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AMENDMENT OF THE LEGISLATION ON PROSPECTUSES AND TRANSPARENCY REQUIREMENTS FOR ISSUERS OF SECURITIES

As a consequence of the transposition into Spanish law of Directive 2010/73/EU, amending Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, and Directive 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**”), and in keeping with the amendments already made to Securities Market Act 24/1988, of July 28, 1988 (the “**SMA**”) through Law 9/2012, of November 14, 2012, on the Restructuring and Resolution of Credit Institutions (“**Law 9/2012**”) ([see our Updates Corporate 26/2012](#)), derived from Royal Decree Law 24/2012 ([see our Updates Corporate 24/2012](#)), December 31, 2012 saw the publication in the Official State Gazette of Royal Decree 1698/2012, of December 21, 2012, amending the existing legislation on the necessary prospectuses and transparency requirements in issues of securities as a result of the transposition of Directive 2010/73/EU (“**Royal Decree 1698/2012**”).

Royal Decree 1698/2012 incorporates into the implementing regulations of the SMA the innovations in European Law in that respect, amending: (i) Royal Decree 1310/2005, of November 4, 2005, which partially implemented the Securities Market Law, in matters relating to admission to trading of securities on official secondary markets, public offerings and the necessary offering prospectus (“**Royal Decree 1310/2005**”); and (ii) Royal Decree 1362/2007, of October 19, 2007, implementing the Securities Market Law, relating to the transparency requirements in relation to information about issuers whose securities are admitted to trading on an official secondary market or other regulated market in the European Union (“**Royal Decree 1362/2007**”).

The amendments made to Royal Decree 1310/2005 and to Royal Decree 1362/2007 are summarized below.

1. AMENDMENT OF ROYAL DECREE 1310/2005

1.1 Definition of public offering

The definition of public offering has been adapted to the amendments made to the SMA by Law 9/2012, such that the following offerings will not be considered public offerings: (i) offerings addressed solely to qualified investors; (ii) offerings addressed to fewer than 150 individuals or legal persons per Member State, other than qualified investors; (iii) offerings addressed to investors acquiring securities for a total consideration of at least €100,000 per investor; (iv) offerings whose denomination per unit amounts to at least €100,000; and (v) offerings with a total consideration of less than €5 million in the European Union, calculated over a 12-month period.

1.2 Resale of securities from previous offerings

Regarding offerings that are not considered public offerings, in accordance with the preceding section, a new provision has been added whereby resale of the securities will be considered a separate offering, so such resale may be considered a public offering if it does not meet the requirements indicated.

Also, in relation to subsequent resale by financial intermediaries, a prospectus will not be required as long as a valid prospectus is available and the issuer has authorized its use in writing.

1.3 Exceptions to the obligation to publish a public offering prospectus

In accordance with the provisions of Directive 2010/73, the exception to the need for publication of a prospectus envisaged for public offerings and admission to trading in the case of mergers extends, with the same conditions, to the case of divisions.

Relating to the exception to the need to publish a prospectus for public offerings:

- In the case of shares offered free of charge to existing shareholders, or dividends paid out in the form of shares, the reference to shares offered free of charge has been removed. This does not mean that a prospectus is needed for an offering of shares made free of charge since, as explained in the preamble to Directive 2010/73, the reference to shares offered free of charge has been removed as it is considered redundant, since such offerings were already included in the exception relating to small offerings.
- In the case of shares offered to employees, the need for such securities to be of the same class as those already admitted to trading has been eliminated, although the employer must have its head office or registered office in the European Union. This exception also extends to companies whose head office or registered office is not in the European Union and whose securities are admitted to trading on a regulated market of the European Union or on a third-country market, provided, in the latter case, that the same document that is required of companies whose head office is in the European Union has been published, and that the European Commission has adopted an equivalence decision regarding the legislation of that third country.

In the case of debt securities (not subordinated, convertible or exchangeable) issued in a continuous or repeated manner by credit institutions, the threshold established for application of the exception has been raised from €50 million to €75 million, calculated over a 12-month period.

1.4 Qualified investors and registration of qualified investors

The concept of qualified investors has been clarified, with the following treated as qualified investors: the professional clients envisaged in article 78 bis 3 SMA, the eligible counterparties referred to in article 78 ter SMA, and SMEs with registered office in Spain that have asked to be treated as qualified investors.

Investment firms and credit institutions that provide investment services must indicate, in the client records they must keep, the details of any individuals and SMEs that have asked to be treated as professional clients.

The regime whereby an issuer, or a person intending to make an offering of securities, may have access to the records of investment firms that contain the details of any of their clients – individuals and SMEs – that have asked to be treated as professional clients has been made more specific. Such access will be available within a reasonable period of time (instead of the three days envisaged in the previous wording), it will be subject to the relevant legislation on data protection and, as a new addition, the clients concerned must have agreed to this information being provided to any issuer that evidences by documentary means the existence of an offering process.

1.5 Admission to trading on an official secondary market of securities already admitted to trading on another Spanish official secondary market

For admission to trading on an official secondary market of securities that are already admitted to trading on another Spanish official secondary market, all the requirements for admission to trading of the securities will be deemed met, save the need to publish a prospectus, notwithstanding the possibility of a request being made to apply the exception established in article 26.1.h) of Royal Decree 1310/2005.

1.6 Summary of the prospectus – Key information

Royal Decree 1698/2012 incorporates into Royal Decree 1310/2005 the amendments already made to the SMA by Law 9/2012, relating to the Summary of the prospectus, as regards the following:

- Content: it must include key information, understood to be the essential and appropriately structured information to be provided to investors in order to enable them to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered to them.
- Cases where it is not necessary to include a summary of the prospectus: admission to trading on an official secondary market of non-equity securities with a denomination per unit of at least €100,000.
- No civil liability must be established solely on the basis of the summary, unless it is misleading, inaccurate or inconsistent with the other parts of the prospectus, or unless it does not provide, read together with the other parts of the prospectus, key information to help investors decide whether or not to invest in the securities.

1.7 Financial reporting to the CNMV

As regards financial reporting to the National Securities Market Commission (the “CNMV”), for admission to trading or public offerings, where the general rule is to include the individual and consolidated audited financial statements for the last three fiscal years in the case of equity securities, and for the last two fiscal years in the case of non-equity securities, the cases where the CNMV may accept financial statements covering a shorter period have been amended:

- The exception referring to the “new market” segment has been removed, as this market segment has disappeared.

- The exception referring to special purpose vehicles, relating to issues of asset-backed securities or of securities backed by a guarantor whose financial statements cover the periods indicated, has been maintained.
- The exception established at the discretion of the CNMV, provided that it considers that there is sufficient information to enable investors to form a well-founded opinion on the issuer and the securities, has been maintained. In particular, it has been clarified that for issuers with a complex financial history the provisions of Regulation (EC) No 211/2007 will apply, whereby inclusion in the registration document of certain items of financial information relating to an entity other than the issuer, including pro-forma information, considering that they relate to the issuer, may be required.

1.8 Publication of the prospectus

Regarding the publication of the prospectus:

- The prospectus may be published on the issuer's website or, where appropriate, on the website of the financial intermediaries placing or selling the securities, including paying agents, at least throughout the period of validity of the prospectus, in contrast to the former regime which required that if the prospectus was published on the issuer's website it had also to be published on the websites of all the financial intermediaries.
- If the prospectus is published in newspapers or in printed form, it must also be published on the issuer's website or on the website of the financial intermediaries placing or selling the securities.

1.9 Period of validity of the prospectus

It has been clarified that a prospectus will be valid for the 12 months from the date of its approval and not from the date of its publication.

1.10 Final terms

If the base prospectus has been passported to other competent authorities of the European Union, the issuer must notify the authorities of the host Member States of the publication of the final terms of the offering or admission to listing.

It has been clarified that the obligation to publish final terms will not apply to prospectuses relating to issues of notes ("*pagarés*") with maturity of less than one year, the only obligation in this case being to submit the supplementary certificate issued by the managing body of the issuer, or by a person with sufficient authority for that purpose, recording the specific characteristics of the issue, in accordance with article 6.2 of Royal Decree 116/1992, of February 14, 1992.

1.11 Supplement to the prospectus

In the case of supplements to the prospectus, it has been clarified that they must be approved in a maximum period of five business days from the date on which the significant new factor, material mistake or inaccuracy became known.

It has also been clarified that supplements to registration documents may be published, especially when they are incorporated by reference in a base prospectus.

1.12 Revocation of purchase and/or subscription orders if a supplement is published

It has been clarified that investors will have the right to withdraw their acceptance of an offering if a supplement is published, provided that the new factor, mistake or inaccuracy that prompted the publication of the supplement arose before the final close of the offering to the public and the delivery of the securities.

1.13 Securities note updating a prospectus

In the case of a registration document approved by the CNMV, it has been clarified that a securities note may be used to update the prospectus, including information that would be included in the registration document, unless such information is provided in a supplement to the prospectus, in which case either channel may be used.

1.14 Companies with reduced market capitalization

Companies with reduced market capitalization and SMEs may publish prospectuses drawn up in accordance with Annexes XXV, XXVI, XXVII and XXVIII of Regulation (EC) No 809/2004, amended by Delegated Regulation (EU) No 486/2012, in order to allow these entities to choose between a proportionate disclosure regime and a complete disclosure regime.

Thus, Royal Decree 1698/2012 defines a company with reduced market capitalization as one that is listed on a regulated market and that has had an average market capitalization of less than €100 million, on the basis of year-end prices for the previous three years.

1.15 Annual information

Chapter V of Title I of Royal Decree 1310/2005, which established that issuers of securities admitted to trading on a Spanish official secondary market had to file each year with the CNMV, following publication of their financial statements, a document containing all of the information published or made available to the general public by the issuer in the preceding 12 months in one or more member States and in third countries, or indicating where such information may be obtained, has been eliminated.

2. AMENDMENT OF ROYAL DECREE 1362/2007

The main changes to Royal Decree 1362/2007 consist in adapting certain articles to the new thresholds of €100,000 established by Directive 2010/73, thus:

- Regarding the language of the regulated information, in the case of securities whose denomination per unit amounts to at least €100,000 [previously €50,000] (or the equivalent of €100,000 as of the date of issue, in the case of debt securities denominated in a currency other than the euro), admitted to trading on one or more regulated markets, the issuer may choose between the language customary in the sphere of international finance or a language accepted by the CNMV and other competent authorities of the host Member States.

The exception also applies to debt securities admitted to trading before December 31, 2010, with a denomination per unit of €50,000 or more (or the equivalent thereof in another currency as of the date of issue).

- As regards the venue for meetings for holders of debt securities, the issuer may choose to hold such meetings in any European Union Member State (provided that certain conditions are met) if the denomination per unit of the securities amounts to at least €100,000 [previously €50,000] (or the equivalent of €100,000 as of the date of issue, in the case of debt securities denominated in a currency other than the euro).

The exception also applies to debt securities admitted to trading before December 31, 2010, with a denomination per unit of €50,000 or more (or the equivalent thereof in another currency as of the date of issue).

Royal Decree 1698/2012 entered into force on January 1, 2013.

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