

European Commission
DG Internal Market Services

21 September 2006

Dear Sir/Madam

Draft Commission Regulation amending Regulation (EC) No 809/2004

The International Capital Market Association (**ICMA**) is pleased to comment on the draft Commission regulation amending Regulation (EC) No 809/2004 (the **Prospectus Regulation**) as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment (the **Draft Regulation**). ICMA is the self-regulatory organisation and trade association representing the investment banks and securities firms issuing and trading in the international capital market worldwide.

We welcome the publication of the Draft Regulation and the further improvements which have been made against the Working Document ESC/16/2006 (the **Working Document**). Most of our concerns expressed in relation to the Working Document have been addressed. Our comments are therefore limited and of a technical nature.

We attach our comments as an **Annex** to this letter and would be pleased to discuss them with you at your convenience.

Yours faithfully



Ondrej Petr

ANNEX

General comments

We strongly support the approach of the Draft Regulation which does not attempt to provide exhaustive list of complex financial histories/significant financial commitments and the historical financial information required, but gives competent authorities the flexibility to evaluate, within certain parameters, whether an occurrence results in a complex financial history/significant financial commitment and what supplementary historical financial information should be required to satisfy Article 5(1) of the Prospectus Directive.

We note, however, that during the period of absence of a unified approach of competent authorities to complex financial histories/significant financial commitments, the disclosure of identical or similar situations may differ in different Member States. The Member States should be reminded to accept this divergence. Currently, some Member States for example resist or complicate passporting prospectuses from other Member States if they take a different view on a particular item of the disclosure. The divergent approaches to complex financial histories/significant financial commitments should not exacerbate this problem.

Specific Comments

Definition of a significant financial commitment

Under Article 5, *"an issuer shall be treated as having made a significant financial commitment if it has entered into a binding agreement to undertake a transaction which, on completion, is likely to give rise to a significant gross change."* In the interest of clarity and for the avoidance of doubt, we would prefer if the last part of the sentence said *"...which, on completion, will give rise to a significant gross change."*

Nature of securities as one of the factors modifying the requirements of item 20.1 of Annex 1 of the Prospectus Regulation

The Draft Regulation applies to the full range of securities which require a share registration document despite the fact that the nature of such securities, rights attached to them and/or their risk profile – and therefore potentially the range of information which may be required to satisfy Article 5(1) of the Prospectus Directive - may vary considerably. By way of an example, there is a difference between shares and convertible/exchangeable debt securities. Even within the class of convertible/exchangeable debt securities, there is a difference between those convertible into/exchangeable for shares of EU issuers, shares of non-EU issuers subject to the EU prospectus/transparency regime and shares of non-EU issuers outside of this regime.

We therefore suggest that the “nature of securities” should be one of the factors listed in Article 4a(2) which a competent authority should take into account when deciding whether and how to modify the requirements of item 20.1 of Annex 1 of the Prospectus Regulation.

Prohibition of making the requirements of item 20.1 of Annex 1 of the Prospectus Regulation more onerous

On page 10, the background note to the Draft Regulation helpfully emphasises that the competent authority cannot by modifying the requirements of item 20.1 of Annex 1 of the Prospectus Regulation impose requirements which in effect go beyond the requirements of item 20.1 or make them more onerous. In light of the importance of this principle, we would welcome if it was included in the Draft Regulation, for example in a recital.