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MAIN INNOVATIONS IN SECURITIZATION IN THE LAW ON PROMOTING
BUSINESS FINANCING

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INTRODUCTION

On April 28, 2015, Act 5/2015 on promoting business financing (“**LFFE**”) was published in the Spanish Official Gazette (“**BOE**”). It establishes measures to (i) increase and facilitate SMEs’ access to bank credit, and (ii) create financing alternatives, such as direct corporate lending and non-bank financing.¹

The LFFE establishes important new measures regarding securitization, adapting their legal framework to the new financial context, based on the experience accumulated from their use over the past two decades. The reform combines two previous legal securitization categories —asset securitization funds (“**FTA**”) and mortgage securitization funds (“**FTH**”)— and enables a more flexible system. It also strengthens transparency and investor protection requirements, defines the role of management companies, and modifies the supervision regime.

The measures in the LFFE have come into force the day after it was published in the BOE, although the law contains several securitization regulations that will be applied on a transitional basis.² The repealing provision establishes the repeal of regulations on securitization funds and their management funds established in 19/1992, of July 7, on Real Estate Investment Funds and Companies and Mortgage Securitization Funds (“**Act 19/1992**”) and Royal Decree 926/1998, of May 14, regulating asset securitization funds and securitization fund management companies (“**Royal Decree 926/1998**”).³

¹ Please click the following link for a summary of the most significant developments in the LFFE on bank financing for SMEs, bond issuance, crowdfunding and changes to the Securities Market Act (“**LMV**”): [Legal Update - Main innovations in the law on promoting business financing](#).

² For example, (i) securitization fund management companies have been given nine months from the implementation of the law to adapt to the changes it contains, and eighteen months to comply with new capital and own-funds requirements; and (ii) the FTH and FTA created before it came into force are still governed by the provisions applicable to them when they were set up, except rules on transparency, which are applicable immediately; any funds in the process of being approved and registered with the CNMV can also be governed by the previous regulations, except transparency rules, if they are incorporated within two months of the implementation of the LFFE.

³ The following are repealed: (i) articles 5, 6 and 7 of Act 19/1992, except for FTH set up before the approval of the LFFE; (ii) article 16 of Royal Decree-Law 3/1993, on urgent measures on budget, tax, financial and employment matters regulating loan and other credit rights securitization; (iii) articles 2 to 5 of the fifth additional provision of Act 3/1994, of April 14, on adapting Spanish legislation on finance companies to the Second Banking Coordination Directive (“**Act 3/1994**”), regulating, among other matters, mortgage transfer certificates; (iv) article 97 of Act 62/2003, of December 30, on Fiscal, Administrative and Social Measures, relating to synthetic securitization; (v) article 27 of Royal Decree-Law 6/2010, of April 9, on measures to

We summarize below the most significant measures on securitizations.

DEVELOPMENTS REGARDING SECURITIZATION FUNDS

Changes to the previous system:

- **Types of funds:** The LFFE combines FTH and FTA in a single category. It also includes rules on synthetic securitization funds in the regulation.⁴
- **Compartmentalization:** The deed of incorporation of the securitization funds allows assets to be divided into independent compartments against which different kinds of securities can be issued, and obligations assumed.
- **Fund assets:** Credit rights that can be added to a fund's assets remain the same (credit rights recorded in the assignor's assets, future credit rights of a known or estimated value, mortgage participations -"*participaciones hipotecarias*"- and mortgage transfer certificates -"*certificados de transmisión de hipoteca*"-); the main change is that they do not have to be uniform, as required under article 2 of Royal Decree 926/1998. Therefore, several risks can be grouped within the same fund.

In rem rights on assets belonging to securitization funds can still be registered with the relevant registries.⁵

- **Fund liabilities:** The content of fund liabilities now also includes loans granted by financial institutions and by any third party.

stimulate economic recovery and employment, including securitization funds being considered a registrable security; and (vi) Royal Decree 926/1998.

⁴ This regulation was established in article 97 of Act 62/2003, of December 30, on Fiscal, Administrative and Social Measures, which has been repealed with the passing of the LFFE (repeal provision, section e).

⁵ The fifth additional provision of Act 3/1994 considered that FTH and FTA could own any amounts, properties, assets, securities and rights received as payment of principal, interest or expenses of the credit rights grouped in their assets following a decision in a court or out-of-court proceeding, and that the assets belonging to the funds had to be registered in the relevant registries. This provision has been repealed, except for its first section, following the passing of the LFFE (repeal provision, section d).

There is no longer the requirement that 50% of fund liabilities must be made up of fixed-income securities.

Securities issued by the fund can be traded on an official secondary market or on a multilateral trading facility ("**MTF**").

The financial risk of the securities issued by funds does not have to be assessed by a credit rating agency.⁶

Funds can grant guarantees in favor of other liabilities issued by third parties, enabling the issuance of "structured covered bonds."

- **Asset transfers:** Assets can be acquired through assignment and through acquisition, primary market subscription and any other way allowed by law.

The LFFE eliminates the following requirements for the transfer of assets to a securitization fund, previously regulated under article 2 of Royal Decree 926/1998:

- Assignment of the assets to funds is not required to be made by means of true sale, unconditionally or for the whole period remaining until maturity.
- The law eliminates the requirement for the assignor not to grant guarantees or assure the success of the transaction.
- The assignor is not required to retain administration and management of the assigned credit.⁷ However, this will not apply to mortgage loans that form part of an issue of mortgage participations or mortgage transfer certificates, as article 26 of the Mortgage Market Regulations⁸

⁶ However, the rating is still necessary for discounting with the European Central Bank.

⁷ Article 2.2 b) of Royal Decree 926/1998 considered that this administration could be assigned.

⁸ Royal Decree 716/2009, of April 24, developing several aspects of Act 2/1981, of March 25, regulating the mortgage market and other rules for the mortgage and financial system.

establishes the issuer's obligation to preserve the custody and administration of the loan or mortgage credit.⁹

- **Synthetic securitization:** Funds can synthetically securitize loans and credit rights by (i) contracting with third parties of credit derivatives, or (ii) granting financial guarantees or collateral in favor of the owners of these loans or credit rights.

To relax the mechanism for this type of securitization, the LFFE eliminates the requirement that the counterparty must be a credit institution, an insurance company or a non-resident company authorized to perform these activities.

The remaining conditions for carrying out this type of securitization are the same as in the previous regulation.

- **Closed funds:** The deed of incorporation of closed-end funds can specify a ramp up period of four months from their establishment, during which assets can be assigned to closed funds, up to a given maximum.
- **Open funds:** The management company can modify the fund's assets ("active management") to maximize yield, guarantee the quality of the assets, manage risk and preserve the conditions in the deed of incorporation, as long as the management policy is regulated in the deed of incorporation, and if applicable, in the prospectus. In this case, a committee must be set up to supervise this activity, remunerated according to the investment and risk policy of each fund.
- **Requirements for incorporation:** The LFFE does not specify the content of the deed. Article 6 of Royal Decree 926/1998 referred to (i) the identification of assets, and their administration and collection management; (ii) rules on replacement, legal and economic and financial characteristics of the assets and the securities to be issued, (iii) transactions to be agreed to ensure regular payments and compensate for interest rate differences, and (iv) rules for winding up the fund.

⁹ In the case of mortgage transfer certificates, this rule applies following the reference to the mortgage market in the fourth additional provision of the LFFE.

- As the financial risk of the securities issued is no longer subject to evaluation, it is not necessary to submit reports prepared by agencies responsible for the credit risk of liabilities.

Securitization fund accounts only need to be deposited with the Spanish National Securities Market Commission (“**CNMV**”) and do not need to be filed with the commercial registry, as required under article 5.4 of Royal Decree 926/1998.

- **Changes to the deed of incorporation:** Any changes to the deed of incorporation requires (i) the consent of all the holders of the securities issued and the remaining creditors of its liabilities, except non-financial creditors, (ii) that CNMV considers the change to be insignificant, or, as a new alternative, (iii) the consent of the creditors’ committee.
- **Extinguishing funds:** The LFFE eliminates the following grounds for extinguishing a fund: (i) the simultaneous presence of exceptional circumstances making it impossible or extremely difficult to maintain the fund; (ii) when a payment default takes place or is foreseen that implies a serious and permanent imbalance in the securities issued or in any non-subordinated credit; and (iii) in the case of FTHs, when the amount of the mortgage bonds pending amortization is lower than the initial 10%.

It adds two causes for extinction: when (i) decided by a three-quarters majority of the creditors’ committee, and (ii) its liabilities have been fully settled.

- **Creditors’ committee:** The deed of incorporation can establish setting up a creditors’ committee to protect creditors’ interests. It will be governed by the terms agreed on the deed of incorporation, with the supplementary application of provisions relating to the bondholder syndicates in commercial law.

DEVELOPMENTS REGARDING SECURITIZATION FUND MANAGEMENT COMPANIES

The LFFE makes the following changes regarding securitization fund management companies:

- **Corporate purpose:** A broader range of funds can be set up, administered and represented by management companies, and their corporate purpose can include managing bank asset funds, and managing special purpose funds and vehicles similar to securitization funds established abroad (in the latter case, subject to applicable regulations).
- **Increased information requirements:** management companies (i) must publish on their websites the deed of incorporation for the funds and all subsequent deeds, the prospectus and its supplements, and the annual and quarterly reports for each of the funds they manage, and they must send these reports to the CNMV for registration; and (ii) are required to notify any events affecting the securities issued and the assets making up the funds under their management.
- **Authorization and registration procedure:** Responsibility for authorizing the setting up of management companies has been transferred to the CNMV; the term for ruling on the authorization has been extended to six months; and, if the term expires without a resolution, it will be considered that the request has been approved.¹⁰

The following documents no longer have to be submitted with the request for authorization: negative certificate from the registry regarding the proposed corporate denomination, detailed information¹¹ on shareholders with a significant holding in the company (the LFFE only requires their identification and the size of their shareholding), and schedule of activities.

¹⁰ Under previous regulations, the Ministry of Economy and Treasury was responsible for this, based on a report from the CNMV; the term for making a decision was three months, and administrative silence was considered a rejection.

¹¹ Article 15 of Royal Decree 926/1998 required information on the career, professional activity and net worth of shareholders who were natural persons; in the case of legal persons, it required their financial statements, annual reports and auditors' reports for the previous two financial years, the composition of their governing bodies and the group structure.

- **Share capital and own funds:** The LFFE sets management companies' minimum capital and total own funds at €1 million. Companies managing funds with assets exceeding €250 million must increase their own resources by 0.02% of the book value of the assets managed (up to €5 million).
- **Management board:** The minimum number of management board members has been reduced from five to three.
- **Internal control and conduct regulations:** Management companies must have internal control and information technology security procedures and mechanisms, with systems to prevent money laundering and a procedure to deal with related-party transactions. They must also have units for regulatory compliance, risk control and internal audit, which must be kept separate from the operating units.

Management companies must approve internal conduct regulations on the actions of administrators, executives, employees, attorneys-in-fact and other persons to whom they delegate duties.¹²

- **Amendment to corporate bylaws:** Agreements to increase or reduce capital have been added to the list of statutory amendments that only require notification to the CNMV, rather than its prior approval.¹³
- **Resignation:** The procedure and conditions for the management company's resignation will be regulated in the future.

SUPERVISION AND SANCTIONING REGIME

In addition to LFFE's reference to the regulations for collective investment institutions, it also regulates the supervision and sanctioning regime. Infringements are classified into those considered very serious, serious and

¹² The management company's responsibility will not be affected by it having delegated functions to third parties, or by any sub-delegation.

¹³ Also applicable to agreements on the change of corporate name, registered office in Spain, the incorporation to bylaws of mandatory legal or regulatory provisions, and compliance with judicial and administrative resolutions and those that the CNMV considers insignificant.

moderate, which refer to notification obligations specified under the LFFE and applicable legislation, investment in assets and the contracting of transactions, compliance with own-capital requirements and the purchase of controlling interests in management companies. In most cases, seriousness is evaluated according to the impact on the quality of assets and the securities holders' interests, and whether the behavior has occurred repeatedly.

This supervision and sanctioning regime will apply to management companies, the funds they manage, the entities assigning assets to the funds, the issuers of the assets created for their incorporation to a fund, the managers of the assets assigned and any remaining persons bound by applicable regulations.

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