

## SPAIN CORONAVIRUS. STATE OF EMERGENCY: MEASURES TAKEN BY THE CNMV REGARDING UCI, PE, EICC AND THEIR MANAGEMENT COMPANIES

This client briefing explains the main measures taken to date by the Spanish Securities Market Commission (*Comisión Nacional del Mercado de Valores*) ("CNMV") regarding undertakings for collective investment ("UCI"), private equity entities ("PE"), closed-ended undertakings for collective investment ("EICC" as they are known in Spain and, together with UCI and PE, the "**Entities**") and their respective management companies (that is, *sociedades gestoras de instituciones de inversión colectiva* ("SGIIC") and *sociedades gestoras de entidades de inversión colectiva cerrada* ("SGEIC")); together, the "**Management Companies**"), in the context of the state of emergency declared in Spain to manage the health crisis situation caused by the COVID-19 virus, by means of Royal Decree 463/2020, of 14 March ("RD 463/2020"), effective as from that same date (and amended by RD 465/2020, RD 476/2020, RD 487/2020 and RD 492/2020, extending the duration of the state of emergency) (the "**State of Emergency**"). Here, "**D Date**" will be the date when the State of Emergency is lifted.

### 1. THE CNMV'S ACTIVITIES WILL CONTINUE

Although Additional Provision Three (Suspension of administrative deadlines) of RD 463/2020 suspends deadlines and interrupts the time limits for procedures involving public sector entities during the State of Emergency, the CNMV decided, by Resolution of 20 March 2020, that such suspension of deadlines does not affect its supervisory activities in general (requirements and other supervisory acts), even though it may refer to situations and events preceding the State of Emergency. Nor does it affect authorisations processed by Entities and securities markets possibly favourable to interested parties, nor any other procedures created and justified by the Entity's Executive Committee.

Consequently, **during the State of Emergency, the CNMV will (i) continue to supervise** securities markets and entities subject to its rules, and **(ii) continue with its authorisation procedure** of Directorates General for Entities and Securities Markets, in those cases where this may be favourable to interested parties.

Through its Q&A of 1 April 2020, the CNMV clarified certain questions arising in relation to its authorisation activities during the State of Emergency. While its replies referred to SGIIC and UCI, we feel they also all apply to

#### Key issues

- During the State of Emergency, the CNMV will continue with its supervisory activities and authorisation procedures.
- Management Companies' reporting obligations to the CNMV and to the Entities' investors remain generally in force, although the CNMV will take into account the justifications for any delays in preparing and reporting information. Any such difficulties must be reported to the CNMV as soon as possible.
- The CNMV has confirmed that extensions given to Spanish joint stock companies (S.A.) in relation to their annual accounts during the State of Emergency apply to Entities (both S.A. and funds) and to Management Companies.
- The CNMV has created a new macroprudential tool empowering it to order SGIIC to increase the liquidity of the UCI under management so as to give them time to process a potential backlog in fund redemption requests in an orderly and equitable manner.

the rest of the Entities and to SGEIC, in those cases where the exact same applicable regulations exist. Thus, for example, in relation to ***the opening of SGIIC and Spanish branches of management companies authorised in other EU Member States***, the CNMV clarified that once authorisation has been obtained to open a SGIIC or the passport has been obtained to open the branch, the time limit of one year in which such Entities must register with the CNMV and start their activities is suspended as from the date the State of Emergency was declared. That period will resume when the end of the State of Emergency is decreed, i.e. on D Date.

To make it easier for Entities to ***obtain a provisional Tax Identification Number (NIF)*** so as to be able to register investment funds in the CNMV's corresponding administrative registry, the Spanish Tax Authorities have enabled an "exceptional" online procedure on their website to apply remotely for a provisional NIF ("Procedimiento excepcional para la obtención de NIF por entidades de forma no presencial durante el estado de alarma").

And in relation to the ***expiry of certificates from the Royal Spanish Mint***, the CNMV urges interested parties to contact a Notary Public and request the issue of a notarial power of attorney in favour of the party for whom the certificate is requested, and to have such power forwarded to the CNMV in order for the certificate to be issued.

## 2. FUND MANAGERS' REPORTING OBLIGATIONS DURING THE STATE OF EMERGENCY

On 27 March 2020, the CNMV replied to several queries it received regarding the various reporting obligations of Entities and Management Companies during the State of Emergency. We summarise them here:

- **Preparation, audit and approval of the Entities' and their Management Companies' annual accounts. Submission of accounts to the CNMV, publication and delivery to investors**

The declaration of the State of Emergency has entailed the adoption of certain measures in relation to deadlines in civil, administrative and court proceedings and, pursuant to the provisions of Royal Decree-Law 8/2020, of 17 March ("RDL 8/2020"), also in relation to certain deadlines applicable to the legal regime governing legal entities. In particular, Article 40 of RDL 8/2020, as amended by Final Provision 1.13 of Royal Decree-Law 11/2020, of 31 March ("Article 40"), establishes new deadlines for the preparation, audit and approval of the annual accounts of joint stock companies (*sociedades anónimas*, "S.A."), which is the legal form of SGIIC, SGEIC and those UCI, PE and EICC that have a separate legal status from that of their investors.

According to Article 40 of RDL 8/2020:

- ✓ Even if this was not established in the corporate by-laws, during a State of Emergency, meetings of the boards of directors of an S.A. and its General Shareholders' Meetings may be held via conference call or videoconference, provided that (a) all board members or persons entitled to attend the Meetings or the parties representing them have the necessary means with which to do so; (b) the secretary of the management body can properly identify the persons in attendance; and (c) the meeting's format is expressly indicated in the minutes, which are immediately sent to the email address of each party in attendance. Meetings via conference call or videoconference will be considered to have been held at the registered address of the S.A. If a Notary Public is requested to be present at a General Shareholders' Meeting to draw up the minutes, he or she may use a remote means of communication in real time which adequately ensures that the function of Notary is fulfilled.
- ✓ Board meetings of S.A. may also be considered valid during the State of Emergency when voting is done solely in writing, provided such format is decided by the chairperson, which may be the case when requested by at least two of the directors.
- ✓ The deadline for preparing the annual accounts and, when required by law, the management report and other documents required of an S.A. by its management body (3 months as from the end of the financial year) is suspended under a State of Emergency. This time limit will recommence at D Date, giving S.A.s an additional 3 months in which to prepare these documents. However, accounts prepared

by the board of directors of an S.A. during a State of Emergency (by the deadline established by law) will also be considered valid.

- ✓ If an S.A. is obliged to have its annual accounts audited or if it does so voluntarily, the time limit for this (which is generally 1 month from the date the accounts are delivered to the auditor) will be understood to be extended for 2 months after the State of Emergency ends.
- ✓ The period allowed for the approval of the S.A.'s annual accounts by its General Shareholders' Meeting (which is 6 months as from the end of the financial year) is also extended, although in a different way, depending on whether the company is listed or not: (a) in the case of listed companies (according to Article 41 of RDL 8/2020), the ordinary general meeting can meet for this purpose within 10 months following the end of the financial year (regardless of when the accounts are, or should be, prepared and regardless of D Date); and (b) in the case of non-listed companies, the General Shareholders' Meeting must meet for this purpose within the following 3 months, as from the end of the new (extended) time period for the annual accounts to be prepared; that is, within the 6 months as from D Date.
- ✓ Proposal for profit distribution/allocation of losses: Those S.A. which, having prepared their annual accounts, call an ordinary general meeting after the entry into force of RDL 8/2020 may substitute the proposal to distribute profit or allocate losses contained in the notes to the financial statements, with another proposal. In that case, the management body must justify such substitution on the situation caused by the COVID-19 virus, and a statement from the auditor must be included with the new proposal, confirming that the auditor's opinion would not have changed, had it known of the new proposal at the time of signing.

In its communiqué dated 27 March 2020, the CNMV confirmed that the regime governing the suspension and extension of time limits for the preparation, audit and approval of annual accounts of all Entities and their Management Companies is that established in Article 40 of RDL 8/2020, both in relation to entities incorporated as an S.A. and those taking the form of a fund.

**The table below sets out, for each type of Entity and Management Company, the ordinary deadlines and the changes to these** pursuant to the provisions of Article 40, as set out in the CNMV's communiqué of 27 March 2020. It is important to note that, **by law, all Entities listed below and their Management Companies must change their financial year to the calendar year**. Consequently, when the State of Emergency was declared, they were all within the time limit for the preparation, audit and approval of their annual accounts corresponding to the financial year ended 31 December 2019.

#### FOR MANAGEMENT COMPANIES

DEADLINES FOR THE PREPARATION, AUDIT AND APPROVAL OF ANNUAL ACCOUNTS AND THEIR PRESENTATION TO THE CNMV		
	SGIIC	SGEIC
Applicable legislation	Rule 6 of CNMV Circular 7/2008, dated 26 November	Art. 67.8 of Act 22/2014, dated 22 November
Ordinary deadlines	<u>Preparation:</u> 3 months as from the end of the financial year  <u>Audit:</u> 1 month as from the delivery of the accounts to the auditor  <u>Approval:</u> no time limit, but must be approved before the accounts are submitted to the CNMV and after the audit report is issued  <u>Submission to the CNMV</u> (*): 4 months as from the end of the financial year	<u>Preparation:</u> 3 months as from the end of the financial year  <u>Audit:</u> 1 month as from the delivery of the accounts to the auditor  <u>Approval:</u> no time limit, but must be approved before the accounts are submitted to the CNMV and after the audit report is issued  <u>Submission to the CNMV</u> (**): 6 months as from the end of the financial year

<b>New deadlines under the State of Emergency</b>	<p><u>Preparation:</u> 3 months as from D Date</p> <p><u>Audit:</u> 2 months as from the delivery of the accounts to the auditor</p> <p><u>Approval:</u> no time limit, but must be approved before the accounts are submitted to the CNMV and after the audit report is issued</p> <p><u>Submission to the CNMV (*) (**):</u> 4 months as from D Date.</p>
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(\*) Submission of annual accounts, together with the audit report and management report for SGICC.

(\*\*) Submission of annual accounts, together with the audit report and management report, as part of the Annual Report, for SGEIC.

(\*\*\*) If the accounts were already prepared when the State of Emergency was declared, they may be submitted to the CNMV at the end of the 2 month extension, for verification by the auditors.

## FOR ENTITIES

<b>DEADLINES FOR THE PREPARATION, AUDIT AND APPROVAL OF ANNUAL ACCOUNTS AND THEIR PRESENTATION TO THE CNMV</b>		
	<b>UCI</b>	<b>PE and EICC</b>
<b>Applicable legislation</b>	Arts. 33.1 and 29 of Royal Decree 1082/2012, dated 13 July	Arts. 67.2 and 67.3 of Act 22/2014, dated 22 November
<b>Ordinary deadlines</b>	<p><u>Preparation:</u> 3 months as from the end of the financial year</p> <p><u>Audit:</u> 1 month as from the delivery of the accounts to the auditor</p> <p><u>Approval:</u> no time limit, but they must be approved by the GSMS of UCI that are S.A. before the accounts are submitted to the CNMV and after the audit report is issued</p> <p><u>Submission to the CNMV and publication (*):</u> 4 months as from the end of the financial year</p>	<p><u>Preparation:</u> 5 months as from the end of the financial year</p> <p><u>Audit:</u> 1 month as from the delivery of the accounts to the auditor</p> <p><u>Approval:</u> no time limit, but they must be approved by the GSMS of PE and EICC that are S.A. before the accounts are submitted to the CNMV and after the audit report is issued</p> <p><u>Submission to the CNMV and publication (**):</u> 6 months as from the end of the financial year</p>
<b>New deadlines under the State of Emergency</b>	<p><u>Preparation:</u> 3 months as from D Date</p> <p><u>Audit:</u> 2 months as from the delivery of the accounts to the auditor</p> <p><u>Approval:</u> no time limit, but must be approved before the accounts are submitted to the CNMV and after the audit report is issued</p> <p><u>Submission to the CNMV (*) (**):</u> 4 months as from D Date.</p>	

(\*) Submission of annual accounts, together with the audit report and management report for UCI.

(\*\*) Submission of annual accounts, together with the audit report and management report, as part of the Annual Report, for PE and EICC.

(\*\*\*) If the accounts were already prepared when the State of Emergency was declared, they may be submitted to the CNMV at the end of the 2 month extension, for verification by the auditors.

As we can see in the tables above, the CNMV has assimilated all the Entities and their Management Companies with joint stock companies (S.A.) only as regards the deadlines for preparing and auditing annual accounts. However, since the deadlines for submitting annual accounts to the CNMV are tight, those Entities incorporated as S.A.s, along with all Management Companies (which are required by law to be incorporated as S.A.s), will not be entitled to the extensions established by Article 40 for the approval of their annual accounts by the General Shareholders' Meetings (i.e. the three months in addition to the three-month extension from D Date for preparation). The CNMV has also not taken into account the longer deadlines for submitting annual accounts to the CNMV afforded to PE/EICC/SGEIC (as opposed to UCI and SGIIC) by the applicable regulations, and has decided to establish the same submission deadlines for all Entities and their Management Companies.

To avoid pressure in meeting the audit and submission deadlines once D Date has arrived, and in anticipation of a barrage of requests for audit reports thereafter, we recommend that Entities and their Management Companies, during the State of Emergency and to the extent possible, (i) prepare their annual accounts using the online mechanisms cited and permitted by Article 40, even where not established in their by-laws; and (ii) request the audit of their annual accounts.

Lastly, we would like to highlight other provisions relating to Entities' and Management Companies' annual accounts cited in the CNMV's communiqué of 27 March 2020:

- ✓ Annual accounts that had not yet been prepared when the State of Emergency was declared must include information on the impact of the Covid-19 pandemic in note 22 to the financial statements, "*Events After the Reporting Period*". If the annual accounts have already been prepared, this information must be included in the next investors report.
- ✓ In order to fulfil transparency obligations, audited annual accounts must be published on the Management Companies' websites and in the places established for their publication in each of the Entities' prospectuses, on the same date as they are submitted to the CNMV. They must then be delivered to the Entities' members and shareholders as soon as possible, no later than one month following submission to the CNMV.
- ✓ The rules mentioned here do not apply to EuSEFs, EuVECAs or ELTIFs, since the EU Regulations that govern them allow until 30 June for the submission of annual accounts to the competent supervisory authorities (where the calendar year is used as the financial year). The CNMV will inform such entities of the rules on submission of annual accounts and audits if necessary (i.e. if the State of Emergency is prolonged).

• **UCI quarterly reports**

SGIIC must deliver quarterly reports to investors who have expressly requested them, no more than one month following the end of the quarter in question, and must publish these reports in the places indicated in the prospectus and the KIID.

Accordingly, UCI must deliver Q1 2020 reports (figures as at 31 March 2020) by 30 April 2020.

The CNMV reiterates that, while the obligation to prepare, publish and submit quarterly reports to the CNMV remains in force in the current situation, the CNMV will take into account the difficulties the situation poses and the potential justifications for delayed preparation and publication of quarterly reports, when exercising its supervisory role. Any such difficulties must be reported to the CNMV as soon as possible.

The CNMV will, in general, consider it justified by the circumstances if SGIIC suspend physical delivery of the quarterly report while the State of Emergency persists, provided that they use their best endeavours to individually inform each investor who had requested a hard copy of the quarterly report that they can view it on the relevant website.

Lastly, SGIIC must include information on the impact of Covid-19 on the UCI's investments in the descriptive annex to the quarterly report (section 9), along with information on the investment decisions made, including their views on the market outlook and possible strategies for managing their portfolio.

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- **Submission of confidential information statements of the Entities and their Management Companies (EERR)**

The obligation of the Entities and their Management Companies to submit their various confidential information statements (EERR) within the deadlines established in the applicable regulations remains in force.

For UCI: Rule 21 of CNMV Circular 3/2008, of 11 September, on accounting rules, annual accounts and confidential information statements establishes that UCI must submit various monthly, quarterly and annual confidential information statements. Depending on the type of statement, it may refer to the UCI, its compartments or to classes or series of participations or shares. Such statements must be submitted to the CNMV by the last calendar day of the month following the date of the statement. If that day is not a business day, the statement must be submitted the very next business day. Spanish funds of hedge funds ("IICIL") must submit their statements by the last calendar day of the third month following the date of the statement in question. For example, they must submit their statements as at 30 September by 31 December. They must however deliver the statements to the depositary before submitting them to the CNMV, at least 15 days before the deadline for submission to the CNMV.

For PE: Rule 19 of CNMV Circular 11/2008 on accounting rules, annual accounts and confidential information statements of PE (amended by CNMV Circular 5/2018, of 26 November) establishes that PE must submit annual confidential information statements to the CNMV by 30 April of the following year.

For Management Companies: Rule 58 of Circular 7/2008, of 26 November, on accounting rules, annual accounts and confidential information statements of Spanish investment service companies, SGIIC and SGEIC (amended by CNMV Circular 5/2018, of 26 November) establishes that Management Companies must submit semi-annual or annual confidential information statements – depending on the type of statement – to the CNMV by the 30th day of the month following the end of the six-month period or year in question.

However, the CNMV will take into account the difficulties the situation poses and the potential justifications for delays in the above reporting, when exercising its supervisory role. Any such difficulties must be reported to the CNMV as soon as possible.

- **Submission of OIF forms**

UCI and PE must continue to report on asset and liability statistics ("OIF" forms) to the CNMV by the deadlines established in the applicable regulations.

Under Rules 1 and 2 of CNMV Circular 5/2008, of 5 November, on statistical reporting requirements relating to the assets and liabilities of European Union undertakings for collective investment (amended by CNMV Circular 5/2014, of 27 October), the following are required to submit statements: all compartments – or UCI (funds and companies, financial and non-financial) if they have no compartments – whose investment policy is not monetary or monetary at short term, or is not to invest in monetary UCI or monetary UCI at short term, or in UCI included in the list of Monetary Financial Institutions published by the European Central Bank. This also applies to PE registered with the CNMV.

Two categories of reporting population are established in Circular 5/2008 in relation to reporting requirements:

- (i) UCI and PE not exempted due to size: forms OIF1, OIF2 and OIF3 must be submitted monthly by the 20th day of the month following the date of the statement in question. However, Spanish hedge funds ("IICIL"), IICIICIL and PE, although they must also submit monthly statements, have until the 20th day of the fourth month following the date of the statement in question. For example, if the statement is dated 30 April, the deadline for submission is 20 August.
- (ii) UCI and PE exempted due to size: forms OIF2e and OIF3e must be submitted quarterly by the 20th day of the month following the date of the statement in question (March, June, September and December). However, IICIL, IICIICIL and PE, although they must also submit quarterly statements, have until the 20th day of the fourth month following the date of the statement in question. For example, if the statement is dated 31 March, it must be submitted by 20 April, or by 20 July in the case of IICIL, IICIICIL and PE.

As with confidential information statements, the CNMV will take into account the difficulties the situation poses and the potential justifications for delays in the above reporting, when exercising its supervisory role. Any such difficulties must be reported to the CNMV as soon as possible.

- **AIF Procedure and reporting by money market funds**

The reporting requirements established by the Alternative Investment Fund Managers Directive (AIF Procedure) remain in force. Such reports must contain the information indicated in Annex IV to Commission Delegated Regulation (EU) No 231/2013.

The reporting requirements for money market funds established in Regulation (EU) 2017/1131 also remain in force. However, in light of the ESMA announcement published on 31 March, the first report must be submitted in September 2020 (rather than April 2020, as originally established), since ESMA is working on an update to the XML schemas that should be used for the reporting.

Again, the CNMV will take into account the difficulties the situation poses and the potential justifications for delays in the above reporting obligations, when exercising its supervisory role. Any such difficulties must be reported to the CNMV as soon as possible.

- **Internal audit report**

The internal audit units of SGIIC and Spanish open-ended investment companies (SICAV) are required to prepare an annual internal audit report on the result of their activities which, under Rule 6 of CNMV Circular 6/2009 on internal control at management companies, must be delivered to the board of directors and the CNMV by digital means within the first four months of each financial year. Although the deadline for submitting the report to the CNMV remains in force, reasonable delays in submission may be admissible due to the current health crisis situation, provided that the company in question notifies the CNMV of the justifying event or events.

- **Requests for information from the CNMV to Management Companies and self-managed entities**

The obligation also remains in force for Management Companies and self-managed entities to respond to requests from the CNMV, which they must do within the deadline provided in each request, as established in the CNMV Board Resolution of 20 March 2020 on the suspension of deadlines in administrative proceedings established in RD 463/2020.

However, they may request extensions if they face any difficulty in responding by the deadline as a result of the current situation, which the CNMV will generally be disposed to grant.

In any case, the CNMV has stated that it will take the current situation into account when formulating its requests and when setting deadlines for response.

- **Material incident reporting**

Any material incidents that affect an Entity's daily operations must be reported to the CNMV as soon as possible, particularly those that affect the calculation and publication of the net asset value of managed UCI or that affect subscription and redemption transactions. Entities and Management Companies must also communicate to the CNMV any doubts they may have regarding proper procedure, given the current situation.

### **3. NEW CNMV MACROPRUDENTIAL TOOL FOR ORDERING SGIIC TO INCREASE LIQUIDITY IN ORDER TO HANDLE A BACKLOG OF REDEMPTION REQUESTS**

We will close by highlighting the amendment to paragraph 7 of Article 71 septies of the Spanish Undertakings for Collective Investment Act (LIIC) that was made by Royal Decree-Law 11/2020, of 31 March, on the adoption of supplementary social and economic measures to address COVID-19. With this amendment, the CNMV is now expressly empowered to order SGIIC to adopt measures to increase the liquidity of the UCI under management so as to give them time to process, in an orderly and equitable manner, a potential backlog of redemption requests that could affect the stability of, and confidence in, the financial system.

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