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Draft

## COMMISSION REGULATION

of [...]

**amending Commission Regulation (EC) 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**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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<sup>1</sup>, and in particular Article 7(1) thereof,

Whereas:

- (1) Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards<sup>2</sup> requires companies governed by the law of a Member State, whose securities are admitted to trading on a regulated market of any Member State, to prepare their consolidated accounts in accordance with adopted international accounting standards, now commonly referred to as International Financial Reporting Standards ("IFRS"), for each financial year starting on or after 1 January 2005.
- (2) 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<sup>3</sup> requires that the historical financial information provided by third country issuers in prospectuses for offer of securities to the public or the admission of securities to trading on a regulated market be prepared in accordance with IFRS adopted pursuant to Article 3 of Regulation (EC) No 1606/2002 or with the national accounting standards of a third country equivalent to these standards. If historical financial information was not drawn up in accordance with such standards it must be presented in the prospectus in the form of restated financial statements.
- (3) However, Article 35 of Commission Regulation (EC) No 809/2004 contains transitional provisions which, in certain limited cases, exempt third country issuers

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<sup>1</sup> OJ L 345, 31.12.2003, p. 64.

<sup>2</sup> OJ L 243, 11.9.2002, p. 1.

<sup>3</sup> OJ L 149, 30.4.2004, p. 1; corrected version in OJ L 215, 16.6.2004, p. 3.

from the obligation to restate historical financial information which was not drawn up in accordance with either IFRS or accounting standards of a third country equivalent to IFRS. Under those transitional provisions, the obligation to restate historical financial information does not apply to any prospectus filed before 1 January 2007 by a third country issuer which has either prepared its historical financial information in accordance with internationally accepted standards, or which has prepared its historical financial information in accordance with the national accounting standards of a third country and has securities admitted to trading on a regulated market before that date. In the latter case, if the historical financial information does not give a true and fair view of the assets and liabilities, financial position and profit and loss of the issuer, that information must also be supplemented by such more detailed or additional information as is necessary to ensure that a true and fair view is given.

- (4) Under Commission Regulation (EC) No 809/2004 as currently drafted, those transitional exemptions will no longer apply in respect of prospectuses filed from 1 January 2007, and historical financial information which is not presented in accordance with either IFRS or equivalent third country accounting standards will have to be restated.
- (5) Since the adoption of Commission Regulation (EC) No 809/2004 many countries have adopted IFRS directly into their national accounting standards. This clearly demonstrates that one of the aims of Regulation No 1606/2002, which was to encourage the increasing convergence of accounting standards so that IFRS are accepted internationally and are truly global standards, is being fulfilled. Accordingly, it is appropriate that third country issuers should be exempt from the obligation to restate historical financial information prepared in accordance with national accounting standards if, in accordance with IAS 1 Presentation of Financial Statements, it contains an explicit and unreserved statement that it complies with those standards.
- (6) In its advice delivered in June 2005, the Committee of European Securities Regulators (CESR), established by Commission Decision 2001/527/EC<sup>4</sup>, considered that the Generally Accepted Accounting Principles ("GAAP") of Canada, Japan and the United States, each taken as a whole, are equivalent to international accounting standards adopted pursuant to Article 3 of Regulation (EC) No 1606/2002, subject to remedies, such as additional disclosures and in some instances supplementary financial statements.
- (7) In January 2005, the Accounting Standards Board of Japan (ASBJ) and the International Accounting Standards Board (IASB) announced their agreement to launch a joint project to reduce differences between IFRS and Japanese GAAP and launched a joint work programme in March 2005 towards the convergence of Japanese GAAP with IFRS. In January 2006, the Accounting Standards Board of Canada publicly stated its objective to move to a single set of globally accepted high-quality standards for public companies and concluded that this objective is best accomplished by converging Canadian accounting standards with IFRS within five years. In February 2006, the IASB and the US Financial Accounting Standards Board published a memorandum of understanding which outlines a work programme for convergence

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<sup>4</sup> OJ L 191, 13.7.2001, p. 43.

between IFRS and US GAAP with a view to fulfilling one of the US Securities and Exchange Commission's (SEC) conditions that need to be met before it will lift the reconciliation requirement for foreign issuers using IFRS that are registered with the SEC, by 2009 at the latest.

- (8) The progress of the convergence process will be closely examined before any decision on equivalence is taken. This process, therefore, needs to be closely monitored and assessed on an on-going basis to ensure the changes made remove the need for the additional disclosures and supplementary financial statements identified by CESR in its advice. This assessment should form part of a progress report during the two-year transitional period.
- (9) In light of the efforts of the accounting standard setters in Canada, Japan and the US to converge with IFRS, it is appropriate to extend the transitional provisions provided for in Article 35 of Commission Regulation (EC) No 809/2004 to exempt third country issuers from an obligation to restate historical financial information which was drawn up in accordance with the accounting standards of Canada, Japan or the United States, for a further two year period while the convergence process continues and the progress report is completed.
- (10) During that two year period, the Commission should closely monitor the progress in the convergence between IFRS and the GAAPs of Canada, Japan and the US in order to ensure that it is in a position to take a decision on equivalence by the end of 2008. In addition, the Commission should actively monitor ongoing progress in the work by the relevant third country authorities to eliminate any requirement for Community issuers accessing the financial markets of a third country to reconcile financial statements prepared using IFRS.
- (11) Whilst many countries have adopted IFRS directly into their national GAAP, other countries are converging national GAAP to IFRS over a period of time. Where a third country issuer provides historical financial information that is prepared using a GAAP that is converging with IFRS and the national authority responsible has made a public commitment to this effect and established a work programme, during the period until 31 December 2008, there is no need for a requirement to restate historical financial information. In order to ensure that the exemption is available only in cases where these conditions are satisfied, the third country issuer should be required to provide evidence to the competent authority demonstrating that the national authority has made a public statement and established a work programme.
- (12) Accordingly, it is appropriate to amend Article 35 of Commission Regulation (EC) No 809/2004 to provide additional transitional exemptions in respect of historical financial information of third country issuers in the cases described. In all other cases, third country issuers should be subject to the obligation to restate their historical financial information in accordance with adopted IFRS in any prospectus filed with a competent authority on or after 1 January 2007.
- (13) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee.

HAS ADOPTED THIS REGULATION:

*Article 1*

Article 35 of Regulation (EC) No 809/2004 is amended as follows:

(1) Paragraph 5 is replaced by the following:

"5. Subject to paragraph 5A, from 1 January 2007, third country issuers referred to in paragraphs 3 and 4 shall present their historical financial information in accordance with international accounting standards adopted under Regulation (EC) No 1606/2002 or a third country's national accounting standards equivalent to those standards. If such historical financial information is not in accordance with any such standards, it must be presented in the form of restated financial statements.

(2) The following paragraphs 5A and 5B are inserted:

"5A Third country issuers are exempt from an obligation to restate historical financial information included in a prospectus filed with a competent authority before 1 January 2009 where one of the following conditions is met:

- (a) the notes to the financial statements that form part of the historical financial information contain an explicit and unreserved statement that they comply with International Financial Reporting Standards in accordance with IAS 1 Presentation of Financial Statements;
- (b) the historical financial information is prepared in accordance with the Generally Accepted Accounting Principles of either Canada, Japan or the United States of America;
- (c) the historical financial information is prepared in accordance with the Generally Accepted Accounting Principles of a third country other than Canada, Japan or the United States of America, and the following conditions are satisfied:
  - (i) the third country authority responsible for the national accounting standards in question has made a public commitment to converge those standards with International Financial Reporting Standards;
  - (ii) that authority has established a work programme which demonstrates the intention to progress towards convergence before 31 December 2008; and

- (iii) the issuer provides evidence to the competent authority demonstrating that the conditions in (i) and (ii) are satisfied.

5B The Commission shall closely monitor, and inform the European Securities Committee about, the amount of progress in the convergence between International Financial Reporting Standards and the Generally Accepted Accounting Principles of Canada, Japan and the United States of America and, in particular, inform the Committee immediately if the process is not proceeding satisfactorily. In addition, before 1 April 2008 at the latest, the Commission shall present a report to the European Securities Committee [and to the European Parliament] on that progress in convergence and progress towards the elimination of any reconciliation requirements that apply to Community issuers under the rules of a third country. The Commission may request or require another person to prepare the report."

#### *Article 2*

This Regulation shall enter into force on the [twentieth ...] day following that 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, [...]

*For the Commission*

[...]

*Member of the Commission*