

## A BRIEF GUIDE TO MARKETING FOREIGN INVESTMENT FUNDS IN CHILE

### I. INTRODUCTION

This article provides a brief guide to marketing foreign investment funds in Chile. It sets out some preliminary considerations regarding the legal nature of the investments typically offered in a fundraising exercise; and addresses the extent to which the marketing of such instruments is regulated by Chilean law. It then discusses the more detailed rules on public and private offerings of foreign investment funds. This article also provides a few highlights about the role performed by local providers that assist in the selling efforts of foreign funds in Chile.

### II. PRELIMINARY CONSIDERATIONS

#### The legal nature of the investment

When it comes to their legal form, investment funds come in many shapes. Funds can be structured as companies, limited partnerships or unit trusts, just to name some of the most popular legal forms funds adopt in common law jurisdictions. In exchange for its capital contribution, the investor gets a *share* in a company, an *interest* in a limited partnership or a *unit* in a unit trust.

From a marketing perspective, ascertaining the legal nature of the investment fund is important. As we shall see later, unlike EU jurisdictions, Chilean law does not have a special regime applicable to the offering of foreign investment funds. Therefore, fund promoters intending to market in Chile must consider general securities laws to establish whether such marketing is regulated. In summary, (i) where the investment in a foreign fund is characterised as a security<sup>1</sup> which is promoted by means of a public offer, it will fall within the remit of Law No. 18,045 (the "Securities Market Act") and will be subject to registration; (ii) where the investment in a foreign fund is characterised as a security, but which is promoted by means of a private offer, it will fall outside the remit of the Securities Market Act and will *not* be subject to registration, although the Chilean securities regulator<sup>2</sup> has, to some degree, regulated private offers of securities; and (iii) where the investment in a foreign fund is not characterised as a security, its marketing will remain unregulated under Chilean law.

#### Key points

- Foreign investment funds characterised as *securities* and marketed in Chile by means of a public offer are subject to registration in accordance with Chilean securities laws, unless an exemption applies
- Private offers of foreign investment funds characterised as *securities* are not caught by Chilean securities laws. The Chilean securities regulator has clarified the conditions an offer must meet in order not to be a public offer
- Marketing of foreign investment funds not characterised as *securities* is not regulated in Chile
- Additional rules must be considered where a local provider helps promote foreign investment funds in Chile

<sup>1</sup> *Valores* in the original.

<sup>2</sup> On December 14, 2017 the *Comisión para el Mercado Financiero* replaced the *Superintendencia de Valores y Seguros* as the Chilean securities regulator.

### The Chilean regime on securities offering

The Securities Market Act defines and regulates public offers of securities. Two conditions must be met for an instrument to fall within the scope of the Securities Market Act:

- (1) the instrument must be a security; and
- (2) the offer of such security must be public.

Private offers of securities are excluded from the application of the Securities Market Act.

As the scope of the Securities Market Act is limited to securities, before turning to the public/private offer dichotomy, it is necessary to address the instruments that fall within the “securities” definition.

### Definition of “securities” and its impact on foreign investment funds

The Securities Market Act defines securities as ‘any *transferable instrument*, including shares, options for the purchase or sale of shares, bonds, debentures, units (quotas) of mutual funds, saving plans, negotiable instruments and, in general, any investment instruments or credit instruments.’ The Chilean securities regulator has provided further guidance on the meaning of this term by stating that the instrument must comply with certain characteristics, including being freely transferable.<sup>3</sup>

According to the foregoing definition, where the investment in a foreign fund takes the form of shares in a company, such shares would typically be characterised as securities under the Securities Market Act.<sup>4</sup> Where the investment in a foreign fund takes the form of a partnership interest, however, the position is likely to differ. Interests in partnerships often contain restrictions on transferability. As we have seen, for an instrument to be a security it must be freely transferable. The lack of this feature effectively leaves the offer of foreign partnership interests, which contain restrictions on transferability, outside the remit of the Securities Market Act. As a precaution, before marketing partnership interests in Chile, we recommend taking advice to ensure they are not captured by the definition of “securities” set out in the Securities Market Act.

## III. MARKETING OF SHARES OR OTHER SECURITIES IN FOREIGN FUNDS

What follows applies to interests in foreign investment funds characterised as securities under Chilean law.

### Public offers of securities

The Securities Market Act defines a public offer of securities as one addressed “*to the public or to a certain sector or specific group of the public.*” Due to the vagueness of this definition, whether a fund offering

<sup>3</sup> Namely, the instrument must not contain restrictions on negotiability, such as another party’s consent or other formalities. See OFORD No. 987 (2006); OFORD No. 9100 (2015); and OFORD No. 3502 (2017), all issued by the Chilean securities regulator.

<sup>4</sup> In our view, shares issued either by open-ended funds or by closed-ended funds would be caught by the definition.

qualifies as public is something that needs to be determined according to the factual circumstances of each case. The Chilean securities regulator has, to some extent, identified elements that facilitate such determination. For example, it has ruled that a public offer of securities captures any general invitation to acquire securities using mass media.<sup>5</sup>

A public offer of foreign securities is conditional upon the registration of such securities in Chile.<sup>6</sup> The registration process of foreign securities is onerous. According to General Regulation No. 352, issued by the Chilean securities regulator, several requirements must be met by (i) the issuer; (ii) the securities; and (iii) the issuer's home state securities regulator.<sup>7</sup> Moreover, a legal representative in Chile or a local sponsor, typically a local stock exchange or a locally licensed securities intermediary,<sup>8</sup> must be appointed with broad powers, including to request the securities (fund) registration and to act as process agent in judicial or administrative proceedings.<sup>9</sup> It is perhaps for this reason that entities marketing foreign securities do not typically follow this route.

### Public offers of securities limited to qualified investors

In General Regulation No. 216, the Chilean securities regulator has set out a list of qualified investors. See Table 1 "*Qualified Investors*" for further details on the various categories of qualified investors. A lighter registration regime applies to public offers limited to these investors. For example, it is not a requirement for the foreign fund to be subject to oversight by its home state regulator.<sup>10</sup> That said, public offers limited to qualified investors are still subject to many of the requirements set out in General Regulation No. 352. As a result, they remain unusual in Chile.

### Public offers of securities exempted from the registration regime

There are a couple of ways to exempt a public offer of securities from registration.

**Exemptions based on cooperation agreements.** The Chilean securities regulator has exempted certain foreign securities from registration.<sup>11</sup> These exemptions are predicated on the existence of cooperation agreements with foreign regulators and currently include:

- (i) securities of issuers treated as "reporting issuers" under Canadian law;
- (ii) securities registered with national securities registries in Mexico, Peru and Colombia;<sup>12</sup> and

<sup>5</sup> See, for example, Exempt Resolution No. 468, of 27 July 2009, issued by the Chilean securities regulator.

<sup>6</sup> Public offers of foreign securities and their registration is set out in the Securities Market Act and further regulated in General Regulation No. 352. The public offering of securities which are not registered in Chile triggers a criminal offence under the Securities Market Act.

<sup>7</sup> Or by the regulator of the jurisdiction where the securities are traded.

<sup>8</sup> The term locally licensed securities intermediary includes '*corredores de bolsa*' and '*agentes de valores*'.

<sup>9</sup> Please visit the Chilean securities regulator's website (available [here](#)) for further details regarding General Regulation N° 352.

<sup>10</sup> Or by the regulator of the jurisdiction where the securities are traded.

<sup>11</sup> Resolutions No. 246 and No. 347.

<sup>12</sup> Restrictions apply.

**Table 1: Qualified Investors**

- (1) Institutional investors, i.e. banks, financial companies, insurance and reinsurance companies, fund managers and any other institutions that qualify as such as determined by the Chilean securities regulator;
- (2) banks, insurance and reinsurance companies, fund managers and securities intermediaries, in each case, organised outside Chile and in the case of securities intermediaries, when acting for their own account or for the account of clients, provided such clients are not (i) Chilean citizens; (ii) Chilean residents; or (iii) in transit in Chile;
- (3) local securities dealers;
- (4) local dealers of agricultural products;
- (5) Chilean or foreign individuals or legal entities who, at the time of making the investment, hold financial investments in securities which can be offered to the public in Chile or abroad in an amount not less than 10,000 Unidades de Fomento (UF);
- (6) Chilean or foreign individuals or legal entities who, have delegated their investment decision to a Qualified Investor pursuant to a portfolio management agreement and provided that (i) the authority to participate in private placements is expressly set out in such agreement; and (ii) the Qualified Investor informs the client of the transactions carried out pursuant to such authority with a frequency set out in such agreement;
- (7) Chilean or foreign legal entities, in respect of which investment decisions are made by a Qualified Investor; and
- (8) Chilean or foreign individuals or legal entities who, at the time of making the investment, hold financial investments in securities which can be offered to the public in Chile or abroad in an amount not less than 2,000 UF and meet any of the following (i) own assets in an amount equal to or greater than 100,000 UF; (ii) during the past 4 months have entered into at least 20 transactions in the securities market, each for an amount equal to or greater than 1,000 UF; or (iii) broadly, have sufficient knowledge to understand the risks associated with participating in the securities market.

- (iii) securities in respect of which Spain is the home Member State and which are listed in an official secondary market in Spain or in another regulated market in the European Union.

**General Regulation No 345 exemption.** Another exemption regime relates to public offers of equity securities (including shares and fund units) which, broadly, meet the following two conditions:

- (i) the offered securities represent at least 10% of the issuer’s capital; and
- (ii) the proposed minimum investment of each individual investor is at least 2% of the issuer’s capital.<sup>13</sup> It should be noted that to benefit from this exemption, the offeror must comply with certain disclosure and compliance requirements.

### Private offer of securities

Securities offerings that do not meet the public offer test are private offerings and are therefore excluded from the remit of the Securities Market Act. In General Regulation No. 336, the Chilean securities regulator has set out the conditions an offer must meet in order not to be a public offer of securities (the “**Private Offer Safe Harbour**”). To benefit from the Private Offer Safe Harbour, the offering must:

- (i) meet certain disclosure obligations. See Table 2 “*Disclosure Obligations under General Regulation No. 336*” for further details;
- (ii) ensure compliance with certain reporting and safeguard requirements. See Table 3 “*Key Reporting and Safeguard Requirements*” for further details;
- (iii) not be carried out through mass media;<sup>14</sup> and
- (iv) meet one of the following conditions:
  - (A) the offer is made only to qualified investors falling into categories (1) through (6) of General Regulation No. 216 without regard to their number; or
  - (B) the offer is made to no more than 250 qualified investors falling into categories (7) or (8) of General Regulation No. 216, through one or more successive offers, within 12 months counted from the first offering; or
  - (C) the minimum denomination of each security is 5,000 Unidades de Fomento.<sup>15</sup>

As the Private Offer Safe Harbour provides that marketing must not be conducted through mass media, it is advisable that fund promoters design websites in a manner that ensures they are not publicly accessible in Chile. Open websites with free access about a fund may undermine reliance on the Private Offer Safe Harbour.

An offer which does not fall within the Private Offer Safe Harbour does not *per se* become a public offer. However, we recommend carrying out

<sup>13</sup> The rules to establish these percentages are complex. Please contact us if you require further details.

<sup>14</sup> The term mass media includes the press, radio, television and internet where such media is publicly accessible in Chile, without regard to the where it is produced or broadcasted.

<sup>15</sup> Approximately USD 200,000.

The *Unidad de Fomento* (UF) is an inflation-indexed monetary unit of common use in Chile. As of the time of writing, 1 *Unidad de Fomento* equals approximately USD 40.

### Table 2: Disclosure Obligations under General Regulation No.336

The issuer or placement agent must include, in all offering materials, a disclaimer setting out:

- (i) the commencement date of the offer and an express reference that the offer is being made under the Private Offer Safe Harbour;
- (ii) that the securities are not registered with the Securities Registry or Foreign Securities Registry kept by the Chilean securities regulator;
- (iii) that the issuer is under no obligation to provide public information in Chile regarding the securities; and
- (iv) that the securities may not be the subject of a public offer in Chile unless they are registered in the Securities Registry.

Where the communication is not in Spanish, the disclaimer must also be in Spanish.

### Table 3: Key Reporting and Safeguard Requirements

Key safeguards include (\*):

- (i) verifying the identity and qualified investor status of the investor;
- (ii) meeting the conditions and quantitative restrictions set out in the Private Offer Safe Harbour;
- (iii) proving compliance with the terms of the Private Offer Safe Harbour, upon request from the Chilean securities regulator.

(\* The above list is only a summary of the requirements set out in General Regulation No. 336. Please contact us if you require further details.

a close examination of the terms of such offer to avoid falling within the scope of the public offer regime.

### Reverse enquiry

Reverse enquiry or passive marketing is not a legally defined term in Chile and there is no official guidance about the consequences of relying on this practice. That said, where contact is initiated by a single prospective investor on an unsolicited basis and in respect of a specific investment, arguably a subsequent offer in response to such prospective investor's enquiry should be treated as a private offer. Of course, the larger the number of investors that are invited to invest in this manner -even if on a one-to-one basis-, the harder it will be to rely on this practice,<sup>16</sup> unless such offers are relied upon in the context of the Private Offer Safe Harbour.

## IV. MARKETING OF PARTNERSHIP INTERESTS IN FOREIGN FUNDS

As we have seen, instruments which lack transferability, most likely partnership interests, are not securities and are therefore not regulated by the Securities Market Act. Thus, the marketing of such instruments is not subject to the requirements set out in section III above. In addition, as Chile has not regulated the marketing of foreign funds that do not qualify as securities, any marketing obligations applicable to the promoter of such funds will be those of the jurisdiction governing the fund promoter and/or the fund itself.

## V. THE ROLE OF THE LOCAL PROVIDERS

In the previous sections we have explored the various regimes under which foreign funds may be marketed in Chile. Whether or not a foreign fund needs to rely upon the services of a Chilean provider, however, requires a few additional considerations. By way of illustration, we set out below some high-level points:

### Registered securities

As we have seen, before making a public offer of foreign securities, it is necessary to appoint a legal representative or a local sponsor (e.g., a locally licensed securities intermediary) in Chile to carry out the registration of the securities. Therefore, a foreign fund or a foreign fund promoter will have to engage the services of a local provider to register the shares of a fund if it wants to make a public offer of such shares in Chile.

It is possible for a foreign issuer to place registered securities directly to Chilean investors on a cross-border basis and without a need for a licence. Where a foreign issuer resorts to intermediaries, however, it is important to note that only locally licenced securities intermediaries or fund managers supervised by the Chilean regulator may market or distribute registered securities in Chile. In this regard, the Chilean securities regulator has allowed the over-the-counter trading of foreign securities registered in Chile, provided such trading is conducted through locally licenced securities intermediaries, local banks or fund

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<sup>16</sup> Especially if those investors constitute a "certain sector" or a "specific group".

managers supervised by the Chilean regulator.<sup>17</sup>

### Unregistered securities

The Chilean securities regulator has allowed locally licensed intermediaries to participate in the marketing of foreign securities not registered in Chile, but only as a “link”<sup>18</sup> between the investor and the foreign fund promoter, provided that:

- (i) both the issuer and the foreign fund promoter are regulated;
- (ii) the locally licensed intermediary provides the investor with mandatory warnings; and
- (iii) the website is password protected.<sup>19</sup>

Nevertheless, it should be remembered that a foreign fund promoter does not need to resort to a locally licensed intermediary to market unregistered foreign funds and may instead carry out a private offer of such securities on a cross-border basis without a licence if relying on the Private Offer Safe Harbour.

### Individuals acting on behalf of the locally licensed securities intermediary

As of July 2018, the employees of a locally licensed securities intermediary engaged in the marketing of investment funds (including foreign funds) or in investment advisory activities, need to be certified by the Securities Market Accreditation Committee (the “Committee”). The Committee holds a public record of the individuals certified to operate in the securities market, which is available for online consultation.<sup>20</sup>

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<sup>17</sup> General Regulation N° 367. This should not be construed, however, as a limitation on the rights of the investor to trade in such securities directly in the international markets.

<sup>18</sup> A “link” is the activity pursuant to which a Chilean investor accesses the website of a foreign fund promoter from the website of a locally licensed intermediary, such that the investor can instruct the purchase of foreign securities directly from the foreign fund promoter.

<sup>19</sup> Circular No. 1943 of 2000 issued by the Chilean securities regulator.

<sup>20</sup> Available [here](#).

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