Initial Public Offerings

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Chile

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Introduction

Brief history of the IPOs in Chile

After the privatisation process that took place at the beginning of 1980, there have been more than eighty (80) Initial Public Offerings in Chile. A key factor was the introduction of the private pension fund system created by the social security reform in 1981, which allowed pension fund managers (**AFPs**) to become primary players in the capital markets arena. Remarkable transactions include the Quiñenco IPO in 1997, one of the first holding companies (the biggest holding company in Chile as of today) to go public; also Cencosud's IPO in 2004 was the first offered simultaneously in Chile and in the international markets, marking a definite trend in subsequent offerings up to now; and in the offering of Inversiones La Construcción, which raised the total amount of US $466,000,000, the largest IPO in Chilean history. The latest offering was the SMU IPO in January 2017 which raised almost US$ 200,000,000 and, together with the IPO of Empresas Lipigas in 2016, broke a streak of more than three years without IPOs (the worst in Chilean history).

Why are companies, domestic and foreign, choosing to go public?

In general, the key reason to go public is the need for capital in amounts that the regular financial system is not prepared to extend, or simply because companies do not want to be subject to contractual restrictions that regular lending imposes on them.

It is also common to see companies going public due to owner structural reasons. Mainly, family-owned companies where the old family structure is no longer available and therefore the selling-out liquidity, and certain associated tax benefits, make this alternative a good reason for going public, even though it implies more legal responsibilities, as we will describe below.

Finally, we have seen reasons for going public related to the capital structure of the company. Since the appearance of the private equity funds (**PEFs**) industry, it is now more common to see a company going public after the regular investment period of the PEF has ended, to allow it to cash out its investment – traditionally, a period of five up to seven years from the original investment. In addition, we have seen companies such as the retailer SMU (January 2017), where funds collected from the IPO were applied to repay debt and allow the company a better leverage ratio to growth.

Current regulatory scheme and market practices are conducive to going public

Despite the fact that everything could be improved, we believe that in general, regulatory schemes and market practices are conducive to companies going public and incentives are well located. If we focus on sources of capital, the final decision will depend on many

variables but especially on how difficult (or expensive) is to get financing from the regular financial market (banks) *vis-à-vis* the capital markets, including its debt side (i.e. bonds, commercial paper).

Are companies that go public in Chile of a particular type or from a particular industry?

There is no one marked trend of industries going public. In the last 30 years we have seen a variety of companies from different industries going public. That goes from banking services, retail, utilities (water, power generation, transmission and distribution, gas, etc.), to agro industrial, real estate developers, food industry, pharmaceuticals and hi-tech industries.

The IPO process: Steps, timing and parties and market practice

Publicly listed companies ("*Sociedades Anónimas Abiertas*") are stock corporations that have their shares both (a) registered in the Securities Registry ("*Registro de Valores*") held by the Chilean Securities Regulator (**SVS**), voluntarily or by legal obligation, and (b) listed with a stock exchange for their trading and public offering. A stock corporation is obligated to register with the SVS if it has 500 or more shareholders or at least 10% of its shares held by a minimum of 100 shareholders, excluding those who, directly or indirectly, exceed that percentage.

Extraordinary Shareholders' Meeting

To initiate an Initial Public Offering process by a Chilean stock corporation, the first step for the issuer is that the Board of Directors convenes an extraordinary shareholders' meeting of the corporation to consider and decide upon the registration of the company and its shares in the Securities Registry, increase of the equity capital of the corporation, amendment to its bylaws, and issuance of new shares. The process of registering a company and registering its shares in the Securities Registry differ and run separately. In fact, a stock corporation can be previously registered in case it offers securities by means of public offer (e.g. a bond). For purposes of this chapter, we will assume that neither the Chilean stock corporation nor its shares are registered in the Securities Registry.

To convene the extraordinary shareholders' meeting, the corporation must publish a notice summoning the shareholders and indicating the agenda.

At the extraordinary shareholders' meeting, among other relevant resolutions regarding the issuance, offering and placement of the new shares, a simple majority of the shares issued by the corporation will be necessary to approve the proposed capital increase, registration of the company and the shares before the Securities Registry; an estimate of the offering price; a delegation to the Board of Directors of the authority to set the price of the offering (in which case, the placement has to take place not later than 180 days following the date of the shareholders' meeting, renewable for one time for a maximum of 180 additional days by a new shareholders' meeting).

A transcription of the executed minutes of the shareholders' meeting has to be notarised. Also, an abstract or summary of the notarised minutes has to be filed with the Registry of Commerce and published in the Official Gazette within 60 days from the date of the notarised instrument.

Following the shareholders' meeting, the Board of Directors meets to approve the issuance of the new shares, the terms, conditions and characteristics of the new shares, and instructs the general manager of the corporation to carry out the actual issuance thereof.

SVS filing

Upon completion of the foregoing formalities, the General Manager may initiate the

registration process with the SVS by filing an application requesting the abovementioned registration.

The application must be accompanied by: (a) a prospectus prepared in accordance with Annex No. 1 of Section I of the SVS General Rule No. 30 and a prospectus prepared in accordance with Annex No. 1 of Section III of the SVS General Rule No. 30 (**Chilean Prospectus**); and (b) certain other filing information and documents which include (for the share registration) relevant Board minutes and shareholders' minutes, draft of notices related to the pre-emptive rights period and exercise, etc.

Starting on the date of the filing, the SVS has 30 business days to review and analyse the application and its accompanying materials. If the SVS has any questions, comments or observations, these should be communicated to the applicant and the 30-day period shall be thereby suspended until any and all such issues are resolved. Once the application is fully processed, the SVS shall issue a numbered certificate evidencing the registration of the company, and another evidencing the shares in the Securities Registry.

Additionally, it is necessary to request the registration of the corporation in a stock exchange (the most common are the Santiago Stock Exchange and the Chilean Electronic Stock Exchange) and execute a Shareholders' Register management agreement with a securities depository and custody company.

Preemptive Rights Offering

Following the registration of the corporation as an issuer of public securities, and the registration of its issued shares for public offering, the corporation publishes a notice announcing the preemptive rights offering (**Preemptive Rights Notice**) to the shareholders who are eligible to exercise their option to subscribe or assign their *pro rata* portion of the new shares. The eligible shareholders are the shareholders who are registered as such in the Shareholders' Registry of the corporation on the fifth business day prior to the initiation of the preemptive rights offering period. This Preemptive Rights Notice has to indicate the number of new shares being offered to the shareholders per share they hold, and the date and newspaper in which a notice communicating the beginning of the preemptive right period starts (**Starting Notice**). Such shall constitute the first day of a 30-day preemptive rights offering period (**Preemptive Rights Offering Period**) and shall contain the price of the offering. The company has to also issue a letter to the shareholders containing the same information.

During the Preemptive Rights Offering Period, eligible shareholders may exercise their option to subscribe their *pro rata* portion of the new shares or otherwise assign such option for value to a third party, or else waive such rights. Typically, in the context of an Initial Public Offering, eligible shareholders, including the controller, waive their preemptive rights on the Preemptive Rights Offering Period. It is common in a placement or purchase agreement (depending on the structure, i.e. with underwriting or not) to covenant the controller and certain minority shareholders to waive their rights in a sufficient number to meet the volume of shares intended for the offering. As a result of such waivers, the placement process can start before the lapse or expiration of the Preemptive Rights Offering Period.

Typically at this point – but not later than the day prior to the publication of the Starting Notice – on the advice of the placement agent, the Board of Directors (or the Shareholders, in case the placement takes place after the 180 days following the date of their meeting approving the issuance of the shares) holds an extraordinary meeting to set the offering price, as well as all the other key elements of the transaction.

Placement of the offering

Upon expiration of the Preemptive Rights Offering Period – or earlier, if a sufficient number of such rights have been validly waived – the unsubscribed new shares may be offered by the corporation to third parties and, therefore, placed in a public offering. However, such offering may not be carried out at a lower price or in more favourable conditions (except that during the 30 days following the expiration of the Preemptive Rights Offering Period, the company may offer the new shares to third parties at a subscription price and on terms and conditions different from the price or the terms and conditions of the preemptive rights offering; *provided however* that such offer is made in a stock exchange).

It is important to note in this regard that the Chilean capital gains tax laws provide for an exception if, among other special requirements, the shares are both acquired and disposed of in a stock exchange transaction. Furthermore, AFPs, the single largest institutional investors in Chile, may only invest in equity securities that are purchased in a stock exchange. Therefore, as a matter of practice, the placement of the new shares is typically structured in the form of a common shares placement in a special auction sale conducted at the Santiago Stock Exchange.

In respect of this special auction sale, the stockbrokers and placement agent typically agree to market, offer and place the shares in the Chilean market on a best-efforts basis and using the Chilean Prospectus, which is Spanish and conforms to Chilean law and practice, and is prepared for use in connection with the public offering of the common shares on the Santiago Stock Exchange, in accordance with applicable law. All orders of shares made by prospective purchasers must be placed through an authorised stockbroker.

The terms and conditions of the offer are set forth by the company as seller, acting through one or more stockbrokers. These conditions may include a minimum price and the creation of specific demand segments based on objective criteria (e.g. type of investors and order size). All the purchase orders entered into the system are compiled by the Santiago Stock Exchange in a single cumulative order book, which will be delivered to the placement agent. Based on such order book (*libro de órdenes*), the stock broker will determine whether the offer was successful or not. The offer must be declared successful if the competitive demand (i.e., orders with a price equal to or above the minimum price (if there is one)) plus the demand at market exceeds the number of shares offered and complies with the conditions established for each of the segments.

Following the launch of the offering, the order book will remain open for purchase offers for the time previously defined by the company, which in no case may be less than two exchange business days. During this period, purchase orders may be amended or redeemed.

With the overall demand information received from the Santiago Stock Exchange, the placement agent will make a price and allocation recommendation to the Board of Directors of the company. Once the determination is made with respect to price and allocation, the placement agent will inform the Santiago Stock Exchange of the offering price and the allocation of the offering among the demand segments, and the company will inform the market by filing a "material fact" ("*Hecho Esencial*") with the SVS. In the event that the offer does not include different demand segments, the placement agent will inform the Santiago Stock Exchange of the offering price.

On the day following the allocation, prior to the opening of the stock market in Chile, the Santiago Stock Exchange will formally award ("*adjudicar*") the offered shares through a special auction and will communicate the final allocation of shares to all participating stockbrokers.

Settlement and clearance

Settlement of the relevant transaction generally occurs two days after the order is placed, although the payment of the purchase price may be conditioned upon the lack of any materially adverse event affecting the corporation to which the order relates during such three-day period. In the event the purchaser fails to pay, the selling stockbrokers are personally obligated to pay the purchase price and to deliver the securities sold, and no defence of lack of provision of funds will be admissible.

Regulatory architecture: Overview of the regulators and key regulations

The Chilean securities markets are principally regulated by the SVS under the Chilean Securities Market Law and the Chilean Corporations Law. The SVS was created and is regulated by Decree Law 3,538 which sets forth the functions, authority and organisation of the SVS.

It is worth noting that on February 23, 2017, the government of Chile promulgated Law No. 21,000 which creates the Commission of the Financial Market, which will come into force and effect not later than August 23, 2018. When the new law comes into effect, this commission will replace the SVS.

The Chilean Securities Market Law sets forth requirements relating to public offerings, stock exchanges and brokers; outlines disclosure requirements for companies that issue publicly offered securities; regulates insider trading; prohibits price manipulation activities; and grants protection to minority investors. Such law also regulates the activities of the stock exchanges, stock brokers and securities agents in order to regulate their performance and sets forth several requirements, such as the constitution of a guarantee, the obligation to inform the public through the SVS and the stock exchanges on a regular basis, and the obligation to comply with all laws and regulations. Stock exchanges are regulated by the Chilean Securities Market Law, the SVS Law and SVS regulations, and each respective stock exchange's regulations.

As a matter of Chilean law, Chilean licensed stockbrokers or any intermediary engaged by a company for purposes of the offering of new shares of stock for their sale to investors in an Initial Public Offering may use any physical or electronic materials to promote and market the offering, including any draft, preliminary, interim or any research produced by the licensed broker-dealers to be used in the marketing of the offering and any other marketing materials (**Offering Materials**) prepared for such purposes, *provided, however*, that: (a) the licensed broker-dealers or the company submit a copy of such offering materials to the SVS prior to their dissemination or publicity; and (b) the Offering Materials contain a legend to the effect that they are subject to the data and information to be contained in the Chilean Prospectus.

The SVS may review, comment and make observations on the Offering Materials, but no prior approval is necessary for their public dissemination.

Offering Materials must include a Spanish "restrictive legend" containing the obligation of the investor to be absolutely informed of the financial situation of the company and evaluate the convenience of acquiring the company's shares.

Offering Materials may not contain any statement, reference or representation that is false or misleading or may otherwise induce the public to error, mistake or misjudgment with respect to the nature, price, profitability, redemption, liquidity, guarantees or any other characteristics of the shares or the company.

Copies of the Chilean Prospectus to be filed by the company with the SVS shall be made available to the investor public by the placement agent at its designated offices.

Regarding financial statements, prior to their filing with the SVS in the form of a "material fact" and thereby made public, the company may not share or disclose them with any third parties (other than the placement agent under a confidentiality obligation with the company). The filing of the "material fact" shall include: (a) certain summarised financial information if the disclosure is related to numbers related to incomes; (b) analysis of the disclosed information; and (c) a legend stating that this information does not replace the financial statements disclosed to the SVS, as described below.

Public listed companies' responsibilities

Public listed companies must disclose the following matters:

1. Consolidated financial statements: The required financial statements are in March, June, September and December. These should include, in addition to the audited report and certain financial information, a reasoned analysis of the financial situation of the company.
2. Annual report: The annual report must include the following information: identification of the company; description of the company's business (which includes, among others, risk factors and investment plans); ownership and shares; management and employees; information regarding subsidiaries and affiliates and investments in other companies; information regarding material facts; comments made by shareholders and Board committee; and financial information. In case of public listed companies, the annual report should be available for the shareholders, at least 20 days in advance of the scheduled shareholders' meeting (held during the first four months of the year).
3. Material facts: A publicly listed company has to disclose truthfully, sufficiently and promptly, all material information/facts about themselves, the securities offered, and the offering. For this purpose, material information or material fact means any such information that a person of good judgment would consider important in his/her investment decisions. A material fact must be disclosed if it occurs or becomes known to the company and it is the Board of Directors of the company that is responsible to disclose. There is not an exhaustive list of material facts, but the SVS gives some guidelines (and a list of examples) through SVS General Rule No. 30, by virtue of which, it may be considered that events that can affect in a significant way include: (i) the assets and obligations of the company; (ii) the performance of the company's business; and (iii) the financial situation of the company.
4. Material facts subject to confidentiality ("*Hecho Reservado*"): A publicly listed company that engages in negotiations that constitute a material fact ("*Hecho Esencial*") that has to be reported to the SVS, may request its treatment as confidential ("*Hecho Reservado*") if: (a) its untimely disclosure may cause an adverse impact on pending negotiations; and (b) the confidentiality request has the support of ¾ of the members of the Board of Directors. A material fact subject to confidentiality has to be reported to the SVS on the day following the Board resolution.
5. Relevant information: A publicly listed company has to submit to the SVS all the legal, economic and financial information that, without being a material fact, is useful for the adequate financial analysis of the company, its securities and their offering. This information includes, among others, those related to relevant aspects of the company's business or which may have a significant impact on it. This information has to be disclosed simultaneously to all the market; publishing this information on the company

website is sufficient. If the disclosure consists in financial projections, the approval of the Board of Directors will be required.

6. Other information: A publicly listed company has to submit additional information to the SVS, which includes, among others, the following: documents of shareholders' meeting; any change in the management of the company; amendment of the company's bylaws; quarterly list of the shareholders; securities transactions executed by its affiliates or related parties; copy of communications sent to the shareholders; payments made to accounting firms; capital amendments and distribution of net profits; and change of accounting firm.

Information regarding securities issuances and placement

Publicly listed companies are governed by a Board of Directors vested by law with full power and authority to administer and manage the corporation, except for: (a) such matters that the law or bylaws reserve for the exclusive decision of the shareholders (see below); and (b) the statutory authority of managers (officers) to act in the ordinary course of business and represent the corporation in court.

The Board of Directors must have a minimum of five members.

Chilean Corporations Law provides that a director who is elected by a group of shareholders or a class of shareholders has the same duties to the corporation and the other shareholders as the other directors. Therefore a director must always advance and look to the interests of the corporation and all its shareholders rather than the interest of the shareholder that elected him or her. This is especially relevant in the context of related party transactions, where a decision by the Board has to approve a matter or transaction between the corporation and one of its shareholders.

Chilean Corporations Law provides that directors are required to keep confidential any corporate business and information which may come to their notice as a result of their office and which has not been officially disclosed by the corporation. This obligation will not apply in the event that the confidentiality may damage the corporate interest, or if it otherwise refers to facts or omissions representing a violation of the bylaws or applicable law.

Shareholders' meetings may be ordinary or extraordinary meetings. An ordinary annual meeting of shareholders is held within the first four months of each year, but in any case following the preparation of the corporation's financial statements for the previous year. The ordinary annual meeting of shareholders is the corporate body that approves the annual financial statements, approves all dividends in accordance with the dividend policy proposed by the Board of Directors, elects the Board of Directors and approves any other matter which does not require an extraordinary shareholders' meeting.

Extraordinary meetings may be called by the Board of Directors when deemed appropriate, and ordinary or extraordinary meetings must be called by the Board of Directors when requested by shareholders representing at least 10% of the issued voting shares or the SVS.

The affirmative vote of a majority of the issued shares in a valid shareholders' meeting is required to approve most of the matters and corporate actions. However, any of the following actions that are provided for in the Chilean Corporations Laws (and any additional matters that the bylaws may add to) will require a two-thirds majority (or such higher majority that the bylaws may provide) of the issued shares: (i) a change of organisation, merger or division of the company; (ii) an amendment to the term of existence or early dissolution; (iii) a change of the corporate purpose; (iv) a change in corporate domicile; (v) a decrease of corporate capital; (vi) the approval of capital contributions in kind and a valuation of the

assets contributed; (vii) a modification of the powers of shareholders or limitations on the powers of the Board of Directors; (viii) a reduction in the number of members of the Board of Directors; (ix) the transfer of 50% or more of corporate assets and liabilities or corporate assets, or the formation or amendment of any business plan that contemplates the transfer of 50% or more of the corporate assets; (x) the form of distributing corporate profits; (xi) the granting of collateral or guarantees to secure third-party obligations, unless such third parties are subsidiary companies, in which case the approval of the Board shall suffice; (xii) the purchase by a company of shares of its own issuance, the cure of formal misstatements or omissions in the by-laws, or any amendments thereto; and (xiii) an amendment to the by-laws intended to create, modify or eliminate preferences shall be approved under the affirmative vote of two-thirds of the shares in the series affected.

Corporations require, at least, a quorum of a majority of the issued voting shares to hold a valid meeting, and a simple majority of the shares present at the meeting to approve or adopt most decisions. Decisions on special matters defined in the paragraph above or in the bylaws, however, require a supermajority of two-thirds of the issued voting shares to approve. In most of these decisions, dissenting minority shareholders are entitled to "*derecho a retiro*" or appraisal rights.

The Chilean Corporations Law provides that legal actions by shareholders against a corporation (or its officers or directors) to enforce their rights as shareholders, or by one shareholder against another in their capacity as such, are to be brought in Chile in arbitration proceedings or, at the option of the plaintiff, in the ordinary courts in Santiago, Chile.

Potential risks, liabilities and pitfalls

Often, we have seen that in the process of going public, the company and their advisors may incur risk and liabilities related to the offering process itself, specifically related to non-public information of the company that is the subject of Offering Materials. Below we describe certain rules and guidance to avoid risks and liabilities of using such information, from the Chilean securities regulation standpoint.

Non-public information

During the due diligence process and prior to its filing with the SVS in the form of a "*Hecho Esencial*" thereby making the offering public, it is important that neither the company nor its officers, directors, representatives, the placement agent or bans may share, deliver or disclose any material non-public information of the company or its businesses with or to any third parties, a group of investors, or other intermediaries not engaged by the company in the offering process. Any non-public disclosure of this offering information triggers the obligation of the company to disclose the information to the public as soon as practicable.

In addition, the use of non-public information may trigger the application of insider trading provisions set forth in the Chilean Securities Market Law. Trading securities with non-public information may be considered insider trading if: (a) the securities concerned are of public trading; (b) the person trading is in possession of material non-public information of the issuer of the securities concerned; and (c) the trade or transaction yields a profit or avoids a loss. SVS regulation allows sanctioning individuals for insider trading with penalties resulting from the outcome of the transaction, and it may be also constitute a securities criminal action.

Projections

In the specific case of company projections, the sharing, disclosure or dissemination of that information by the company or its agents (banks or the placement agent) requires: (a) that

the Board of Directors approves its delivery or sharing with assurances that the data and analysis supporting such projections are reliable; and (b) that concurrently, or as soon as practicable with its delivery to any outside person or entity, the company shall publicise such projections in its corporate website as an "*Información de Interés*" (information of interest is defined as such in SVS NCG 30).

Investor education

Investor education is not a regulated activity in Chile, nor is it otherwise limited or restricted by Chilean securities laws. The placement agent and the banks may conduct pilot fishing and investor education activities with respect to the relevant company in the context of the offering.

Research

No licence or other government authorisation is necessary in order to conduct research activities in Chile. Subject to the restrictions limitation discussed above with respect to Offering Materials, there is no prohibition on circulating or distributing research in advance of the Offering.

SVS general Rule No. 278 of 2010 and Circular letter 2,054 of 2011 issued by the SVS refer to conflicts of interest in the context of these self-regulations and require intermediaries to adopt specific rules on the matter and their incorporation into all client agreements. These rules, policies and procedures, which have to be adopted by all intermediaries, ought to spell out the manner in which conflicts of interest between the intermediary, its employees and its clients shall be managed. Wherever possible, conflicts of interest should be avoided, but when unavoidable, they shall be sorted out in a fair manner for the clients of the intermediary through disclosure of information, internal confidentiality or abstention rules. It is also required that key functions and duties which could give rise to conflicts or risks are appropriately segregated. Accordingly, a reasonable set of self-regulations of an intermediary should contain suitable restrictions on the interaction between research analysts and other employees of the intermediary and its affiliates, such as investment banking personnel, asset managers and others who may pose a potential conflict of interest between the intermediary and its various buy-side and sell-side clients.

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Mr. Langevin focuses his practice on general corporate matters with an emphasis on cross-border transactions in the areas of Capital Markets, Project Finance and Mergers & Acquisitions. He also has broad experience in capital markets transactions, giving advice to local and international clients in debt and equity deals, including advice to the Republic of Chile in its sovereign bonds, registered transactions and private placements under Rule 144A and Regulation S under the US Securities Act.

Representative experience includes advising BTG Pactual, Itau BBA and LarrainVial on SMU's initial public offering (2017), the Republic of Chile represented by the Ministry of Finance on its bond issuance (2017), and the French multinational Essilor International in the acquisition of 100% of Optical Place Vendome (2016).

Mr. Langevin graduated *summa cum laude* from Universidad de Los Andes School of Law on 2004 and obtained a Master of Laws from Duke University USA in 2009. During 2009 and 2010 he practised as a foreign associate in New York at Shearman & Sterling, in the Capital Markets Practice.

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Mr. Valdés graduated from Pontificia Universidad Católica de Chile, School of Law in 2013.

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