Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 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 establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the European Central Bank[(2)],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(3)],

Whereas:

(1) Credit rating agencies play an important role in global securities and banking markets, as their credit ratings are used by investors, borrowers, issuers and governments as part of making informed investment and financing decisions. Credit institutions, investment firms, insurance undertakings, assurance undertakings, reinsurance undertakings, undertakings for collective investment in transferable securities (UCITS) and institutions for occupational retirement provision may use those credit ratings as the reference for the calculation of their capital requirements for solvency purposes or for calculating risks in their investment activity. Consequently, credit ratings have a significant impact on the operation of the markets and on the trust and confidence of investors and consumers. It is essential, therefore, that credit rating activities are conducted in accordance with the principles of integrity, transparency, responsibility and good governance in order to ensure that resulting credit ratings used in the Community are independent, objective and of adequate quality.

(2) Currently, most credit rating agencies have their headquarters outside the Community. Most Member States do not regulate the activities of credit rating agencies or the conditions for the issuing of credit ratings. Despite their significant importance for the functioning of the financial markets, credit rating agencies are subject to Community law only in limited areas, notably under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation[(4)]. Moreover, Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business

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of credit institutions[5] and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions[6] refer to credit rating agencies. It is therefore important to lay down rules ensuring that all credit ratings issued by the credit rating agencies registered in the Community are of adequate quality and issued by credit rating agencies subject to stringent requirements. The Commission will continue to work with its international partners to ensure convergence of the rules applying to credit rating agencies. It should be possible to exempt certain central banks issuing credit ratings from this Regulation provided that they fulfil the relevant applicable conditions which ensure the independence and integrity of their credit rating activities and which are as stringent as the requirements provided for in this Regulation.

(3) This Regulation should not create a general obligation for financial instruments or financial obligations to be rated under this Regulation. In particular, it should not require undertakings for collective investment in transferable securities (UCITS) as defined in Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[7] or institutions for occupational retirement provision as defined in Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision[8] to invest only in financial instruments which are rated under this Regulation.

(4) This Regulation should not create a general obligation for financial institutions or investors to invest only in securities for which a prospectus has been published in accordance with 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[9] and Commission Regulation (EC) No 809/2004/EC of 29 April 2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements[10] and which are rated under this Regulation. In addition, this Regulation should not require the issuers or offerors or persons asking for admission to trading on a regulated market to obtain credit ratings for securities which are subject to the requirement to publish a prospectus under Directive 2003/71/EC and Regulation (EC) No 809/2004.

(5) A prospectus published under Directive 2003/71/EC and Regulation (EC) No 809/2004 should contain clear and prominent information on whether or not the credit rating of the respective securities is issued by a credit rating agency established in the Community and registered under this Regulation. However, nothing in this Regulation should prevent persons responsible for publishing a prospectus under Directive 2003/71/EC and Regulation (EC) No 809/2004 from including any material information in the prospectus, including credit ratings issued in third countries and related information.

(6) In addition to issuing credit ratings and performing credit rating activities, credit rating agencies should also be able to perform ancillary activities on a professional basis. The

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performance of ancillary activities should not compromise the independence or integrity of credit rating agencies' credit rating activities.

(7) This Regulation should apply to credit ratings issued by credit rating agencies registered in the Community. The principal aim of this Regulation is to protect the stability of financial markets and investors. Credit scores, credit scoring systems and similar assessments related to obligations arising from consumer, commercial or industrial relationships should not fall within the scope of this Regulation.

(8) Credit rating agencies should, on a voluntary basis, apply the Code of Conduct Fundamentals for credit rating agencies issued by the International Organisation of Securities Commissions (IOSCO Code). In 2006, a Communication from the Commission on credit rating agencies[(11)] invited the Committee of European Securities Regulators (CESR), re-established by Commission Decision 2009/77/EC[(12)], to monitor compliance with the IOSCO Code and report back to the Commission on an annual basis.

(9) The European Council of 13 and 14 March 2008 agreed to a set of conclusions to respond to the main weaknesses identified in the financial system. One of the objectives was to improve market functioning and incentive structures, including the role of credit rating agencies.

(10) Credit rating agencies are considered to have failed, first, to reflect early enough in their credit ratings the worsening market conditions, and second, to adjust their credit ratings in time following the deepening market crisis. The most appropriate manner in which to correct those failures is by measures relating to conflicts of interest, the quality of the credit ratings, the transparency and internal governance of the credit rating agencies, and the surveillance of the activities of the credit rating agencies. The users of credit ratings should not rely blindly on credit ratings but should take utmost care to perform own analysis and conduct appropriate due diligence at all times regarding their reliance on such credit ratings.

(11) It is necessary to lay down a common framework of rules regarding the enhancement of the quality of credit ratings, in particular the quality of credit ratings to be used by financial institutions and persons regulated by harmonised rules in the Community. In the absence of such a common framework, there is a risk that Member States take diverging measures at national level having a direct negative impact on, and creating obstacles to, the good functioning of the internal market, since the credit rating agencies issuing credit ratings for the use of financial institutions in the Community would be subject to different rules in different Member States. Moreover, diverging quality requirements as regards credit ratings could lead to different levels of investor and consumer protection. Users should, furthermore, be able to compare credit ratings issued in the Community with credit ratings issued internationally.

(12) This Regulation should not affect the use made of credit ratings by persons other than those referred to in this Regulation.

(13) It is desirable to provide for the use of credit ratings issued in third countries for regulatory purposes in the Community provided that they comply with requirements

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which are as stringent as the requirements provided for in this Regulation. This Regulation introduces an endorsement regime allowing credit rating agencies established in the Community and registered in accordance with its provisions to endorse credit ratings issued in third countries. When endorsing a credit rating issued in a third country, credit rating agencies should determine and monitor, on an ongoing basis, whether credit rating activities resulting in the issuing of such a credit rating comply with requirements for the issuing of credit ratings which are as stringent as those provided for in this Regulation, achieving the same objective and effects in practice.

(14) In order to respond to concerns that lack of establishment in the Community may be a serious impediment to effective supervision in the best interests of the financial markets in the Community, such an endorsement regime should be introduced for credit rating agencies that are affiliated or work closely with credit rating agencies established in the Community. Nevertheless, it may be necessary to adjust the requirement of physical presence in the Community in certain cases, notably as regards smaller credit rating agencies from third countries with no presence or affiliation in the Community. A specific regime of certification for such credit rating agencies should therefore be established, in so far as they are not systemically important for the financial stability or integrity of the financial markets of one or more Member States.

(15) Certification should be possible after determination by the Commission of the equivalence of the legal and supervisory framework of a third country to the requirements of this Regulation. The equivalence mechanism envisaged should not grant automatic access to the Community but should offer the possibility for qualifying credit rating agencies from a third country to be assessed on a case-by-case basis and be granted an exemption from some of the organisational requirements for credit rating agencies active in the Community, including the requirement of physical presence in the Community.

(16) This Regulation should also require a third-country credit rating agency to meet criteria which are general prerequisites for the integrity of its credit rating activities in order to prevent interference with the content of credit ratings by the competent authorities and other public authorities of that third country, and to provide for an adequate conflict of interests policy, rotation of rating analysts and periodic and ongoing disclosure.

(17) Another important prerequisite for a sound endorsement regime and an equivalence system is the existence of sound cooperation arrangements between competent authorities of home Member States and the relevant competent authorities of third-country credit rating agencies.

(18) A credit rating agency that has endorsed credit ratings issued in a third country should be fully and unconditionally responsible for such endorsed credit ratings and for the fulfilment of the relevant conditions referred to in this Regulation.

(19) This Regulation should not apply to credit ratings that a credit rating agency produces pursuant to an individual order and provides exclusively to the person who ordered it and which are not intended for public disclosure or distribution by subscription.

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(20) Investment research, investment recommendations and other opinions about a value or a price for a financial instrument or a financial obligation should not be considered to be credit ratings.

(21) An unsolicited credit rating, namely a credit rating not initiated at the request of the issuer or rated entity, should be clearly identified as such and should be distinguished from solicited credit ratings by appropriate means.

(22) In order to avoid potential conflicts of interest, credit rating agencies focus in their professional activity on the issuing of credit ratings. A credit rating agency should not be allowed to carry out consultancy or advisory services. In particular, a credit rating agency should not make proposals or recommendations regarding the design of a structured finance instrument. However, credit rating agencies should be able to provide ancillary services where this does not create potential conflicts of interest with the issuing of credit ratings.

(23) Credit rating agencies should use rating methodologies that are rigorous, systematic, continuous and subject to validation including by appropriate historical experience and back-testing. Such a requirement should not, however, provide grounds for interference with the content of credit ratings and methodologies by the competent authorities and the Member States. Similarly, the requirement that credit rating agencies review credit ratings at least annually should not compromise the obligation on credit rating agencies to monitor credit ratings on a continuous basis and review credit ratings as necessary. Those requirements should not be applied in such a way as to prevent new credit rating agencies from entering the market.

(24) Credit ratings should be well-founded and solidly substantiated, in order to avoid rating compromises.

(25) Credit rating agencies should disclose information to the public on the methodologies, models and key rating assumptions which they use in their credit rating activities. The level of detail concerning the disclosure of information concerning models should be such as to give adequate information to the users of credit ratings in order to perform their own due diligence when assessing whether to rely or not on those credit ratings. Disclosure of information concerning models should not, however, reveal sensitive business information or seriously impede innovation.

(26) Credit rating agencies should establish appropriate internal policies and procedures in relation to employees and other persons involved in the credit rating process in order to prevent, identify, eliminate or manage and disclose any conflicts of interest and ensure at all times the quality, integrity and thoroughness of the credit rating and review process. Such policies and procedures should, in particular, include the internal control mechanisms and compliance function.

(27) Credit rating agencies should avoid situations of conflict of interest and manage those conflicts adequately when they are unavoidable in order to ensure their independence. Credit rating agencies should disclose conflicts of interest in a timely manner. They should also keep records of all significant threats to the independence of the credit rating