

Client Alert

Latham & Watkins Corporate Department

Recent Amendments to the Spanish Securities Act

The Spanish Government has recently passed Royal Decree-Law 24/2012, of 31 August on the restructuring and liquidation of financial entities (*Real Decreto-Ley 24/2012, de 31 de agosto, de reestructuración y resolución de entidades de crédito*) (RDL 24/2012). RDL 24/2012 came into force on 31 August 2012.

RDL 24/2012 has been approved to implement specific measures to reinforce financial stability in Spain as detailed in the Memorandum of Understanding on Financial-Sector Policy Conditionality dated 20 July 2012.

RDL 24/2012 primarily amends the applicable regulation for the restructuring and recapitalization of the Spanish banking sector and strengthens the resolution powers of the Fund for Orderly Bank Restructuring (*Fondo de Reestructuración Ordenada Bancaria*). These topics are widely covered in our *Client Alert* number 1403 "*Royal Decree Law 24/2012 Addresses Restructuring and Termination of Credit Entities*."

In addition, RDL 24/2012 has modified certain relevant sections of the Spanish Securities Act (*Ley 24/1988, de 28 de julio, del Mercado de Valores*) (the Spanish Securities Act).¹ In particular, RDL 24/2012 introduces certain consumer protection measures in the Spanish securities legislation aimed at limiting a bank's ability to sell subordinate debt instruments to non-qualified retail clients and to substantially improve the process any instruments not covered by the deposit guarantee fund to retail clients. RDL 24/2012 also strengthens the compliance and monitoring power of the Spanish Securities and Exchange Commission (*Comisión Nacional del Mercado de Valores*) (the CNMV) in relation to the commercialization of certain complex securities by banks.

This *Client Alert* focuses on the securities-related provisions of RDL 24/2012 and summarizes the key changes to the Spanish Securities Act.

Contents of the Prospectus Summary

According to the Spanish Securities Act and as it is generally customary, the prospectus shall contain a summary in a standardized format.² RDL 24/2012 modifies the contents of the prospectus summary.

The summary shall provide basic information to help investors determine whether not they should invest on the securities. Such basic information shall contain (a) a short description of the main characteristics and the risks related to the issuer and the potential guarantors, (b) a short description of the main characteristics and the risks related to the investment in the securities, (c) the general terms of the offering, (d) information regarding the listing and (e) the

"RDL 24/2012 introduces certain consumer protection measures in the Spanish securities legislation aimed at limiting the sale by banks of subordinate debt instruments to non-qualified retail clients and to ... [strengthen] the compliance and monitoring power of the Spanish Securities and Exchange Commission ..."

reasons for the offering and the intended use of proceeds. The Spanish Securities Act establishes that the basic information included in the summary shall be further detailed in the relevant rules.

Any admission to trading of non-equity securities with a unit nominal value amount of at least € 100,000 is excluded from this summary requirement.

Liability for the Prospectus Summary

RDL 24/2012 limits liability for the information contained in the summary or a translation thereof.

In particular, no liability can attest to the issuer, the offeror, the person requesting admission to trading on an official secondary market, the directors of any of the aforementioned entities or any other person concerning the summary or a translation thereof, unless (i) it is misleading, inaccurate or inconsistent with the other parts of the prospectus or (ii) it does not provide, together with the other sections of the prospectus the basic information to help investors to determine whether they should invest on the securities or not.³

Thresholds for the Exemption to Publish a Prospectus

RDL 24/2012 has increased the thresholds for the exemption to publish a prospectus in connection with a securities offering. After the amendment, the Spanish Securities Act shall not consider the following to be public offerings, and therefore exempts from the obligation to publish a prospectus. These types of offerings include:⁴

- a) An offering of securities exclusively directed to qualified investors.
- b) An offering of securities directed to less than 150 natural or legal persons per Member State, excluding qualified investors.⁵
- c) An offering of securities addressed to investors who acquire securities for a minimum amount of € 100,000 each, per offering.⁶
- d) An offering of securities with a unit nominal value amounting to at least € 100,000.⁷
- e) An offering of securities amounting in the European Union to a total of less than € 5,000,000, calculated over a period of 12 months.⁸

Requirements of Issuers' Periodic Reporting Obligations

RDL 24/2012 has also amended the requirements of issuers' periodic reporting obligations to increase the relevant threshold. In particular, issuers shall be exempt of the obligation to publish and disseminate their periodic financial information in the event that the issuer only issues debt securities with a unit nominal value of least € 100,000 (or, in the event of non-Euro-currency debt securities, whose unit nominal value on the issue date is equivalent to at least € 100,000) and are listed in an official secondary market or another regulated market.^{9,10}

Notwithstanding the above, issuers shall also be exempt from the obligation to publish and disseminate their periodic financial information in the event that such issuers only have outstanding issues of debt securities with a unit nominal value is at least € 50,000 (or, in the event of non-Euro-currency debt securities, whose unit nominal value on the issue date is equivalent to at least € 50,000) and are listed in an official secondary market or another regulated market domiciled in the European Union prior to 31 December 2010, during the period such debt securities are outstanding.¹¹

Reporting Obligations of Investment Services Firms

RDL 24/2012 has also increased the reporting obligations of investment services firms to their clients. The Spanish Securities Act has strengthened the supervisory powers of the CNMV.

The CNMV is now entitled to request that investment services firms deliver the information to investors prior to the acquisition of a product shall contain as many warnings as the CNMV deems appropriate related to such financial instrument. In particular, those warnings that highlight that the product is not suitable for non-professional investors due to its complexity. The CNMV can also request that any media or publicity also include such warnings.¹²

In the event of securities issued by financial entities other than shares, the information delivered to investors shall contain additional information to highlight to investors the differences between such products and bank deposits regarding profitability, risk and liquidity.¹³

When providing investment advice or portfolio management, the investment firm shall provide the client, in writing, with a description on how the proposed investment recommendation adjusts to the investor's profile and goals.¹⁴ When providing other investment services, the investment firm shall deliver the client a copy of the assessment on whether that investment service or the product envisaged is appropriate for that particular client.¹⁵

Additionally, when the investment services are rendered in relation to complex instruments, the agreement entered into shall contain the client's signature together with a representation by the client stating that he was warned that the product was not appropriate for him or that it was not possible to assess its appropriateness, under the terms determined by the CNMV.¹⁶ Investment services firms shall maintain an updated register of clients and non-appropriate products detailing the products that have been negatively evaluated for each client. The CNMV shall determine the characteristics of such databases.¹⁷

Sales of Certain Complex Securities to Retail Clients

Finally, RDL 24/2012 has also introduced additional consumer protection measures in relation to sales of hybrid instruments and other complex products to retail clients, including preference shares (*participaciones preferentes*). The purpose of this amendment is to avoid certain irregular practices that have taken place during the last few years.

Consequently, the sale or placement amongst clients or retail clients of issues of preference shares, convertible debt instruments or subordinated debt considered as equity pursuant to solvency rules applicable to financial entities shall fulfill the following requirements:¹⁸

- a) The issue shall contain a tranche addressed exclusively to professional clients or investors of at least 50 percent of the total issue. The total amount of professional clients or investors shall not be below 50. For this purpose, §78 bis.3 e) of the Spanish Securities Act shall not apply.¹⁹
- b) In the event of preference shares issues, or convertible debt instruments of non-listed entities, the minimum unit nominal value shall amount to € 100,000. For any other issuances, the minimum unit nominal value shall amount to € 50,000.

Any breach of this new rule shall be deemed a very serious violation pursuant to the Spanish Securities Act.

Endnotes

- ¹ Final Provision Three of RDL 24/2012.
- ² §27.3 of the Spanish Securities Act.
- ³ §28.4 of the Spanish Securities Act.
- ⁴ §30 bis .1 of the Spanish Securities Act.
- ⁵ §30 bis .1(b) of the Spanish Securities Act. Prior to RDL 24/2012, the Spanish Securities Act established this threshold in less than 100 natural or legal persons per Member State, without including qualified investors.
- ⁶ §30 bis .1(c) of the Spanish Securities Act. Prior to RDL 24/2012, the Spanish Securities Act established this threshold in a minimum amount of € 50,000 per investor, per offering.
- ⁷ §30 bis .1(d) of the Spanish Securities Act. Prior to RDL 24/2012, the Spanish Securities Act established this threshold in offerings of securities whose unit nominal value amounted to at least € 50,000.
- ⁸ §30 bis .1(e) of the Spanish Securities Act. Prior to RDL 24/2012, the Spanish Securities Act established this threshold in offerings of securities amounting to a total of less than € 2,500,000, which limit was calculated over a period of 12 months.
- ⁹ §35.5(b) of the Spanish Securities Act.
- ¹⁰ §35.5(b) of the Spanish Securities Act. Prior to RDL 24/2012, the Spanish Securities Act established as the issuers' periodic reporting obligation did not apply to issuers who only have outstanding issues of debt securities listed in an official secondary market or another regulated market domiciled in the European Union whose unit nominal value is at least € 50,000.
- ¹¹ §35.5(c) of the Spanish Securities Act.
- ¹² §79 bis .3 paragraph 3 of the Spanish Securities Act.
- ¹³ §79 bis .3 paragraph 4 of the Spanish Securities Act.
- ¹⁴ §79 bis .6 of the Spanish Securities Act.
- ¹⁵ §79 bis .7 paragraph 1 of the Spanish Securities Act.
- ¹⁶ §79 bis .7 paragraph 3 of the Spanish Securities Act.
- ¹⁷ §79 bis .7 paragraph 4 of the Spanish Securities Act.
- ¹⁸ Additional Provision Thirteen of RDL 24/2012.
- ¹⁹ §78 bis.3 e) of the Spanish Securities Act establishes that clients that request it beforehand and expressly waive treatment as retail clients shall be deemed to be professional clients. Such exception does not apply for the purposes of Additional Provision Thirteen of RDL 24/2012.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

Juan Manuel De Remedios

+34.91.791.5016

juanmanuel.deremedios@lw.com

Madrid

Julio Peralta

+34.91.791.5034

julio.peralta@lw.com

Madrid

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult. A complete list of our *Client Alerts* can be found on our website at www.lw.com.

If you wish to update your contact details or customise the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to our global client mailings program.

Abu Dhabi

Barcelona

Beijing

Boston

Brussels

Chicago

Doha

Dubai

Frankfurt

Hamburg

Hong Kong

Houston

London

Los Angeles

Madrid

Milan

Moscow

Munich

New Jersey

New York

Orange County

Paris

Riyadh*

Rome

San Diego

San Francisco

Shanghai

Silicon Valley

Singapore

Tokyo

Washington, D.C.

* In association with the Law Office of Salman M. Al-Sudairi