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Main regulatory developments for issuers in
2020

24 January 2020

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Main regulatory developments for issuers in 2020

In 2020 and early 2021, several capital markets regulatory developments that affect issuers of securities will come into effect:

- The CNMV has rendered ineffective its Recommendations on discretionary transactions with own shares that were published in June 2013 (“**Recommendations on discretionary transactions with own shares**”). In order for issuers who execute transactions with own shares to benefit from a “safe harbor” under Regulation (EU) 596/2014 of 16 April 2014 on market abuse (“**MAR**”) against market abuse enforcement action, such transactions must be executed pursuant to a buy-back program or stabilization measures, or a liquidity contract.
 - <https://www.cnmv.es/portal/verDoc.axd?t={340c42ad-5bee-44cd-bab3-68b5f73a0039}>
- The CNMV’s decision of 24 October 2019 (“**CNMV Decision**”) modified the CNMV’s electronic registry. As of **8 February 2020**, issuers must disclose inside information pursuant to articles 17 MAR and 226 of the consolidated text of the Securities Market Law (“**TRLMV**”) through the “CIP” procedure, and other relevant, regulated and corporate information pursuant to article 227 TRLMV, through the “DIS” procedure.
 - https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-15973
- CNMV Circular 2/2019 of 27 November 2019 (“**Circular 2/2019**”), modified CNMV Circular 1/2017 of 26 April 2017 on liquidity contracts (“**Circular on liquidity contracts**”), by updating and allowing for greater flexibility in liquidity contract regulation, in effect as of **30 March 2020**, to include practices that had been carried out in less liquid areas of the stock market (MAB).
 - https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-17695
- The CNMV is in the process of reviewing the Good Governance Code of Listed Companies (“**CBG**”) of 2015, and has submitted to public consultation a **Proposal to amend some recommendations of the CBG**. It aims to align the CBG with regulatory amendments and to clarify and complement some aspects, reinforce supervision to **prevent malpractice**, introduce an up-to-date **sustainability effort** and to revise the approach to **diversity in boards of directors**.
 - http://www.cnmv.es/DocPortal/DocFaseConsulta/CNMV/ConsultaCBG_2020.pdf
- Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 as regards the promotion of the use of SME growth markets, amended MAR and Regulation (EU) 2017/1129 of 14 June 2017, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (“**Prospectus Regulation**”).
 - The amendments to the Prospectus Regulation are already in effect, while the amendments to the MAR will come into effect on **1 January 2021**.
 - <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R2115&from=EN>

- As of 1 January 2020, **annual financial reports of issuers quoted on the Spanish continuous market (*mercado continuo*) may only be submitted in a single electronic format "xHTML"**.
- <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R0815&from=ES>
- <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R2100&from=ES>

THE CNMV RENDERS RECOMMENDATIONS ON DISCRETIONARY TRANSACTIONS INEFFECTIVE

The CNMV has confirmed its criterion expressed in the past, in relation to discretionary transactions by issuers with own shares, and in turn has rendered ineffective the Recommendations on discretionary transactions with own shares of July 2013. It has declared that they are considered no longer valid and incompatible with the harmonizing purpose of MAR in terms of accepted market practices.

Therefore, according to the CNMV, in order for issuers to be able to carry out transactions with their own shares within a "safe harbor" that justifies compliance with regulations on market manipulation and abuse of privileged information under MAR, **they must do so under a buy-back program or stabilization measures referred to in Article 5 MAR, or under a liquidity contract provided for in the Circular on liquidity contracts**. Issuers who decide to trade with own shares beyond the scope of these legal instruments, under a discretionary management mandate, will of course continue to be subject to compliance with these regulations, but will be **exposed to a greater risk of their transactions being audited by the CNMV *ex post*, under the perspective of market abuse regulations**.

AMENDMENT OF THE DISCLOSURE OF INSIDE AND RELEVANT INFORMATION

The CNMV Decision has updated the list of procedures before its electronic registry following the entry into force of various EU regulations. The change mainly affects the procedures to **report inside information and relevant information to the CNMV** (which was previously done jointly as "relevant facts" under the "HSR" procedure). These two types of information were separated under the reform of the TRLMV by Royal Decree-Law 19/2018 of 23 November. The CNMV's website is expected to be renewed as of **8 February 2020** to accommodate for this new procedure.

The CNMV's electronic registry **includes a new "CIP" (*Comunicación de información privilegiada*) procedure, through which issuers must report inside information in accordance with Articles 17 MAR and 226 TRLMV**.

The CNMV Decision also **introduces the new "DIS" (*Comunicación de otra información relevante, regulada y corporativa*) procedure, through which issuers must report all other financial or corporate information that any provision requires them to disclose in Spain, or that due to its**

particular interest, issuers consider it necessary to disseminate among investors, in accordance with article 227 TRLMV. The CNMV Decision states that there will be standard forms for each of the following types of information: (i) changes to rights associated to classes of shares or securities; (ii) calls for shareholder meetings or assemblies; (iii) home Member State; (iv) report on payments to the Public Administration; (v) reporting related-party transactions (once the Spanish Companies Act is modified and its communication is mandatory); (vi) total number of voting and capital rights; (vii) approval and subsequent registration of the rules and regulations of the general shareholders meeting; (viii) approval and subsequent registration of the rules and regulations of the board of directors; and (ix) other relevant information, which includes any other information that may be of interest to investors.

Therefore, issuers should now use the CIP procedure for both *ex post facto* and, provided the relevant requirements are met, deferred reporting of inside information. In other words, **issuers should use the CIP procedure when information is classified internally as inside information and in relation to which an insider list has been drawn up**, and the DIS procedure for all other information, as appropriate. As to **delays in reporting the information**, issuers must notify the CNMV, through the form provided to that effect within the CIP procedure upon publishing the information, of the following: (i) that it has been delayed; (ii) the type of information and its reference number; (iii) the date on which the inside information first existed; (iv) the date on which the decision to defer reporting was made; and (v) the person or body responsible for the decision to defer reporting. On the other hand, the CNMV Decision does not affect the reporting to the Spanish Stock Exchanges obligations pursuant to rule 4 of Circular 3/2016 of each of the Spanish Stock Exchanges, in relation to the information reported to the CNMV under either of the two procedures. This information of the deferred reporting to the CNMV will not be made public.

REFORMS REGARDING LIQUIDITY CONTRACTS

With effect as of 30 March 2020, Circular 2/2019 introduces a **new limit to the daily volume of trades under a liquidity contract** by companies that have an illiquid market (in accordance with MIFIR) and whose shares are also traded in a regulated market through the fixing trading system (securities with very limited liquidity), or in a multilateral trading facility (MAB issuers). In these cases, the limit on the financial intermediary's trading will be **the higher of (i) 25% of the average daily volume traded in the preceding 30 trading sessions, and (ii) EUR 20,000 per trading session in which the liquidity contract operates**. Issuers in the continuous market that have liquidity contracts in accordance with the standard form approved by the CNMV **will not have to adapt the contract to the new regulation**, since the liquidity contract standard form regulates the conditions to trading by referring to the Circular on liquidity

contracts; they are therefore up to date. Issuers with a liquidity contract in force in a different format (MAB) will have to review their contracts and adjust them accordingly.

Issuers whose shares are traded on a regulated market through the general trading system and whose shares are highly illiquid may be authorised by the **CNMV to apply the new limit** to their daily volume.

AMENDMENT OF THE GOOD GOVERNANCE CODE OF LISTED COMPANIES

As part of its action plan for the 2019-2020 financial year, the CNMV has submitted a **proposal to amend certain recommendations of the CBG** to public consultation until 15 February 2020. The most relevant changes are, firstly, those related to **control mechanisms and handling situations that may affect the reputation of directors and issuers**. Boards are encouraged to **act immediately in situations of possible irregular practices affecting a director** and which can damage the company's reputation, as soon as they become aware of the situation, rather than waiting for prosecution or for oral proceedings to start against the director. Moreover, **the powers of the Audit Committee are reinforced**, giving it the task of supervising non-financial information and of the systems to control and manage non-financial risks, as well as implementing internal control policies and systems. Finally, when directors resign before the end of their term in office, they **must give the board sufficient details of the reasons for their resignation or, in the case of non-executive directors, their opinion on the reasons why they have been removed from office by the shareholders' meeting, and the company must make public as soon as possible** (if this information is relevant to investors) the director's removal from office, circumstances of their removal and the director's opinion (without prejudice to having to explain the matter further in the annual corporate governance report).

Secondly, a number of changes are proposed regarding diversity in the composition of listed companies' boards of directors. A direct recommendation for **directors of the least represented sex to be represented by a minimum of 40% of the total number** of directors is proposed. In addition, and after concluding that the percentage of female executive directors is very low at board level in listed companies, **the recommendation is for company's selection policies to promote the appointment of an appropriate number of women to senior management positions** (with a view to them potentially becoming executive directors in the future).

Other proposals also include **extending to all groups of companies with a controlled listed company the obligation to report any business relations or activities it carries out with its parent company** or with other group companies, and the mechanisms in place to resolve conflicts of interest, regardless of whether the parent company is listed.

On a related note, the terminology is revised, updating the name of the **specialized sustainability committees which supervise compliance with environmental, social and corporate governance policies, from corporate social responsibility committee to sustainability committee**. Furthermore, listed companies must have a **general policy to communicate economic-financial and corporate information** through the channels they may consider, so as to encourage disclosure and the quality of the information for the market, investors and other stakeholders.

The categories of directors in executive committees need not be proportional to the categories of directors at board level, and the committees may be mainly formed by executive directors, provided that they include a minimum of two external directors, of whom one is an independent director. Finally, the CNMV sheds some light on the limit on contract termination payments to directors and establishes that **any amount due as a result of termination, such as post-contractual non-compete or pension plan payments, must also be taken into account to calculate the two years' compensation limit**.

Although the documents submitted for consultation by the CNMV do not refer to this matter, we understand that if the proposed amendments are approved, they will apply for the first time to the annual corporate governance reports to be drawn up in 2021 in relation to financial year 2020.

OTHER AMENDMENTS RELATED TO MARKET ABUSE AND OFFERING AND ADMISSION PROSPECTUSES APPLICABLE TO ALL ISSUERS

Additionally, MAR has introduced other important amendments, which will be in effect as of 1 January 2021. Article 11 MAR states that in **bond issuances addressed to qualified investors, reporting inside information to these investors does not constitute a market sounding** when its purpose is to negotiate the contractual terms and conditions of the investors' involvement in the issuance. The issuer must ensure that the recipients of the information know and acknowledge in writing the obligations that receiving the information entails, as well as related sanctions, so that the communication is deemed to be **made in the normal exercise of a person's employment, profession or duties**, which is permitted under Article 10.1 MAR.

The first half of Article 18 MAR on **insider lists** is also amended, to clarify that the obligation to draw up and maintain insider lists also applies to **persons acting in the name and on behalf of the issuers** (such as, external advisors).

On the other hand, to avoid the abusive use of the exemption to the obligation of publishing a prospectus in the case of securities (i) offered in an acquisition through an exchange offer, or (ii) offered or allotted in connection with a merger or spin-off, the Prospectus Regulation clarifies and emphasizes the **obligation**

of any unlisted company that wishes to request admission to listing, to publish a prospectus in accordance with the provisions of the Prospectus Regulation, even if it is admitted as a result of any of these exceptions. The prospectus exemption in the above scenarios will apply to companies that are already listed before the acquisition or transaction, and provided an equivalent document has been published. This change is already in effect.

NEW ELECTRONIC FORMAT FOR THE ANNUAL FINANCIAL REPORT

Finally, Directive 2013/50/EU, amending the Transparency Directive, provides that, with effect from 1 January 2020, **annual financial reports of issuers in the continuous market must be drawn up in a single electronic format.** The Delegated Regulation 2019/815 of 17 December 2018 states that the single electronic format for the presentation of the **individual and consolidated annual financial reports (annual accounts, management report and responsibility statement) will be the "xHTML" format,** which is human-readable. In addition, **when the reports include consolidated financial statements under IFRS, issuers must identify such financial statements with the machine-readable "XBRL" language,** which enables the automation of the information and involves the application of a taxonomy to convert human-readable text to machine-readable information (all of which is regulated in detail in the annexes to Delegated Regulation 2019/815 of 17 December 2018, which was updated by Delegated Regulation 2019/2100 of 30 September 2019). "XBRL" marking is voluntary for individual financial statements.

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