

24-2012
September, 2012

**ROYAL DECREE-LAW 24/2012, OF AUGUST 31, 2012, ON THE
RESTRUCTURING AND RESOLUTION OF CREDIT INSTITUTIONS**

SECURITIES MARKET LEGISLATION-RELATED AMENDMENTS

Royal Decree-Law 24/2012, of August 31, 2012, on the Restructuring and Resolution of Credit Institutions, primarily made in the context of the commitments given by the Government of Spain in the Memorandum of Understanding on Financial-Sector Policy Conditionality, under the EU's Eurogroup, not only contains the measures reflected in our publication of the same date Updates Corporate 23-2012 ([see publication](#)), but also includes certain amendments related to the securities market as summarized below.

1. MARKETING TO RETAIL INVESTORS OF PREFERRED PARTICIPATIONS, CONVERTIBLE DEBT INSTRUMENTS AND SUBORDINATED FINANCING COMPUTABLE AS CAPITAL [ADDITIONAL PROVISION THIRTEEN]

The following requirements must be met in order to be able to market to, or place with, retail investors issues of preferred participations (*participaciones preferentes*), convertible debt or subordinated financing computable as capital:

- (i) The issue must have an exclusive tranche for professional investors of at least 50% of the total issue, without the total number of professional investors being less than 50 and without including, for the purposes of computing the number of professional clients, clients that meet the conditions in article 78 bis.3 e) of the Securities Market Law (the "LMV") (that is, clients that do not meet the conditions stipulated in article 78 bis.3 LMV to be regarded as professional investors and ask to be treated as such, expressly waiving their treatment as retail clients).
- (ii) In the case of issues of preferred participations or convertible debt instruments of entities that are not listed companies, the minimum denomination per unit will be €100,000, and in the case of other issues, €25,000.

A breach of these new rules will be deemed a very serious infringement pursuant to the provisions of the enforcement regime in the LMV.

2. AMENDMENTS TO THE SECURITIES MARKET LAW [FINAL PROVISION THREE]

Final provision three of Royal Decree-Law 24/2012 introduces certain important amendments, some as a result of the transposition of 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 harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (“Directive 2010/73/EU”), as well as other amendments that bolster the powers of control of the Spanish National Securities Market Commission (the “CNMV”) in relation to the marketing of hybrid instruments and other complex products—such as preferred participations - to retail clients.

We summarize below the amendments to the LMV:

- (i) In line with the provisions of Directive 2010/73/EU:
 - (a) Article 27.3 LMV is amended as regards the contents of the summary of the prospectus. The summary note must contain key information in order to aid investors when considering whether to invest in the securities in question. ‘Key information’ will be defined by regulations, but must at least include a brief description of the essential characteristics and risks associated with the issuer and with the investment in the securities, the general terms of the offer, details of the admission to trading, and the reasons for the offer and the use of the proceeds. Prospectuses for the admission to trading of non-equity securities the denomination per unit of which is equal to or greater than €100,000 are exempted from the summary note requirement.
 - (b) As regards liability for the prospectus, the new wording of article 28.4 LMV states that liability also cannot be sought on the basis of the summary note or its translation, where it does not, when read in conjunction with the other parts of the prospectus, provide key information to aid investors when considering whether to invest in the securities in question.
 - (c) The thresholds are raised for offers which are exempt from the obligation to publish a prospectus, and which are therefore not regarded as initial public offerings or secondary offerings. New article 30 bis LMV raises the maximum number of natural or legal persons (i.e., individuals and legal entities) per Member State to whom the offer is addressed from 100 to 150; the minimum amount per investor is increased from €50,000 to €100,000; the minimum denomination per unit of the offer rises from €50,000 to €100,000; and, lastly, the total consideration for the offer in the EU, calculated over a 12-month period, is increased from €2,500,000 to €5,000,000. As a result, the types of offer not regarded as a public offering or as requiring a prospectus are now as follows:
 - an offer of securities addressed solely to qualified investors;

- an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors;
 - an offer of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer;
 - an offer of securities whose denomination per unit amounts to at least €100,000;
 - an offer of securities with a total consideration in the EU of less than €5,000,000, to be calculated over a period of 12 months.
- (d) The requirements for exemption from the obligations on issuers to supply periodic information are amended in article 35.5 LMV so that the threshold in the case of issuers that exclusively have outstanding issues of debt admitted to trading on official secondary markets or other regulated markets in the EU is raised from a minimum denomination per unit of €50,000 to €100,000. However, a new letter c) is inserted which expands the scope of the exemption, notwithstanding the above, to include issuers whose issues fulfill the above-mentioned characteristics before December 31, 2010 and have a minimum denomination per unit of €50,000 or, in the case of debt securities not denominated in euros, a value per unit at the issue date that is at least equivalent to such amount, throughout the time that such obligations subsist.
- (ii) As for the information obligations of firms providing investment services to their clients, major changes are made to subarticles 3, 4, 6 and 7 of article 79 bis LMV. On the one hand, the CNMV is given the power to require in the information relating to financial instruments and investment strategies that is given to investors before acquiring the product, the inclusion of as many warnings as it deems necessary on the financial instrument and, in particular, warnings that highlight the fact that it is an unsuitable product for non-professional investors due to its complexity. The CNMV may also require such warnings to be included in the related advertising. In the case of securities other than shares issued by a credit institution (for instance preferred participations), the information given to investors must include additional information to draw to the investor's attention the differences between products of this type and ordinary bank deposits in terms of return, risk and liquidity. On the other hand, where investment advice or a portfolio management service is provided, the firm must also now provide in writing or on another lasting medium a description of how the recommendation made is in keeping with the investor's characteristics and objectives. Where other investment services are provided, the firm must give the client a copy of the document evaluating the suitability of the product.

In addition, if the investment service is provided in relation to a complex instrument (for instance, preferred participations), the agreement must include not only the client's signature, but also a handwritten expression, to be defined by the CNMV, whereby the investor declares that he has been advised that the product is not appropriate for him or it has not been possible to evaluate it. Investment services firms must keep at all times a register of clients and unsuitable products reflecting, for each client, the products the appropriateness of which has been evaluated negatively. The CNMV will determine the characteristics of the register.

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