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CAPITAL MARKETS

TOPICS

» Directors' Duties and Liabilities in an Equity Issuance

This article broadly identifies the duties and obligations of a director of a company in an equity issuance in India and in an ADR issue as well as continuing obligations post-issue.

Omission / Misstatement in Prospectus:

In an equity issuance the liabilities of directors primarily emanate from the disclosures and statements made in the prospectus to the issue.

In India, the Companies Act, 1956 (Companies Act) imposes civil and criminal liability on directors for any misstatement in the prospectus to the issue. However, it also provides for certain defenses, including reasonable ground to believe that the statement was true; that it arose from an honest mistake of fact; that it was issued without his knowledge and consent; or that after it was issued, on learning of the misstatement, consent to the prospectus was withdrawn. A fine may also be levied for procedural lapses (e.g. failure to make certain filings with the Registrar of Companies or for incomplete documentation).

Like the Indian Companies Act, the US Securities Act, 1933, also imposes both civil and criminal liability for material misstatements or omissions in the prospectus and registration statements. However, in this case, liability is imposed on all the members of the Companys Board of Directors, regardless of whether they actually sign the registration statement. However, signing executive officers and the directors may establish a due diligence defense if they have performed a reasonable investigation of the statements in the registration statement and had reasonable ground to believe, and did believe, that the registration statement is accurate and there are no material misstatements or omissions. Comfort and Rule 10b-5 (statements regarding disclosures based on due diligence) letters are also often taken. In a Rule 144A offering, reporting obligations remain primarily governed by home country laws (where applicable), rather than by US law.

As per the UK Financial Services and Markets Act, 2000 a director may be liable to imprisonment and/or fine for not publishing a prospectus when it should have been or for omissions or misleading / untrue statements.

It is pertinent to note that in India, the Merchant Bankers to the issue are usually held liable for any omission / misstatement in the prospectus or for failure to exercise proper diligence. Often they in turn get the due diligence done by legal counsel and other experts and rely on the same. However, unlike the liability imposed for fallacious comfort and 10b-5 letters in the U.S., in India, counsel are not statutorily held to that level of liability.

Post-issue obligations Corporate Governance:

Under the SEBI (Prohibition of Insider Trading) Regulations, 1992, all directors are obliged to preserve price sensitive information and are prohibited from dealing in the securities of the company or from disclosing such information, directly or indirectly, to any person who may use it in connection with the sale or purchase of the Companys securities.

Clause 49 of the Listing Agreement, which deals with corporate governance, has recently undergone substantial amendment, based largely on the Report of the Committee on Corporate Governance under the Chairmanship of Shri N. R. Narayana Murthy (which seems to have borrowed concepts from the U.S. Sarbanes-Oxley Act). The provisions of the amended Clause 49 will have to be implemented by existing listed companies by April 1, 2005.

Clause 49 requires the Board of Directors to lay down a code of conduct for the directors which must be posted on the website of the company. Further, all Board members have to annually affirm compliance with the code and the Companys Annual Report must contain a declaration signed by the CEO to this effect. They have also been given the mandate of periodically reviewing legal compliance as well as steps taken by the company to rectify non-compliances.

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By listing in the US, Indian companies become subject to US federal securities laws, anti-fraud and anti-manipulation rules, which, following the enactment of the Sarbanes Oxley Act (SOX), are arguably more onerous than non-US regimes. Non-US issuers are however not subject to US corporate governance laws promulgated by individual states (Blue-Sky Laws).

Non-US companies must obtain an exemption from the NASDAQ corporate governance rules to the extent that they follow different home country standards. On November 3, 2004 the NYSE has revised Section 303A.11 of the Listed Company Manual to clarify that non-US companies are required to disclose its company-specific deviations from US domestic corporate governance practices, rather than a general set of deviations based on its home country practices. Non-US companies have until July 31, 2005 to provide written affirmations of compliance with NYSE corporate governance rules.

SOX stipulates enhanced conflict of interest provisions regarding officers and directors. It also requires CEOs and CFOs to personally certify the companys annual reports (that the officer has reviewed it and that based on his/her knowledge it does not contain any material misstatement). They must also certify that they have evaluated the effectiveness of the companys disclosure controls and procedures. Fines and severe criminal penalties are laid down for knowingly providing false certifications. In turn, CEOs and CFOs typically obtain sub-certifications from the senior managers and CFOs of principal business units.

The SEC has adopted rules designed to prohibit officers and directors, from subverting the auditors responsibilities to conduct and issue proper audits and reports with regard to the companys financial statements and ensure full and open disclosures.

In most Common Law jurisdictions, in addition to any statutory remedies, damages may also be claimed through an action for negligence / fraud / deceit or the contract may be rescinded under the law of contract. Penal remedies may also be taken for fraud and/or criminal breach of trust.

Commendably, Indian corporate governance norms have been conceptually strengthened in line with investor interests, although like their U.S. counterparts they are yet to be given teeth in so far as enforcement provisions are concerned.

Shawn D'Aguiar and Ketki Shah

» Listing of Debt Instruments

The corporate sector is increasingly raising its resources by issuance of debt instruments; private placement of such instruments has been a prominent channel. The private placement of debt instruments has been the preferred route as it could be arranged in a short period of time and the expenditure for the issuance of the same has been relatively less.

Private placement of corporate debt securities had been relatively unregulated to the public issue of corporate debt securities. SEBI has issued regulations for private placements of debt instruments so as to ensure high quality issues, adequate disclosures and to safeguard investors interests etc.

SEBI vide its circulars provides for listing of privately placed debt instruments issued by listed companies; the listed companies have a choice for listing of their privately placed debt securities. However, if the company does not list the privately placed debt securities, then it would not be eligible for trading on the Stock Exchange trading platform. Unlisted companies also have an option of listing their privately placed debt securities. SEBI has provided that listing of all debt securities irrespective of the mode of issuance i.e. whether issued on private placement basis or through public/rights issue, shall be done through a separate Listing Agreement. SEBI has issued a Model Listing Agreement and advised the Stock Exchanges to henceforth list all debt securities through an Agreement prepared in line with the Model Listing Agreement.

SEBI has prescribed various conditions to be complied with by the companies desirous of listing their privately placed debt securities. The company has to make full disclosures (initial and continuing) as required under the Companies Act, SEBI (Disclosure and Investor Protection) Guidelines, 2000 and the Listing Agreement with the exchanges. However, if the privately placed debt securities are in standard denomination of Rs.10 Lakhs, such disclosures may be made only through web sites of the stock exchange where the debt securities are sought to be listed. Further the debt securites should carry a credit rating from a Credit Rating Agency registered with SEBI. The debt securities have to be issued and traded in demat form.

Varalakshmi Venkatraman and Rejeev Reddy.G.

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» Investment by Hedge Funds in India

Internationally, Hedge Funds are unregistered private investment partnerships, funds, pool that may invest and trade in many different markets, strategies and instruments (including securities, non-securities and derivatives). Hedge Funds are a growing segment of asset management industry and are some times called as rich mans mutual fund.

Currently, Hedge Funds are investing in Indian markets through the Participatory Notes route, which is discussed in detail below.

There being no separate legislation for investment by Hedge Funds, their investments are routed through the SEBI (Foreign Institutional Investors) Regulation, 1995 (the Regulations). Under the Regulations an institution established or incorporated outside India are permitted to invest in securities of companies incorporated in India if they are registered as an FII or as a sub-account of an FII. Generally Hedge Funds being unregulated by securities regulators in their place of incorporation or registration they cannot be registered as an FII under the Regulations and hence cannot invest as an FII. Though, Hedge Funds may fulfill the requisite criteria for registration of a sub-account yet it is not registered as a sub-account by SEBI when the application discloses that the applicant is a hedge fund.

Hedge Funds have been investing in the Indian capital market through the participatory note (PN) route, and are expected to have invested $2 billion through this route. Having noted this approach, SEBI has amended the Regulations whereby a Foreign Institutional Investor or sub account are permitted to issue PN only in favour of those entities, which are regulated by any relevant regulatory authority in the countries of their incorporation or establishment, subject to compliance of "know your client" requirement. Where such an instrument has already been issued prior to 3rd February 2004 to a person other than a regulated entity, then such contracts would expire on maturity or within 5 years from 3rd February 2004 whichever is earlier. Further, the Regulations also provide that FII or sub account issuing the instruments have to ensure that there is no further down stream issue or transfer of such instrument to any person other than a regulated entity.

The following entities would be considered to be a regulated entity:

1. Any entity incorporated in a jurisdiction that requires filing of constitutional and/or other documents with a registrar of companies or comparable regulatory agency or body;
2. Any entity that is regulated and authorised or supervised by a central bank;
3. Any entity that is regulated, authorised or supervised by a securities or futures commission or authority in any country, state or territory;
4. Any entity that is a member of securities or futures exchanges or other self-regulatory or futures authority or commission which are ultimately accountable to the respective securities/financial market regulators.
5. Any individual or entity (such as fund, trust, collective investment scheme, investment company or limited partnership) whose investment advisory function is managed by an entity satisfying any of the criteria above.

Further, SEBI has prescribed certain reporting obligations on the FIIs and sub-accounts, which issue PN against underlying Indian securities.

Realising that hedge funds account for about 5% of the market value of the total assets held by FIIs in India, SEBI is considering permitting a limited window opportunity to Hedge Funds for investing as FIIs. SEBI has come out with a report wherein certain safeguards are sought to be created for permitting Hedge Funds:

1. at least 20% of the investors in Hedge Funds should be strong institutional players like pension funds, university funds or insurance companies;
2. the investment advisor to the Hedge Fund should be a regulated investment advisors under the relevant investor advisor Act or the fund should be registered under the Collective Investment Fund Regulations or Investment Companies Act.;
3. the fund manager must have a minimum three-year track record in managing funds with an investment strategy, which is similar to that of the applicant fund.
4. the HF should be a broad based fund

Besides the above requirements, certain other issues for Hedge Funds would be that under the existent regulations the following are not allowed:

1. currency trading or investment in commodity related financial products;
2. concentration in any specific scrip is not allowed as the Regulations specifies scrip-wise and fund wise maximum investment limits;
3. short selling is not allowed.

The issue of permitting Hedge Fund investments in India has been an extremely sensitive issue as they are suspected of destabilizing the stock and currency markets. The high level committee on capital markets has decided not to allow registration of hedge funds as a separate category of overseas investors for now.

Rajesh N. Begur and Rajeev Reddy G.

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» Amendment of Securitisation Act

The Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Bill which seeks to amend the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act) and the Recovery of Debts Due to Banks Act, has been passed by the Lok Sabha in this winter session. The Bill was previously introduced through the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Ordinance, 2004 on November 11, 2004.

The SARFAESI Act was amended to implement Supreme Courts decision in Mardia Chemical v UOI. Under the Amendment, if the borrower intends to prefer an appeal against the decision of Debt Recovery Tribunal (DRT) then 50% of the decreed amount has to be deposited, however, DRT can lower this amount to a minimum of 25% for reasons recorded in writing. Further, a time limit of 4 months has been fixed for DRT to dispose of an application made to it, on the failure of which the borrower/ lender can move the Debt Recover Appellate Tribunal (DRAT) for an order directing the DRT for expeditious disposal of the application. DRAT has been given the power to transfer applications pending before two or more DRTs.

Under the amendment, the secured creditor will be able to take possession of the secured assets only after reasons for not accepting the objections of the borrower have been communicated to the borrower in writing. However, the borrowers have no right to prefer application/petition to the DRT against the communication or reasons given by the secured creditor in reply to his queries and objection. Further, the secured creditor has been given the power to take over the management of the business of the borrower, including the right of transfer by way of lease, assignment or sale for realising the secured assets. The amendment also provides that where the possession of secured assets by the secured creditor is not in accordance with the provisions of SARFAESI Act and rules thereunder, then the borrower is entitled to claim for compensation.

The definition of qualified institutional buyers (QIB) has been modified under the amendment by virtue of which provident funds, pension and gratuity funds are prohibited from investing in security receipts issued by Asset Reconstruction Companies (ARC). Appropriate amendments have also been carried out in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("DRT Act") and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Code).

Rajeev Reddy G.

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» Legal Snapshots

Companies required to give one month notice for M&As:

In keeping with the recommendation of SEBI Advisory committee on derivatives, SEBI has said that the companies which are on the F&O list or are part of an index have to give a 30 days prior notice to stock exchanges for corporate actions such as mergers, demerger, splits and issue of bonus shares. SEBI has asked the stock exchanges to amend Clause 16 of the listing agreement of bourses to incorporate the provisions.

FIIs can invest $100m more in Government paper:

Following the Governments decision to raise the cumulative debt investment limit for Foreign Institutional Investors (FIIs) from $1bn to $1.75bn, the Securities and Exchange Board of India (SEBI) has raised the overall investment limit for FIIs in dated Government Securities and Treasury Bills from $100m to $200m. FIIs are free to invest till the total investment reaches $175m, thereafter prior approval of SEBI will have to be taken. SEBI would monitor the investment on a daily basis and would publish the total outstanding position of all FIIs and sub-accounts in government securities and treasury bills.

US $ 500 million limit on FIIs investing in Corporate debt:

On December 2, 2004, the Securities and Exchange Board of India ("SEBI") has vide Circular No. IMD/FII/18/2004 announced that there would be a cumulative sub-ceiling of US $ 500 million on FIIs investments in Corporate Debt. It may also be mentioned that on November 29, 2004 SEBI had through Circular No. IMD/FII/17/2004 clarified that the cap of US $1.75 billion would be applicable only to FII investment in dated Government securities and T-bills, both under 100% debt route and general 70:30 route, and as such corporate debt would not be computed within the sub ceiling of US $1.75 billion.

Fresh JV pacts may come with termination clause:

The Finance Ministry had sought remove the restriction under Press Note 18, which requires a foreign company having a joint venture in India to get a no-objection certificate from the Indian partner before setting up another Indian subsidiary. However, in the position paper prepared by the Finance Ministry, it seeks to take a middle path by proposing that the future shareholder agreements for fresh joint ventures should provide for a termination clause. As per this proposal, the onus of dissolving such contracts would be on the business partners as against the present policy where all applications for terminating a joint venture has to be routed through the FIPB.

Retirement funds cant invest in ARC paper:

The Government has prohibited provident funds, pension and gratuity funds from investing in security receipts issued by ARC. Under the recent amendment to Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, definition of Qualified Institutional Buyers (QIBs) has been modified in such a way that provident funds, pension funds and gratuity funds are excluded from the list of QIB. With the amendment ARC will no longer enjoy the public financial institution (PFI) status. As the PFI status is withdrawn an ARC will have to take approval from Securities and Exchange Board of India (SEBI) every time its stake in the listed company breaches the 5% limit following, i.e. The conversion of debt into equity as it would be seen as a creeping acquisition.

IRDA relaxes norms for companies to invest in IPOs:

The Insurance Regulatory and Development Authority (IRDA) has relaxed investment norms so as to give more headroom to Insurance companies in investing in initial public offerings (IPOs). The IPOs of well-known corporates are now categorised as approved investments, however they are categorised subject to certain conditions such as the issue size should be over Rs 500 crore, the number of shares offered cannot be less than 5 million shares. Further, the company issuing shares through IPO should belong to a financially sound group with a good performance record, for which the Insurers Board shall lay down the criteria. Life insurance companies are required to ensure that the company issuing shares meets the earnings and dividend criteria for seven years, while non-life insurers can invest in companies that fulfil the conditions for three years. Once the companies have invested in an IPO, they have to regularly monitor the investments to ensure that the shares are regularly traded. Earlier investments in IPOs came under unapproved investments, which were limited to 25% of total investments.

RBI calls for MoU between three regulators:

The Reserve Bank of India (RBI) has proposed the signing of a memorandum (MoU) between three regulators- RBI, SEBI and IRDA pending the evolution of a legal framework for inter-regulatory co-ordination. A nodal cell has been established at the RBI and the 24 financial conglomerates have been identified.

Government to bar frequent name changes by Companies:

The Ministry of Company Affairs is seeking to bar frequent name changes by companies, in order to protect interests of investors. A five-year forced interval between name change is being proposed, however, exceptions would be made for genuine cases where a company is acquired by another company. It is proposed that in rare cases companies would be allowed to change names, provided Registrar of Companies and the Regional Director are convinced that there is genuine need for renaming the company.

Audit reports to now reveal companies share capital too:

It The level of disclosure to be made by companies in the audit reports to Central Board of Direct Taxes (CBDT) will be increased. In addition to the present situation where the companies only disclose loans and deposits during the year, the companies may be required to furnish additional Information like money being invested in the business i.e. share capital of the company. Income tax rules are set to be amended soon to incorporate additional disclosures.

Rs. 5 lakh fine likely for erring pension managers:

The Union cabinet has approved the introduction of the Pension Fund Regulatory Development Bill in Parliament. The Bill proposes for a maximum fine of Rs. 5 lakh for errant pension fund managers. It also provides that Securities Appellate Tribunal (SAT) would hear the appeals against the regulator, this is expected to be a stopgap arrangement until the government comes up with an omnibus appellate authority for the financial sector. It also provides for a licence fee regime, which will apply, to both the pension fund managers and the central record-keeping agency. The central record-keeping agency will have the authority to invest the deposits mobilized by the pension funds in different investment schemes; it will however not have authority to guide operations of Pension Fund Mangers.

Cabinet further approved amendments to the Depositories Act, to give a statutory backing to the derivatives market, presently outside the purview of the definition of securities; and the Securities Contracts (Regulation) Act, 1956 (SCRA) enabling the Securities and Exchange Board of India (SEBI) to approve the demutualisation of the stock exchanges in the country. These Amendment Bills will now have to be placed before parliament in order to become law.

New securities lending borrowing plan soon:

At present, the Futures & Options trades are cash settled and no actual delivery of stock takes place, SEBI is trying to put in place a new securities lending and borrowing programme in order to start physical settlement of derivatives. The physical settlement was originally proposed to commence six months after the introduction of stock options in July 2001.

Financial Companies Regulation Bill likely to end up in cold storage:

The Financial Companies Regulations Bill which was introduced to consolidate and amend the law for regulation of FIs and to protect the interest of the depositors of defaulting NBFCs. However, now since RBI has put in place a plan for NBFCs to voluntarily phase out public deposits and also since it unveiled a road map for residuary non-banking companies, it is being proposed that the legislation is uncalled for.

PSU banks can list board-bound experts:

In order to improve the corporate governance and bring professional insights in State-owned banks, the Government has decided to allow these banks to draw up a list of experts and professionals who could be inducted as non-official directors on their boards as against the earlier practice where appointment of non-official directors was done exclusively by the Government. However, the final decision on the selection of such non-official directors will vest with the Appointments Committee of the Cabinet. The Government has finalized guidelines for nomination of non-official directors to the board of PSUs.

Public & Private banks may soon be governed by one law:

An umbrella legislation is being proposed for governing both public and private banks, instead of separate legislations as presently exists. However, piloting such legislation may not be easy due to the political constraints. A similar move was taken earlier, however it was abandoned.

Foreign banks may get to buy 10% of private banks equity in a year:

Though Reserve Bank of India guidelines on foreign ownership in private banks is being awaited, the Central government has proposed to allow foreign banks takeover Indian private banks. The foreign banks would be allowed to acquire upto 10% equity a year in a private bank and takeover the bank in three to four years.

Government move to remove 10% voting rights barriers in banks hits rock:

In order to enhance foreign investment in bank, the finance ministry had moved a Cabinet note to amend the provision in the Banking Regulation Act which stipulates that irrespective the scale of ownership in the bank, the voting rights be restricted to 10%. However, in a recent development the Ministry of Finance has been asked to withdraw its cabinet note by highest quarters in the Government.

RBI to publicise penal action against banks now:

In order to make the regulations more transparent RBI has decided to publicise penal actions against banks. RBI will issue a press release citing details of the circumstances under which penalty is imposed on a bank, along with communication on the imposition of penalty in public domain. The press release will be confined to disclosure of the stricture or the direction only. The banks are required to publish such penalties in the notes on account on their balance sheets.

Trusts may get to invest in stocks of their choice:

The Government has decided to defer the phase out of the 4% central sales tax (CST) i.e. a central tax on inter-state sales whose proceeds goes entirely to the State from where the sale originates. Further, the CST shall not be co-terminus with the introduction of value added tax by States from April 05. The empowered Committee on of State Finance ministers on VAT will give their recommendations on time-frame for CST phase out.

Transport sector may get a watchdog soon:

A new common regulatory authority, in lines of TRAI (Telecom Regulatory Authority of India) is sought to be established for all round development of transport-based infrastructure in the country. Besides tackling various legal issues involved in the infrastructure sector, one of the main objectives of the proposed regulator is to bring in more FDI. The composition and the nature of the authority are still being worked out.

Government plans stricter norms for drug trials here:

The mandatory reporting of adverse drug reactions (ADR) during clinical trials and post-marketing is to be strictly enforced, any failure to comply would result in withdrawal of permission for conducting the trial. The Health Ministry is expected to introduce tougher norms in amended Schedule Y of the Drugs and Cosmetics Act to be notified shortly. The Union Health Minister has indicated withdrawal of permission for conducting trials as one of the penalties if the drug developer does not abide by the rules.

Integrated food law to take shape by mid-05:

A comprehensive law for regulating and promoting orderly growth in food processing sector is expected to be finalised by mid-2005. The integrated food law aims to provide a single window to guide the units in marketing, processing, handling, transportation and sale of food. A single reference point for standards, regulations and enforcement agencies for the food-processing sector is sought to be provided by an integrated food law, as against the prevailing 13 separate legislations and administrative authorities at the central and state levels. The legislation also covers enforcement of quality standards and lays down ground rules for keeping the food-processing sector informed on the policy changes and responses on strategic issues such as GM foods and irradiation.

» Meet the A.R.A. LAW Team

In each issue, we profile one person who is a part of A.R.A. LAW. They will also be sharing their experiences of being with A.R.A. LAW.

Priya Parialkar jointed A.R.A. LAW in November 2002 as 'Manager - Administration'. She is an Arts graduate from the Bombay University and has majored in English Literature. Prior to joining A.R.A. LAW, she had worked for over five years in the Administration and Telecom Division of a leading Multi-National Company. Priya has traveled extensively throughout India whilst working on the expansion of the Telecom Division of the MNC. She has also completed a diploma course in Computers.

"In my initial days at A.R.A. LAW, I was worried if I could cope up with the new environment ,administration and the managerial responsibilities of a noted Law Firm but over a few weeks itself I developed a strong comfort level and good rapport with the Partners, Associates and the Support Staff. The Firm also actively cultivates a friendly and supportive ambience and works on the principle that one must always enjoy ones working. The reason I admire the Firm and respect the its members is because A.R.A. LAW thrives on a healthy working environment, opportunities to learn new things and moreover gives an individual the freedom to think out of the box and freely share ones views. I am glad that I am part of the A.R.A. LAW family".

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