

## Amendments to the regulation of collective investment introduced by Act 16/2013

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The Official Journal of Spain (BOE, its acronym in Spanish), of 29 October, published Act 16/2013, of 29 October, establishing a package of measures on environmental taxation and adopting other tax and financial measures ("**Act 16/2013**"). Final provision 1 of said Act, which will come into force on 1 January 2014, amends the Collective Investment Schemes Act ("**CISA**") 35/2003, of 4 November, regarding the statutory and regulatory regime applicable to the registration of domestic and foreign investors in collective investment schemes ("**CIS**"), and modifies, as a result, certain tax aspects of the statutory and regulatory regime for CIS share and unit transfers.

In accordance with the rules and regulations in force until 31 December 2013, the registration of CIS shares and units in Spain is performed as follows:

- a) **Spanish CIS incorporated as investment companies marketed in Spain:** by way of reference to the Spanish Companies Act, the registration of shareholders of investment companies must be done directly, ie, the company's register of shareholders must record all shareholder identification details, regardless of whether the company is self-managed or the management has been delegated to a CIS management company.
- b) **Spanish CIS incorporated as investment funds (investment trusts) marketed in Spain:** in accordance with the provisions of article 40 CISA, registration of investment fund unitholders must be done directly, ie, the register of unitholders must record their

identification details if marketing has been carried out with the intermediation of the management company or at least the tax identification number of the unitholder and the name of the distributor through which the units have been subscribed if the marketing has been done with the intermediation of an entity other than the management company of the CIS (alternative introduced in the Act, in order to prevent management companies from having access to full identification details of investors).

- c) **Spanish CIS incorporated as investment companies or investment funds marketed abroad:** article 21.1 a) of Regulation 1082/2012, of 13 July, approving CISA rules ("**CISR**") allows the use of omnibus accounts by Spanish CIS when they market their shares or units abroad, providing that, in the CIS' register of shareholders or unitholders, the holders channelled through the foreign distributor must be recorded under the name of the distributor, but on behalf of its clients.
- d) **Foreign CIS incorporated as investment companies or investment funds marketed in Spain:** the Spanish securities and markets authority (CNMV, its acronym in Spanish) has concluded that the use of omnibus accounts in the marketing of these CIS in Spain is a matter subject to the legislation of the CIS' country of origin. Hence, although not regulated by Spanish law, the register of shareholders and unitholders of foreign CIS marketed in Spain is performed through omnibus accounts opened in the name of the Spanish distributor, but on behalf of investors.

According to Act 16/2013, the marketing entities will keep the identifier register of investors when the marketing is carried out directly by them. However, this change only affects the CIS incorporated as investment funds; not investment companies where the register of shareholders will continue to be governed by the provisions of the Companies Act and, therefore, should continue to be performed directly in the name of the CIS investor shareholder. As far as investment funds are concerned, distributors must individually record the balance and value of each investor's holdings, broken down by transaction and including the financial and tax details required to comply with the tax obligations of the distributor and the investor. In this case, the management company must record, in the register of unitholders of the CIS, the identity of the intermediary distributor, without providing unitholder details, which will thus be left in the marketing entity's safekeeping.

In view of the above, once Act 16/2013 comes into force, the registration of CIS shares and units will be done as follows:

- a) **Spanish CIS incorporated as investment companies marketed in Spain:** registration will still be done directly, recording all shareholder identification details in the CIS' register of shareholders, regardless of whether the company is self-managed or the management has been delegated to a CIS management company.
- b) **Spanish CIS incorporated as investment funds (investment trusts) marketed in Spain:** according to the new wording of article 40.3 CISA, investment fund units marketed through distributors or other management companies (other than the CIS' management company) may appear in the CIS' register of unitholders under the name of the distributor, but on behalf of the unitholders, thus allowing the use of omnibus accounts for this type of CIS.

Notwithstanding the above, the new wording presents some peculiarities that should be borne in mind when registering unitholders. The first is that unitholders will be registered either in the CIS' register or in the distributor's register, but never in both - the entities involved in the process having to opt between one and the other method of registration. The second is that in the event that a unitholder holds units in the register of unitholders prior to

the entry into force of Act 16/2013, said units shall remain registered in the CIS' register of unitholders even if the management company and distributor choose to register through the omnibus account.

For the purposes of the above, the management company and the distributor are compelled to regulate in the relevant unit allocation agreement (i) the distributor's obligation to provide information to unitholders to which they are legally entitled and the management company's obligation to provide the distributor with such information, and (ii) the distributor's obligation to send the aggregate statistical information on the unitholders to the management company which, in turn, must file said information with the CNMV.

- c) **Spanish CIS incorporated as investment companies or investment funds marketed abroad:** article 21.1 a) CISR has not changed, so registration shall still be performed through omnibus accounts in the name of the distributor, but on behalf of its clients.
- d) **Foreign CIS incorporated as investment companies or investment funds marketed in Spain:** the use of omnibus accounts by foreign CIS remains without express regulation, although marketing will still be carried out in the same manner, using omnibus accounts. Act 16/2013 quite rightly removes the reference made for foreign CIS to the "centralising agent" of unitholders (introduced by Act 31/2011, of 4 October), amending the CISA and repealing this legal figure that caused such a stir in the market.

Given the implications for the protection of investor assets that the use of this type of accounts has, the new wording of article 40.3 CISA provides a form of protection to investors, referring to the Spanish Securities Market Act and its implementing regulations, and in particular to article 42.2 of Royal Decree 217/2008, of 15 February, on the legal regime for investment services companies. According to these rules and regulations, the distributor using global accounts must (i) maintain an effective separation between the securities of the investor and those of the entity, (ii) obtain express individual consent, in writing and in advance, from the client for using this registration system, and (iii) have systems and controls in the entity to ensure compliance with the obligation to keep assets separate.

Moreover, the amendments introduced by Act 16/2013 have a number of tax implications, salient amongst which are the inclusion of distributors as entities required to supply information to the tax authorities (given that, as from January 2014, management companies will no longer have access to investor details where so agreed). Additionally, a number of obligations are imposed on the unitholders of an investment fund if they are simultaneously holders of units of the same fund in registers of unitholders of more than one distributor, or, in the case of units from one, several or successive transfers of other units or shares, when any such transfers were made concurring with the same situation of simultaneity in the units or shares redeemed or transferred. The aim here is to ensure that unitholders and shareholders pay taxes on share or unit values

determined in accordance with the FIFO (First In First Out) method.

As a final note, we expect the commercial impact of these CIS market changes in Spain to be significant, because now Spanish CIS can access the same network of distributors foreign CIS access without the fear of having to give client data to potentially competing entities; thereby eliminating the competitive disadvantage suffered by Spanish CIS.

Therefore, the market opens up considerably as one same CIS may be marketed by distributors belonging to different groups, broadening marketing networks, and distributors may offer a wider product range to its clients without fearing their clients' data moving freely in a market full of competing agents.

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