

Recent key developments in the area of Spanish financial regulation

Prepared by the Regulation and Research Department of the Spanish Confederation of Savings Banks (CECA)

CNMV Circular on financial instrument warnings (Circular 1/2018, published in the *Official State Journal* on March 27th, 2018)

With this Circular, Spain's securities market regulator, the CNMV, aims to step up the 'informed consent' requirement when retail clients invest in certain products, particularly complex ones. To this end, it standardises the manner in which financial intermediaries must warn their retail customers of the risks associated with the products they wish to invest in.

It applies to entities that provide investment services other than discretionary and individualised portfolio management for retail clients in Spain, thus applying specifically to: (i) investment service firms (including the natural persons with the status of financial advisory firms); (ii) credit institutions and collective investment scheme management companies authorised to provide certain investment and ancillary services; and, (iii) certain foreign entities: branches in Spain; entities authorised to operate in another European Union Member State (when they operate in Spain through an agent established in Spain) and entities authorised in a non-EU Member State (when they operate in Spain without a branch).

The Circular establishes three kinds of standard warnings:

- Warnings concerning particularly complex financial instruments that are generally not appropriate for retail clients: The Circular stipulates the content of the warnings for certain financial instruments that are, in the opinion of the CNMV, not apt for

retail clients on account of their particular complexity. Shares deemed non-complex financial instruments are excluded.

Entities must have their retail clients sign the warning and provide a hand-written statement saying: *"Product that is difficult to understand. The CNMV considers that, in general, it is not appropriate for retail investors."*

In the event that the entity deems the retail clients should also be warned that the product or service is inappropriate or that a lack of information has prevented it from establishing whether or not the investment product or service is appropriate, both warnings should be provided together.

In the event of services provided by phone, entities must keep a recording of the corresponding retail clients' oral consent.

In the case of services provided online, entities are obliged to put the means in place to ensure that their retail clients can type in the corresponding handwritten statement prior to processing the order; the entities must also be capable of certifying that consent has been provided.

- Warnings concerning financial instruments that are also eligible bail-inable liabilities: Entities must provide this warning, which must form part of the contractual documentation, as well as obtaining the retail customer's signature. They must also provide an additional warning in tandem if they deem that the service or product is not apt or that they do not have the information needed to make that determination.

- Warnings concerning the existence of a significant difference with respect to the estimated current value of certain financial instruments: For certain financial instruments, entities must warn retail clients of the existence of a significant difference between the cash value at which a transaction is to be carried out (including fees and commissions) and their estimate of the instruments' current realisable value.
- The provision of discretionary portfolio management services;
- The provision of investment advice; and,
- Any transactions they may perform with the sponsors of the CISs they manage.

The requirements introduced under this Circular apply to all products purchased prior to its effectiveness that would qualify for a warning under the new rules; the related warnings must be provided to retail clients in the next statement they are due to receive.

CNMV Technical Guide on related-party transactions of collective investment schemes and other transactions performed by collective investment scheme management companies (Technical Guide 1/2018, published on the CNMV's website on February 27th, 2018)

The goal of the Technical Guide is to provide criteria regarding:

- The definition of related parties and related-party transactions (specifically including the collective investment scheme (CIS) depositary and any depositary group company); and,
- When related-party transactions require prior authorisation in light of the specific conflicts of interest to which they may give rise and which transactions must be carried out in the sole interest of the CISs and on an arm's length basis (at prices or under conditions that are the same as or better than those of the market).

It also itemises the activities the CIS management companies may carry out that are not expressly deemed related-party transactions but should be conducted under the general regime for handling potential conflicts of interest: