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News Alert

Banking and Financial Law Department

CNMV (Comisión Nacional del Mercado de Valores [National Securities Market Commission]) Control Over Advertising of Investment Products and Services

The Spanish National Securities Market Commission Circular 2/2020, of 28 October, on advertising of investment products and services ("Circular 2/2020")

On 13 November 2020, the Spanish National Securities Market Commission (CNMV) Circular 2/2020 was published in the BOE (Boletín Oficial del Estado [Official State Gazette)], implementing Order EHA/1717/2010, of 11 June, on the regulation and control of advertising investment products and services (the "**Order**"), with respect to both the scope of application and the content and format that advertising messages must respect.

It should be noted that Circular 2/2020 will enter into force three months after its publication in the BOE (that is, on 13 February 2021), except with regard to the characteristics of the internal registration of advertising activities, which shall come into force six months after the publication by the Bank of Spain of the technical specifications provided for in the second final provision of the Bank of Spain's Circular 4/2020, of 26 June, on the advertising of banking products and services.

I. Scope of Application of Circular 2/2020

Circular 2/2020 applies to any advertising activities aimed at investors or potential investors residing in Spain related to the offering of specific investment products or services (objective scope) carried out by the following entities (subjective scope):

- Objective scope: financial instruments, investment services and activities and auxiliary investment services, activities involving the management of CIS, private equity entities and securitisation trusts, structured deposits, Participatory Financing Platform (PFP) services and any other financial products, services or activities subject to the supervision of the CNMV.

- Subjective scope: investment services companies, credit institutions, companies managing collective investment institutions (SGIIC) and companies managing closed-ended collective investment undertakings (SGEIC), including Spanish branches of foreign entities or entities that operate in Spain with freedom to provide services or, in the case of EU entities, through an agent. Additionally, PFP, any party interested in public offerings for the acquisition of securities or public offerings for the sale or subscription of securities and any other entity that carries out advertising activities related to the offering of products or services referred to in the objective scope.

However, the following are expressly excluded from the scope of application of Circular 2/2020, since they are not considered advertising activities:

a) Corporate advertising campaigns.

b) Documentation or information provided in presentations to analysts or institutional investors, conducted by representatives of entities, issuers or insurers during the placement period with the aim of establishing institutional investors' interest in an offer.

c) Periodic publications issued by the analysts and experts defined in the Commission Delegated Regulation (EU) 2016/958 on financial instruments or services, including, among others, analysis reports and investment recommendations.

d) Pre-contractual and contractual information or information or warnings regarding the characteristics and risks of the products or services offered and provided to investors in compliance with reporting obligations, as well as information regarding the objective data of a financial instrument or explanatory information about the situation of the markets and the entity's management decisions in a market context.

e) Documentation or information about investment strategies or investment ideas by an SGIIC, an SGEIC or an EU alternative funds manager or, on behalf of the latter, for potential professional investors domiciled or registered in the EU.

In any event, Circular 2/2020 prohibits any advertising activities aimed at retail investors or the general public relating to any product or service, when the sale or provision of such product or service is prohibited for this type of customer.

II. Principles and Criteria Applicable to the Advertising of Investment Products and Services

The information contained in commercial communications must be consistent with the informative contents, including warnings established by Law, or at the request of the CNMV.

Advertising must also comply with the following general principles regarding the content and format:

- Be clear, unbiased and not misleading, using simple language that is easy to understand.
- Refer to the product's mandatory legal documentation, indicating where this can be obtained.
- Clearly identify that it is an advertising communication.
- Communicate the value or benefits of the product or service.
- Allow the advertising piece to be properly understood by the intended target audience.
- Prevent secondary messages from contradicting the content of the main message.
- Ensure that any relevant information or warnings about the product or service are appropriately highlighted.
- Not include limitations or exclusions of liability for the advertising content.

III. Commercial communication policy and internal advertising records

Entities that advertise their investment products and services must establish a commercial communication policy that includes appropriate internal procedures and controls to ensure compliance with the provisions of Circular 2/2020.

In particular, said policy, which must be reviewed periodically, must include a description of the advertising activities, the general principles and criteria set forth above, the functional areas responsible for the internal review of advertising pieces and a description of the internal procedures and controls in place for the protection of customers' interests and the management of the risks derived from the advertising activity.

The body responsible for the approval of the commercial communication policy will be the governing body, which may approve a simplified policy in smaller entities with more limited advertising activities and which do not relate mainly to complex products.

Entities belonging to the same group may structure the commercial policy at a group level.

Entities shall be required to keep updated internal records of their advertising activities, which shall comply with the conditions of truthfulness, completeness, accessibility and traceability required to enable the CNMV to carry out its supervisory functions.

Each of the advertising campaigns shall be recorded separately by calendar years, identifying them by consecutive numbers and commercial name, and the information must be kept for a period of five years from the start of the campaign.

IV. On the Supervisory Function of the CNMV

Advertising shall not, under any circumstances, require prior authorisation from the CNMV, with the CNMV having an *ex-post* supervisory function.

In this regard, the CNMV may request, at any time, all the specific information about the advertising campaigns in order to assess the degree of compliance with the provisions established in the Order and in Circular 2/2020, which must be addressed within a maximum period of three business days.

The CNMV may report any discrepancies identified in the advertising activities, and may even order the discontinuance or rectification thereof. If such order is issued, the entity will have a period of three business days to demonstrate its compliance with the requirements or object to the decision based on duly justified reasons.

