that a European securities and markets authority should have supervisory powers over credit rating agencies. Further, the Commission should retain its competence to enforce the Treaties, in particular Chapter I of Title VII of the Treaty on the Functioning of the European Union (TFEU) regarding the common rules on competition in accordance with the provisions adopted for the implementation of those rules.

(4) Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(4)] established the European Supervisory Authority (European Securities and Markets Authority) (ESMA).

(5) The scope of competence of ESMA should be clearly defined so that financial market participants can identify the authority competent in the field of activity of credit rating agencies. ESMA should be given general competence under Regulation (EC) No 1060/2009 of the European Parliament and of the Council[(5)] regarding matters relating to the registration and ongoing supervision of registered credit rating agencies.

(6) ESMA should be exclusively responsible for the registration and supervision of credit rating agencies in the Union. Where ESMA delegates specific tasks to competent authorities, ESMA should continue to be legally responsible. The heads and other staff of competent authorities should be involved in the decision-making process within ESMA in accordance with Regulation (EU) No 1095/2010, acting as members of ESMA bodies, such as its board of supervisors or its internal panels. ESMA should have the exclusive power to conclude cooperation agreements on information exchange with the supervisory authorities of third countries. To the extent that competent authorities participate in the decision-making process within ESMA or when executing tasks on behalf of ESMA, they should be covered by those cooperation agreements.

(7) Transparency of information given by the issuer of a rated financial instrument to the appointed credit rating agency could have much potential added value for the functioning of the market and investor protection. Consideration should therefore be given on how best to extend the transparency of information underlying the ratings of all financial instruments. First, disclosing that information to other registered or certified credit rating agencies is likely to reinforce the competition between credit rating agencies, because it could lead, in particular, to an increase in the number of unsolicited ratings. The issuing of such unsolicited ratings should promote the use of more than one rating per financial instrument. This is also likely to help avoid possible conflicts of interest, especially under the issuer-pays model, and should enhance the quality of the ratings. Second, disclosing that information to the whole market could also increase the ability of investors to develop their own risk analyses by basing their due diligence on that additional information. Such disclosure could also lead to decreasing reliance on credit ratings issued by credit rating agencies. In order to achieve those fundamental objectives, the Commission should assess those issues in greater depth by giving further consideration to the appropriate scope of the disclosure obligation, having regard to the impact on local securitisation markets, further dialogue

with interested parties, the monitoring of market and regulatory developments, and experience gained by other jurisdictions. In the light of that assessment, the Commission should put forward appropriate legislative proposals. The Commission's assessment and proposals should allow the definition of new transparency obligations in the manner most appropriate to meet the public interest, and most consistent with the protection of investors.

(8) As credit ratings are used throughout the Union, the traditional distinction between the home competent authority and the other competent authorities and the use of supervisory coordination by colleges are not the most appropriate structure for supervising credit rating agencies. Following the establishment of ESMA, it is no longer necessary to maintain such a structure. The registration process should therefore be streamlined and the time limits should be reduced accordingly.

(9) ESMA should be responsible for the registration and ongoing supervision of credit rating agencies, but not for the oversight of the users of credit ratings. Competent authorities designated under the relevant sectoral legislation for the supervision of credit institutions, investment firms, insurance undertakings, assurance undertakings, reinsurance undertakings, undertakings for collective investment in transferable securities (UCITS), institutions for occupational retirement provision and alternative investment funds should therefore remain responsible for the supervision of the use of credit ratings by those financial institutions and entities which are supervised at national level in the context and for the purpose of the application of other financial services directives, and of the use of credit ratings in prospectuses.

(10) There is a need for an effective instrument to establish harmonised regulatory technical standards to facilitate the application of Regulation (EC) No 1060/2009 in day-to-day practice and to ensure a level playing field and the adequate protection of investors and consumers across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust ESMA with the development of draft regulatory technical standards.

(11) In the field of credit rating agencies, ESMA should submit to the Commission draft regulatory technical standards concerning the information to be provided by a credit rating agency in its application for registration, the information that a credit rating agency must provide for the application for certification and for an assessment of its systemic importance to the financial stability or integrity of financial markets, the presentation of the information, including structure, format, method and period of reporting, that a credit rating agency must disclose, concerning the assessment of compliance of credit rating methodologies with the requirements set out in Regulation (EC) No 1060/2009, and the content and format of ratings data periodic reporting to be requested from a credit rating agency for the purpose of ongoing supervision by ESMA. In accordance with Regulation (EU) No 1095/2010, those draft regulatory technical standards should be endorsed by the Commission to give them binding legal effect. In developing its draft regulatory technical standards, ESMA should consider and, if appropriate and necessary, update the guidelines already issued by the

Committee of European Securities Regulators regarding the content of Regulation (EC) No 1060/2009.

(12) In areas not covered by regulatory technical standards, ESMA should have the power to issue and update non-binding guidelines on issues related to the application of Regulation (EC) No 1060/2009.

(13) In order to carry out its duties effectively, ESMA should be able to require, by simple request or by decision, all necessary information from credit rating agencies, persons involved in credit rating activities, rated entities and related third parties, third parties to whom the credit rating agencies have outsourced operational functions and persons otherwise closely and substantially related or connected to credit rating agencies or credit rating activities. The latter group of persons should cover, for instance, the staff of a credit rating agency who are not directly involved in rating activities but who, due to their function within the credit rating agency, may hold important information on a specific case. Firms which have provided services to the credit rating agency may also fall into that category. Undertakings using the credit ratings should not fall into that category. If ESMA requires such information by simple request, the addressee is not obliged to provide the information but, in the event that it does so voluntarily, the information provided should not be incorrect or misleading. Such information should be made available without delay.

(14) In order to exercise its supervisory powers effectively, ESMA should be able to conduct investigations and on-site inspections.

(15) The competent authorities should communicate any information required pursuant to Regulation (EC) No 1060/2009 and assist and cooperate with ESMA. ESMA and the competent authorities should also cooperate closely with the sectoral competent authorities responsible for supervision of the undertakings referred to in Article 4(1) of Regulation (EC) No 1060/2009. ESMA should be able to delegate specific supervisory tasks to the competent authority of a Member State, for instance where a supervisory task requires knowledge and experience with respect to local conditions, which are more easily available at national level. The kind of tasks that it should be possible to delegate include the carrying out of specific investigatory tasks and on-site inspections. Prior to the delegation of tasks, ESMA should consult the relevant competent authority about the detailed conditions relating to such delegation of tasks, including the scope of the task to be delegated, the timetable for the performance of the task, and the transmission of necessary information by and to ESMA. ESMA should compensate the competent authorities for carrying out a delegated task in accordance with a regulation on fees to be adopted by the Commission by means of a delegated act. ESMA should not be able to delegate the power to adopt decisions on registration.

(16) It is necessary to ensure that competent authorities are able to request that ESMA examine whether the conditions for withdrawal of a credit rating agency's registration are met and to request that ESMA suspend the use of ratings where a credit rating agency is considered to be in a serious and persistent breach of Regulation (EC) No 1060/2009. ESMA should assess such requests and take any appropriate measures.

(17) ESMA should be able to impose periodic penalty payments to compel credit rating agencies to put an end to an infringement, to supply complete information required by ESMA or to submit to an investigation or on-site inspection.

(18) ESMA should also be able to impose fines on credit rating agencies, where it finds that they have committed, intentionally or negligently, an infringement of Regulation (EC) No 1060/2009. Fines should be imposed according to the level of seriousness of the infringements. The infringements should be divided into different groups for which specific fines should be allocated. In order to calculate the fine related to a specific infringement, ESMA should use a two-step methodology consisting of setting a basic amount and adjusting that basic amount, if necessary, by certain coefficients. The basic amount should be established by taking into account the annual turnover of the credit rating agency concerned and the adjustments should be made by increasing or decreasing the basic amount through the application of the relevant coefficients in accordance with this Regulation.

(19) This Regulation establishes coefficients linked to aggravating and mitigating circumstances in order to give the necessary tools to ESMA to decide on a fine which is proportionate to the seriousness of an infringement committed by a credit rating agency, taking into account the circumstances under which that infringement was committed.

(20) Before taking a decision to impose fines or periodic penalty payments, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence.

(21) Member States should remain competent to lay down and implement the rules on penalties applicable to the infringement of the obligation on financial institutions and other entities to use, for regulatory purposes, only credit ratings issued by credit rating agencies registered in accordance with Regulation (EC) No 1060/2009.

(22) This Regulation should not create a precedent for the imposition of financial or non-financial penalties by European Supervisory Authorities on financial market participants or other undertakings in relation to other types of activity.

(23) ESMA should refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of res judicata as the result of criminal proceedings under national law.

(24) ESMA decisions imposing fines and periodic penalty payments should be enforceable and their enforcement should be governed by the rules of civil procedure which are in force in the State in the territory of which it is carried out. Rules of civil procedure should not include criminal procedural rules but it should be possible that they include administrative procedural rules.

(25) In the case of an infringement committed by a credit rating agency, ESMA should be empowered to take a range of supervisory measures, including, but not limited to, requiring the credit rating agency to bring the infringement to an end, suspending the use of credit ratings for regulatory purposes, temporarily prohibiting the credit rating