SECURITIES LAW ARGENTINA[1]

Part 1. The regulator and its supervisory and regulatory powers

The "Comision Nacional de Valores"[2], CNV, is the authority in charge of the supervision and regulation of the securities market. The CNV is not the main regulator of banks and insurance companies, which are supervised by the Central Bank and the Superintendence of Insurance, respectively.

The President of the Republic appoints the five members of the Board of the CNV, who cannot be discharged at will before the expiration of their term.

Both the regulation and supervision of the securities markets have been assigned by law to the CNV, except that matters related to the listing of securities are regulated by the stock exchanges or other self regulatory organizations[3]. However, the Central Bank, as monetary policymaker and controller of the country's currency, may temporarily and generally limit the public offering of new securities[4]. The CNV issues the regulations applicable to persons and entities involved in the public offer of securities[5]. The regulations issued by the CNV are not generally subject to the approval of other governmental authorities.

The CNV is empowered conduct administrative investigations for violations of securities laws. For such purposes it is empowered to command the delivery of documents and testimony of witnesses without limitation[6].

Part 2. The duty to disclose material information

In order to make a public offer of shares, the issuer must file and publish a prospectus, which must be made available to potential investors, and copies of it sent to the Stock Exchange. However, there is no obligation of actual delivery of the prospectus to investors.

According to the Rules of the CNV[7] (the "CNV Rules"), the prospectus must include all material information that may affect the financial or economic position of the issuer, including among other information, the remuneration of directors and officers as an aggregate figure, the name and number of shares of every shareholder holding more than 5% of the capital stock of the issuer, as well as the number of shares held by each director or officer.[8] The Transparency Rules[9] broadened insider ownership

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1 We have updated the text of the paper to capture the effect of Decree 677/01 (*Transparency Rules for the Public Offering of Securities* or *Regimen de Transparencia de la Oferta Pública*).

2 National Securities Commission.

3 Law 17,811, Section 30.

4 Law 17,811, Section 20.

5 Law 17,811, Section 7.

6 Law 17,811, Section 12.

7 Chapter VIII, Annex I.

8 In addition, directors, officers, and controllers of a publicly-traded company must report to the CNV their holdings of stocks and bonds of the company annually, or monthly if a change has occurred. Any person who directly or indirectly buys shares representing 5% of the votes of a certain corporation, or buys a number of shares that added to prior holdings amount to more than 5%, must report this fact to the CNV and to the Stock Exchange where the relevant shares are listed.

reporting requirements to include the disclosure of indirect ownership of directors and officers (i.e., through corporate entities which, in turn, own shares of the issuer[10]).

In general, the prospectus must disclose transactions in which directors, officers and controlling shareholders have an indirect interest. The CNV Rules[11] requires the description of transactions between the issuer and any parent or affiliate of the issuer, when they represent 10% or more of the gross sales of the issuer. It also requires the description of transactions between the issuer and (i) any manager, employee member of the "Supervisory Committee", or shareholder holding more than 5% of the capital stock of the issuer, or (ii) any director who has a direct or indirect interest in the transaction and who did not abstain when said transaction was approved by the Board as required under Section 272 of Law 19,550 (the "General Corporations Law"). However, because Annex I refers only to those transactions entered into in violation of Section 272 of the General Corporations Law, a transaction authorized by a board meeting in which the interested director abstained, will not necessarily have to be disclosed in the prospectus (unless it falls within the residual concept of "material fact").[12]

Pursuant to the CNV Rules, the prospectus must be signed by one or more persons authorized to represent the issuer by the Board[13]. In practice, it is usually the Chairman of the Board (who is also the President of the company) who signs the prospectus.

The CNV Rules require the issuer to include in the prospectus a statement that the directors are exclusively responsible for the information in the prospectus (along with the auditors within the scope of their duties), and that they confirm under oath that the prospectus contains truthful and complete information on any relevant fact that needs to be revealed according to the law and regulations[14].

Prior to the Transparency Rules, the distributor was not required by law to perform a due diligence review of the information contained in the prospectus, nor was it required to assume civil liability for the accuracy and completeness of the information in the prospectus. However, the distributor was likely to perform a due diligence review of the contents of the prospectus as a matter of commercial practice. In any case, under the CNV Rules[15], the distributor could be held liable if it induced investors to err through false or incomplete representations, but it could not be held liable for representations not included in a prospectus that, without being fraudulent or false, turned out to be incorrect due to the distributor's negligence in conducting a professional evaluation.[16]

From the day on which the request for authorization of the public offering is filed until the day on which such authorization is granted by the regulator, the issuer may distribute a preliminary prospectus and hold certain limited meetings with potential investors. During that time, such potential investors may "show their interest" in the shares but neither the issuer nor the distributor can effectively accept any offer.

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[9] Decree 677/01, (*Transparency Rules for the Public Offering of Securities*) effective June 1st, 2001.

[10] Section 5.

[11] Chapter VIII, Annex I.

[12] Under the current version of the CNV Rules, the prospectus must disclose any material transaction entered into between the issuer and any insider within the prior three years, regardless of whether such transaction complied or not with Section 272 of Law 19,550.

[13] Chapter VIII, Section 1, paragraph (c).

[14] Chapter VIII, Section 6.

[15] Chapter XIX, Section 25.

[16] Under the Transparency Rules, the distributor is required to conduct a due diligence of the information contained in the prospectus and is held liable for any inaccuracy thereof (Section 35).

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

If the prospectus includes false statements or omits material information, the issuer may be subject to any of the penalties set forth in Section 10 of Law 17,881. All those penalties are of an administrative nature and would be imposed by the CNV. The sanctions listed in Section 10 include the following: (i) *apercibimiento* (formal warning), (ii) fine, (iii) temporary restrain to make a public offering (for up to two years) or (iv) permanent restrain to make a public offering. The CNV may also impose any of the sanctions described in (i) and (ii) on directors and officers of the issuer, and on the members of the accounting firm of the issuer.[17] In addition, the CNV may temporarily restrain the issuer for up to 30 days from performing any act under its supervision and/or request the judiciary to impose any other preliminary injunction on the issuer, its directors, distributors, or accountants.[18]

The CNV may impose administrative penalties whenever the issuer, its directors, officers or accountants have omitted to disclose any material information, regardless of whether such omission was intentional or resulted from negligence.

No sanctions apply to a distributor who sells shares as an underwriter but is not involved in the preparation of the prospectus.[19]

In addition, the accountants involved in the preparation of the financial information in the prospectus may also be sanctioned by the self-regulatory organization that regulates accountants' activities.

3.2 Judicial sanctions

In cases where the issuer's directors or officers acted with criminal intent to defraud the public, they may be held criminally liable under Sections 172 and 173 of the Penal Code, which deal with fraud, as well as under Sections 300 and 301 thereof which deal with the approval of false balance sheets and fraud in connection with the issuance of shares. If found liable for any of these crimes, the directors or officers involved become automatically disqualified to be directors or officers of any corporations for a period of 10 years following their sentence[20].

The regulator may request the judiciary any kind of preliminary injunction, including without limitation the order to stop an issuance of securities.[21] The regulator can also appear before the judiciary and sue a liable party for the collection of fines and duties owed.

3.3 Stock exchange sanctions

According to the Rules of the Buenos Aires Stock Exchange[22], the exchange is obliged to suspend or cancel the issuer's listing following the regulator's suspension or cancellation of the issuer's registration.

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[17] Under the Transparency Rules, the CNV may also disqualify such persons and the directors and officers of the distributor to act as directors, members of the Supervisory Committee, accountants, external auditors or managers of any entity subject to its supervision or to act as intermediaries in the public offering of securities (Section 39).

[18] Law 17,881, Section 13.

[19] Under the Transparency Rules the distributor is subject to the same sanctions applicable to the issuer (see footnote No. 14).

[20] General Corporations Law, Section 264, paragraph 3.

[21] Preliminary injunctions are granted *ex parte* in Argentina.

[22] Sections 42 and 45.

Therefore, if the CNV suspends or cancels the issuer's authorization to make a public offering, the Buenos Aires Stock Exchange must suspend or cancel the issuer's listing.

Part 4. Investor's right of restitution for losses

In cases of losses incurred due to false statements or omissions of material information in a prospectus during a public offering of shares, the injured investors may start a civil proceeding to obtain the restitution of the damages through the judicial system. Argentine procedure rules do not provide for class action suits.

In case of false statements or omission of material information, the investor may obtain restitution from the issuer, its directors and officers[23], and its accountant, under a combination of the general principles of contract law, corporations law, and securities law, as described below:

1. Securities law requires the issuer, its directors and accountants to certify having made full disclosure of all material facts by signing the liability statement included in the prospectus (see fifth paragraph of Part 2 above).

2. Under the General Corporations Law[24], the directors and the members of the Supervisory Committee are responsible for damages caused to the corporation and its shareholders as a result of an invalid issuance of shares (i.e., an issuance of shares made in violation of the securities law).

3. Further, contract law provides for the implicit guarantee by the seller (i.e. issuer, underwriter) of any hidden defects of the asset transferred.[25]

In order to obtain the rescission of the contract or restitution of damages incurred by reason of a defective prospectus, the investor must prove that (1) the liable party (the issuer, its directors and officers, or the accountant who audited the issuer's financial information) either knew or should have reasonably known the omitted information or that a statement included in the prospectus was false (i.e. that they acted with negligence), (2) it suffered losses, and (3) such losses were caused by the omitted information or false statement.[26]

Recovery is not available in a case of false statements or omissions of material information in the prospectus from a distributor who sells shares as an underwriter but is not involved in the preparation of the prospectus.[27]

The securities laws do not provide any specific defenses to the issuer, its directors, officers, or accountants. However, under contract law, they may defend themselves by proving that the investor knew or should have reasonably known the omitted information or false statement, or that the investor did not suffer any losses because he or she did not pay for the securities (i.e., that he was given them for free).[28]

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[23] Officers who are also directors (e.g., the President, who is always the Chairman of the Board) will be held liable in their capacity as such.

[24] Section 200.

[25] Civil Code, Section 2164 and subsequent; Commercial Code, Section 473.

[26] Under the Transparency Rules, the liable party has the burden of the proof that the losses were not caused by the omitted information or false statement. Otherwise, such link between the wrong and the losses is presumed by the law.

[27] Under the Transparency Rules the distributor is liable for any such false statements or omissions regardless whether or not it was involved in the preparation of the prospectus (see footnote No. 14).

[28] Under the Transparency Rules, such defense is limited to actual knowledge by the investor (Section 35).

The controlling shareholder is generally not liable for the acts or omissions of the company. In exceptional cases (including cases of securities fraud), the corporate veil may be pierced [29]. Other laws, such as tax, labor and bankruptcy, hold the controlling shareholder liable for the corporation's liabilities in limited cases involving fraud or malice. However, the acts or omissions of directors and officers of a corporation may not be directly attributed to the controlling shareholder.

The judiciary may take approximately 2 to 3 years to resolve a case of restitution of losses due to a defective prospectus, from the moment of filing the complaint until first instance judgment. However, judgements are usually appealed. An appeal procedure would likely be granted as a matter of law. If the defendant does not have a valid defense under the law but opposes the lawsuit and resorts to the defenses and recourses generally available, a firm and final sentence may take 4 to 5 years from the moment of filing the initial complaint.

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[29] Section 54 of Law 19,550 provides: "If the activities of a corporation conceal the attainment of *ultra vires* purposes, constitute a mere means to break the law, breach the public order or the good faith or the rights of third parties, they shall be attributed to the partners or the controlling shareholders who made that possible, who will in turn be jointly and unlimitedly liable for damages".

SECURITIES LAW OF AUSTRALIA

Part 1. The regulator and its supervisory and regulatory powers

The main securities regulator in Australia is the Australian Securities and Investment Commission ("ASIC"). The regulator of banks and insurance companies is the Australian Prudential Regulation Authority.

The Governor General (as Australian Head of State) appoints members of the ASIC based on the nomination of the Minister. There is no requirement that Parliamentary approval be obtained (ASIC Act 11(Cth)s9). Members of ASIC may only be terminated on legal grounds (ASIC Act section 111).

The ASIC generally assumes both regulatory and supervisory functions. The ASIC can issue Policy Statements that indicate how it will administer the law, and Practice Notes that offer interpretative views. It also modifies some laws by class order (non-removable) that effect general exceptions to the operation of the law for the specified class of persons, often on particular conditions. Several class-order powers exist for ASIC, including:

- Power to exempt or modify fundraising disclosure requirements - CA[30] section 741(2)
- Power to exempt or modify takeover law requirements - CA section 669(2)
- Power to exempt or modify managed investment scheme law requirements - CA section 601QA(2)
- Power to exclude things from definition of "financial product" – CA section 765A(2)
- Power to exempt or modify from the requirements for corporate retail bonds - CA section 283GA(2)
- Power to modify accounting requirements - CA section 341

The ASIC can issue a written notice requiring a person to produce specified documents relating to the affairs of a body corporate or registered scheme (ASIC Act s28 and 33). This power may only be exercised in furthering compliance with national scheme law or when there is an alleged or suspected contravention of a law concerning management or affairs of a body corporate, or involves fraud or dishonesty and relates to a body corporate, securities or futures contract. The ASIC can also issue a written notice requiring any person to appear for examination on oath and to answer questions where the ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter it is investigating, or is to investigate (ASIC Act s19, 5).

Part 2. The duty to disclose material information

Generally a person must not make an offer of securities or distribute an application form for an offer of securities, unless a disclosure document for the offer has been lodged with ASIC.[31] Moreover, a person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors unless the offer or form is included in the disclosure statement or accompanied by a copy of the disclosure statement. Applications for shares made under a disclosure document cannot be accepted for 7 days after the disclosure document is lodged with the ASIC (CA s727(3)).

The disclosure document can be a prospectus, a short form prospectus, a profile statement, or an offer information statement, depending on the circumstances of the offer. The standard full-disclosure

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[30] Companies Act No. 50 of 2001.

[31] In a limited number of situations detailed in s708, an offer is exempted from the disclosure requirements (CA 2001 (Cth) Part 6D.2, s727).

document is the prospectus. The short form prospectus may simply refer to information filed with the ASIC, which must be delivered to investors who request it. A brief profile statement may be delivered with the offer, under ASIC approval, but a prospectus must still be prepared, filed, and delivered to investors who request it. Finally, an offer information statement can be used instead of a prospectus when the amount to be raised will total less that $5 million.

According to the CA s710, the prospectus for a body's securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attached to the securities offered, and the assets and liabilities, financial position and performance, profits and losses and prospects of the issuing body. The prospectus must also include, among others, the following information:

1. Inducements fees for appointment of directors must be disclosed under CA s711(3)(a), but not the salaries and compensation of directors and officers. However, the annual report of listed companies must include details of the nature and amount of each element of the emolument[32] of each director and each of the 5 named officers of the company receiving the highest emolument (Corporations Law, Section 300A). Companies must also provide details of options granted to any director and the five most highly remunerated officers (Corporations Law, Section 300(1)(d)).**[**
2. Description of transactions in which directors, officers or the controlling shareholder have or will have a direct or indirect material interest (CA s711(2)).
3. Description of material contracts made in the ordinary course of business that will be performed in the future, as well as material contracts not made in the ordinary course of business, is not expressly required by the law, but it would be as long as relevant according to a "reasonable investor" test, which depends on the definition of "material". In the context of the of interests and fees of certain people[33] involved in the offer of the CA, the obligation to disclose a matter that meets the definition in that section is absolute regardless of whether it would otherwise be thought material (section 711). In other cases disclosure is only necessary if the materiality principle under section 710 is satisfied, even if the contract would be material in other contexts, e.g., under accounting standards. Of course, contracts that accounting standards classify as material will normally also meet the generic standard set by CA section 710.
4. Prospectus disclosure of the name and ownership of main shareholders, or of the shares held by each of the directors and officers, is not required. However, a person must disclose to a listed company, if: (1) the person begins to have, or ceases to have, a substantial holding in the company or scheme; or (2) the person has a substantial holding in the company or scheme and there is a movement of at least 1% in their holding; or (3) the person makes a takeover bid for securities of the company or scheme (section 617B). The person must also give the information to each relevant market operator (i.e., the stock exchange in the case of a listed firm). The definition of substantial holding includes direct and indirect ownership of 5% or more of the voting shares (CA section 9 and 608). Similarly, directors of publicly-traded companies must notify the stock exchange of relevant (direct or indirect) interests in securities of the company or a related body corporate (CA section 205G).

The prospectus (CA s351) must be signed by the issuer's directors. The distributor is not required to perform a due diligence review of the contents of the prospectus. However, a distributor can be held liable for representations not included in a prospectus that, without being fraudulent or false, turned out to

[32] The ASIC has released has indicated that the **"**elements of emoluments to be disclosed would normally include salary and fees;…the value of shares issued and the value of options granted…" (Practice Note 68).

[33] Including, (1) directors, (2) persons named in the prospectus as performing a function in a professional, advisory or other capacity in connection with the preparation or distribution of the prospectus, (3) a promoter of the body; and (4) an underwriter to the issue or sale.

be incorrect due to the distributor's negligence in conducting a professional evaluation.[34] For this reason, the distributor is likely to perform a due diligence review of the contents of the prospectus as a matter of commercial practice.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

The ASIC can prohibit trading in particular securities in order to protect the public interest (CA s775). It can also sanction the distributor by revoking a license to operate in the securities industry (CA s797A-797G). Moreover, in case of false or omitted material information from the prospectus, the ASIC may order (after a hearing, or prior to one through an interim order) that no offer, sale or transfer of the securities be made while the order is in force (CA s739).

Enforceable undertakings under ASIC Act s93A, 93AA are used by ASIC as a remedial sanction that is limited in breadth only by the creativeness of the regulator. The process is that ASIC agrees to accept an undertaking that it negotiates as an alternative to legal proceedings for a penalty. It does not replace other civil rights. Typically the party (i.e., in the a case of a defective prospectus, the issuer of the securities, or the distributor, will undertake both to do and to refrain from doing acts (e.g., not act in contravention and set up systems designed to pre-empt and monitor potential contraventions).

Finally, the ASIC can issue penalty notices if it has reason to believe that a person has committed an offense (CA s1313), but penalty notices are only available where the maximum penalty is $550, while disclosure contraventions carry substantially higher penalties.

3.2 Judicial sanctions

It constitutes an offense to offer securities under a disclosure document that includes a misleading or deceptive statement or omits information required by the law (CA s728). Therefore, the issuer's directors and officers, and the distributor, can be held criminally liable in case of defective information in a prospectus, unless they made all the reasonable inquires, and after doing so believe on reasonable grounds that the prospectus was truthful and complete. If the principal of the accounting firm that audited the financial information in the prospectus has consented to the association of their name with the defective information that person can be criminally responsible in case of false statements or omissions (regarding that information) under CA s728 Contraventions may be sanctioned with a fine and imprisonment (CA Sch 3(240)). Note that criminal liability requires prove that the contravention is materially adverse from an investor's viewpoint.

The court may, on the application of the ASIC, grant an injunction to restrain the person (including the issuer of the securities, the distributor, or the accounting firm that audited the financial information in the prospectus in a public offer) from engaging in a conduct that constitutes a contravention to the CA (as in the case of a defective prospectus), and require that person to perform any act (CA s1324), although a stop order (see above) is the normal ASIC process.

3.3 Stock exchange sanctions

[34] Section 995 has now been renumbered as section 1041H. This section is a coverall- similar to Rule 10b-5. The revised section now also includes a long list of examples of misleading and deceptive conduct. The section applies to representations not in a prospectus made by anyone, and imposes strict liability for what is found to be misleading – i.e., incorrect (due diligence defence is not available, and negligence need not be proved.) In order to prevent the section being used to eliminate due diligence defences for prospectus statements, there is an exclusion of the section's application to conduct that contravenes the prospectus prohibitions (section 1041H(3)).

If an issuer violates the listing rules of the Australian Stock Exchange, including the rules regarding the content of the prospectus, the ASX can suspend an issuer's securities from quotation, or remove the securities from listing (Listing Rules 17.3 and 17.12).

Part 4. Investor's right of restitution for losses

If the prospectus contains a misleading or deceptive statement or an omission, any person who suffers loss or damage because of that may obtain restitution through a judicial proceeding before a civil judge (section 728 (1)). Class actions suits are available to this effect.[35]

The issuer, its directors and officers, the distributor, the accounting firm, and lawyers advising the transaction, are civilly liable for the truthfulness and completeness of the information included in the prospectus (CA s 729 (1)). The distributor is liable only if she is also an underwriter, or is responsible for or involved in contravention of disclosure requirements. Accountants and attorneys may only be liable when: (i) they are named in the disclosure document with their consent as having made a statement that is included in the disclosure document, or on which a statement in the disclosure document is based, or (ii) they contravene or are involved in the contravention of s728(1). The controlling shareholder may be liable for the information included in or omitted from the prospectus if she becomes a person "involved" (the statutory shorthand for participants in an offence other than the principal) in the contravention, as defined in section 79 of the CA.

The approach of the CA is to make nominated classes of people liable for misstatements and omissions, but then to provide a "due diligence" defense (i.e., onus on the defendant to prove). Therefore, in order to obtain restitution in court, the plaintiff must prove: (1) that the prospectus contains a misleading or deceptive statement or omits to state required information (i.e. the omitted information was either that which an investor would reasonably require, or its disclosure is mandated by statute); (2) that the defendant was a liable person; and (3) that the loss or damage has been suffered (quantified) because the document was defective (CA section 729). Although the prosecutor must prove that the misleading or deceptive statement or omission was materially adverse from an investor's viewpoint to constitute an offense under CA s728(3), a civil claimant for compensation does not carry that onus of proof. Finally, reliance on the prospectus by the investor is assumed when the offering document is misleading or incomplete.

To escape liability, the defendant has the following defenses: (1) that she acted with due diligence, if she proves she made all reasonable inquiries and after doing so, believed on reasonable grounds there was no omission or misleading statement in the prospectus (CA s731(2)); (2) that she reasonably relied on information provided by a third party not being their own employee or agent (CA s733(1)), or (3) that her consent had been publicly withdrawn, or in case of a new matter, she did not know about it (section 733).

General (common law) rescission of contract is also possible with the refund of the investment on the grounds of innocent or fraudulent misrepresentation in accordance with the ordinary principles of the law of contract (*Peek v Gurney (1873) LR 6HL 377)*

The controlling shareholder may by her actions become a de facto director of the issuer (i.e., when a director acts in accordance with her instructions or wishes) and thus subject to liability as a director.

[35] Federal Court of Australia Act 1976 (Cth) Part IV and CA Part 2F.1A allow class action type proceedings to be instituted for recovery under any claim provided for under Federal law. The threshold test is that there be at least 7 claimants who all have a claim against the defendant, which arise out of the same, similar or related circumstances, and give rise to a substantial common issue of law or fact. (Federal Court of Australia Act s33C).

Although a shareholder is generally not responsible for the company's liabilities, a holding company may be liable for its subsidiary's debts on insolvency (CA section 588V).(see *Standard Chartered Bank Ltd v Antico (1995) 13ACLC 1381*).

There are no reported cases on the judicial application of CA s 729 (1), and there is insufficient record of proceedings to estimate the duration of a judicial case of prospectus liabilities. If the defendant has an arguable defense proceedings, a commercial case may take 1 to 2 years in first instance. Note that summary judgement is unavailable in a case where the defendant does not have a valid defense. An appeal is available as of right to the Full Court, and by leave to the High Court (equivalent to the US Supreme Court) as a matter of its discretion. From commencement of initial proceedings, a prospectus liability case may be disposed of in 3 to 4 years if appealed.

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SECURITIES LAW OF AUSTRIA

Part 1. The regulator and its supervisory and regulatory powers

As of December 2000 the Austrian Securities Authority ("ASA") was the main regulator for the securities market, while there were separate regulators of banks and insurance companies organized in the Federal Ministry of Finance.

The Federal Minister of Finance appointed the director of the ASA, and the director appointed the members of the ASA (only the appointment of his vice-director required the approval of the Federal Minister of Finance). The Federal Minister of Finance could revoke the appointment of the director of the ASA if he did not follow his instructions or in case of an important reason.

As of 1 April 2002, the new "super-regulator" in charge of the regulation and supervision of the Austrian securities market is the Financial Markets Authority ("FMA"). The FMA also regulates and supervises banks, insurance companies and pension funds.

The two executive officers of the FMA are suggested by the Federal Government and are appointed by the President of the Republic of Austria. The directors of the FMA (the president, the vice-president and four members) are appointed by the Federal Minister of Finance and by the Austrian Chamber of Commerce (which appoints two co-opted members). The Federal Minister of Finance can relieve the officers and directors of the FMA before the expiry of their terms only for grounds. Prior to such relieve, the Federal Minister of Finance shall hear the Austrian National Bank with the exception of immediate danger.

Generally, the Austrian House of Representatives ("*Nationalrat"*) may adopt all Acts regarding the securities market. The Federal Minister of Finance is authorized under the Austrian Securities Supervision Act ("WAG") to issue certain regulations. They are published in the Official Gazette and not subject to the approval of other governmental authorities. Finally, the Vienna Stock Exchange has the authority to approve or reject the admission to listing in the exchange based on the Offering Document.

The ASA, and as of April 1st, 2002 the FMA acting as a regulator is entitled to conduct any investigations and take any measures necessary to ensure fairness in the capital markets (Section 2 WAG). Measures available to the ASA/FMA are standard administrative measures (notification obligations, supervisory rights arising from the concession granted by the ASA/FMA) based on general Austrian administrative law. Only when investigating the abuse of inside information ASA/FMA can issue an administrative order commanding the delivery of documents and the testimony of witnesses from persons or entities under its regulation and supervision. Such investigative powers of the ASA/FMA are furthermore expanded to third parties (e.g. witnesses or brokers having issued orders regarding the financial instruments under investigation) who are – in general – not *per se* under ASA/FMA's regulation and supervision (§ 2 para 2 sub-para 4 WAG).

Part 2. The duty to disclose material information

It is prohibited by Austrian law under the Stock Exchange Act ("SEA", § 74 and § 78) and the Capital Market Act ("KMG", § 2) to sell shares to the general public without first making a prospectus available. The prospectus must meet the requirements set forth in the Stock Exchange Act in order to list the shares on the exchange. Also the KMG provides for specific schemes to be complied with when drawing up the

prospectus for securities to be offered in the secondary market. Further, the prospectus has to be audited by a *prospectus auditor*. The prospectus must be fully published in a newspaper with nationwide circulation or in the form of a brochure available free of charge to the general public at the registered corporate seat of the issuer and distributor. A public notice must also be published in the Official Gazette of the Republic of Austria. It is not expressly required, however, that such a prospectus actually be delivered to each individual prospective investor.

The prospectus shall contain all relevant information allowing investors to make an informed judgment of the issuer and the securities (SEA, § 74). Specifically, for listing in the Official Market, the prospectus must include the information described in Schedule A of the SEA, which include, among other information, the following:

1. The total remuneration paid and benefit in kind granted to the members of the administrative, management, and supervisory bodies, as total amounts for each category of body, as well as the total number of shares and options they hold.
2. As far as it is known by the issuer, name of the shareholders who, directly or indirectly, own 20% of issuer's capital, as well as of the persons who, directly or indirectly, severally or jointly, control the issuer, as defined thereat. Note that any person who, directly or indirectly, acquires or sell shares in a listed firm must report within seven days to the Stock Exchange Council, the ASA, and the company in question if as a consequence of the transaction their proportion of voting rights, exceeds or falls below 5%, 10%, 25%, 50%, 75%, and 90% (SEA, § 91).
3. There is no requirement to disclose material contracts that create outstanding obligations or that are entered outside of the normal course of business, except for general information on the trend of the business or the effect of exceptional factor on the issuer's activities.
4. Nonetheless, the interests of directors and officers in transactions with the issuer have to be disclosed in the prospectus as long as those transactions are unusual in their nature and conditions, and for outstanding loans (hence not for each and every transaction in which the directors, officers and controlling shareholder have an interest).

The prospectus for the application for admission to listing shall be signed by the issuer, the auditor of the annual accounts, and the persons who have assumed responsibility for the prospectus or any part therein (SEA, § 72 (3) item 7 and § 80). The members of the management board (or officers[36]), as legal representatives of the issuer, have to sign the prospectus.

The distributor has to sign the prospectus only if she undertook the responsibility regarding certain parts thereof. There is no legal obligation for the distributor to perform a due diligence review of the information contained in the prospectus. As a matter of commercial practice, the distributor is likely to perform at least a limited due diligence review of the contents of the prospectus to identify obvious defects of the prospectus to avoid possible civil liabilities that may arise from the offering of a defective prospectus (see below).

Under the Capital Market Act, i.e. if a public offering is undertaken before the securities are listed on the stock exchange, the issuer and the accountant have to sign the prospectus as "issuer" and as "prospectus auditor", respectively (KMG, § 8). Other than under the SEA, the KMG does not expressly provide for additional "underwriters" taking over the responsibility regarding certain parts of the prospectus. The distributor may assume civil responsibility for the accuracy and completeness of the information in the

[36] Generally, the corporate structure in Austria as a civil law country is different from that in a common law country. For purposes of this chapter, the members of the supervisory board will be referred to as "directors", while the members of the management board will be referred to as "officers".

prospectus if she acts as "prospectus auditor." However, the distributor is not legally required to act as "prospectus auditor", which is normally performed by an auditing firm or a credit institution.

The issuer's attorneys must not sign the prospectus so long as they only advised in the preparation of the prospectus and did not undertake any responsibility regarding any part therein.

Under the SEA, applications for listing are made to the company operating the stock exchange, which must reach a decision within 10 weeks after the filing. The prospectus should be approved and the shares should be listed on the stock exchange if it complies with the applicable norms. However, the issuer must provide the company operating the stock exchange with all information necessary for the determination of the requirements for the admission to listing. In case the prospectus fails to provide required material information, the exchange operating company will not admit the shares.

Under the Capital Market Act, i.e. as regards securities that are not listed, there is no such additional examination authority as provided for under the SEA. However, the Austrian Control Bank, acting as a notification office (*Meldestelle*) is responsible for a limited examination of prospectuses received, in particular regarding the fulfillment of formal requirements such as the required signatures from the issuer and the prospectus auditor. Due to this limited examination authority, the Austrian Control Bank cannot oppose a prospectus complying with statutory formal disclosure obligations and/or other formal requirements, but failing to provide material information.

The SEA does not establish a waiting period when shares may be offered but actual shares may not be committed, agreed or finalized. Generally, an initial public offering shall be permissible within Austria only on the condition that a prospectus that has been drawn up and audited in conformity with the provisions of the Capital Market Act is published at least one day in advance of the public offering. If there is a public issue before the listing, the first day of the listing has to be after the last day of the subscription period, if such subscription period has been set forth.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

Insofar a violation of the KMG in connection with the public offering of securities or other financial instruments requiring the drawing up of a prospectus does not constitute a criminal offence; the Federal Ministry of Finance may impose administrative sanctions. Such violations cover widespread aspects of non-compliance with the provisions of the KMG. In particular, non-compliance with statutory requirements regarding the contents of a prospectus as well as with the signing, publication and notification requirements constitute an administrative offence. Administrative sanctions may be imposed against the issuer, offeror, distributor and prospectus' auditor. Such administrative sanction applies for both intentional and negligent infractions.

Further, in case an investment firm violates legal provisions and regulations regarding trading and the licensing of financial services, the FMA can apply sanctions such as (i) an order to reestablish lawful conditions, (ii) a prohibition to conduct business in case of repeated or continued violations, or (iii) revoke the financial firm's license (WAG § 24(3) and Banking Act § 70).

3.2 Judicial (criminal) sanctions

The issuer and all persons which have rendered false material advantageous information, or concealed adverse facts in the offering document, with a view to influencing the decision on the acquisition, can be subject to criminal sanctions, including prison of not more than two years or a corresponding fine (KMG

§ 15 item 1 sub-para 2). This sanction may apply to the issuer, its directors and officers, the distributor, or the auditors, when the intentional conduct described can be attributed to them.

Note that an order to stop or refrain from a specific action, or commanding the undertaking of specific actions can always be granted by the judiciary under general civil law.

3.3 Stock exchange sanctions

The admission to listing of an issuer shall be repealed if any of the admission requirements was obtained through incorrect information or deceitful behavior (SEA § 64(5)). The stock exchange can also expel a member in case of failure to fulfill its duties and the company operating the stock exchange can suspend membership for time required to establish if there are grounds for expulsion (SEA § 19). A distributor acting as an underwriter and being a member of the stock exchange would be subject to this sanction in case of incorrect or incomplete information in the prospectus for a public offering, due to its fault.

Part 4. Investor's right of restitution for losses

Investors may obtain restitution for losses incurred by reason of untruthful or incomplete information in a prospectus through a civil law suit. Compensation for easily provable damages may also be awarded through a judicial proceeding before a criminal judge in case the defective prospectus constitutes a criminal offense.

The Austrian Civil Code lays down the general principles of liability under tort. Section 1295 of the Austrian Civil Code provides for the right to demand indemnification for the damages from a person's fault. These damages may have been caused by violation of a contractual duty or, alternatively, without regard to a contract. According to Section 1294, damages may arise from an illegal act or omission, and may be caused knowingly and purposefully, or by careless ignorance or lack of proper diligence. As a general rule, the plaintiff is to prove the fault of the defendant (Section 1296). However, Section 1298 provides that in case defendant causes damages by violating a contractual or statutory obligation, the burden of proof for the fault shifts from the plaintiff to the defendant, who then has to prove that the damages claims did not arise from his fault ("reversal of burden of proof").

Securities laws specifically provide for the investor's right to obtain restitution for damages due to a defective prospectus (SEA Section 80 and KMG Section 11). For listed securities, the issuer and persons who have assumed responsibility for the prospectus or parts of it (i.e. underwriters) are jointly and severally liable for the losses incurred by the investor for misrepresentations of fact in the prospectus due to false information given or for concealment of material information (SEA Section 80). Liabilities arise also in case misrepresentations or concealment of material information is made negligently. Liability is expanded to the *auditor of the annual accounts* certifying the issuer's annual accounts or the prospectus in case the auditor has knowledge (i) of such tortuous acts by the issuer or other persons (violation of SEA Section 80) and (ii) that the annual accounts will form part of the incorrect prospectus.

Under KMG Section 11, if the public offering precedes the listing on the stock exchange, the *issuer* is civilly liable for losses resulting from incorrect or incomplete information in the prospectus (or in any other information published by the issuer under the Austrian Capital Market Act that is relevant to assessing securities or investments) for which she is responsible herself. The liability of the *issuer* also covers faults of her staff or any other persons whose services were used to draw up the prospectus. The *prospectus auditor* is liable for any incorrect or incomplete information due to her own gross negligence, or that of her staff or of any other persons whose services were used to audit the prospectus. Similarly, the *auditor of the annual accounts* is liable if she certifies the annual accounts knowing that the information

in the prospectus is incorrect and/or incomplete and knowing that the annual accounts confirmed by her forms part of the prospectus. Finally, the *intermediary* professionally engaged in the transaction is liable if it knew that the information in the prospectus was incorrect or incomplete or was unaware of it due to gross negligence.

Under the SEA, the parties civilly liable for the contents of the prospectus are: (i) the issuing company; (ii) the officers of the issuer that sign the prospectus; (iii) the auditor of the prospectus; (iv) the auditor of the annual accounts; and (v) other persons who may have assumed responsibility for the prospectus or any of part of it. However, the issuer's directors and its controlling shareholders are generally not liable for the content of the prospectus.

The controlling shareholder of a corporation cannot be held civilly responsible for the corporation's liabilities. Moreover, the controlling shareholder cannot be held civilly liable for the acts or omission of the directors or officers of the corporation because she does not have the authority to give them instructions.

Under the general principles of tort law, the infringement of provisions of securities law can lead to liability for damages. Since the provisions as basis for a claim are cumulative, investors within the applicability of the Stock Exchange Act may claim restitution for damages pursuant to Section 80 of the SEA, Section 11 of the KMG, and general civil law. Investors within the applicability of the Capital Market Act may claim restitution pursuant to Section 11 of the KMG and can always resort to general tort law.

The burden of proof is on the investor/plaintiff. Any investor who wants to obtain restitution in case of a false statement or material omission in the prospectus has to establish in court that:

i. the false statement or omitted information in the prospectus was material;
ii. the defendant acted with negligence (but see the qualifications in the paragraph below);
iii. the investor relied on the offering document to invest;
iv. the investor suffered losses; and
v. the investor's losses were caused by the false statement or omitted information.

As outlined above the liability standard that may be applied pursuant to Section 11 of the KMG and Section 80 of the SEA depends on the liable party. In general, liability under the SEA solely requires negligently behavior, whereas under the KMG, liability of the *prospectus auditor*, the *intermediary* as well as the *distributor* is restricted to grossly negligently or even intentional behavior. Solely proof of <u>negligence</u> is required to obtain restitution from the issuer, its liable officers, and the persons who have assumed responsibility for the prospectus. Proof of <u>gross negligence</u> is required to obtain restitution from the *auditor of the prospectus* and the *intermediary*. Finally, proof of <u>knowledge</u> that the annual accounts were incomplete or incorrect is required to hold the *auditors of the annual accounts* liable.

There are no specific defenses under securities laws. The defendant can, however, prove the contrary.

If there is a contractual relationship in the acquisition of listed shares, the burden of proof for the fault (regarding the information in the prospectus) shifts from the plaintiff to the defendant, according to Section 1298 of the Austrian Civil Code (see above). This shifting of the burden of proof would also apply to the contractual relationship of the investor with the distributor. Therefore, in such case, the investor is relieved from the burden to prove that the defendant acted with negligence but the burden would be on the defendant to prove that it did not act negligently or - in case of e.g. a distributor - grossly negligently.

Regarding Section 11 of the KMG some prevalent Austrian legal writers are of the opinion that under Section 11 the reverse of the burden of proof (Section 1298 Civil Code) shall only be applicable to very specific situations (i.e. in case reasons for exclusion are applicable to the *prospectus auditor*). Following this opinion (i.e. leaving the burden of prove with the damaged investor) would seriously reduce the investor's possibilities to have compensated damages arising from a defective prospectus.

Claims for compensation of damages under Section 11 of the KMG are time barred after 5 years from the end of the public offering. In addition, claims are restricted to purchase price paid by the investor plus interest since plus the costs incurred.

Under normal circumstances, a case of restitution for losses incurred by reason of incorrect or incomplete information in a prospectus in a public offering of securities should not take more than three years, from the moment of the initial complaint filing until a firm and final resolution by the judiciary. A first instance judgement would be issued in approximately one year and a half.

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SECURITIES LAW OF BELGIUM

Part 1. The regulator and its supervisory and regulatory powers

The main securities regulator is the Banking and Finance Commission (BFC), which supervises banks and securities markets. The BFC is integrated by a president, a director of the Banque Nationale de Belgique, and five members.[37] The president and members of the BFC are appointed by Royal Decree, based on the joint nomination of the ministers of finance, justice, and economic affairs and may be discharged through a Royal Decree signed by the same three ministers. However, in practice, they have all served to the end of their term.

Since the constitution prohibits large delegation of powers, regulations that are generally applicable have to be submitted to approval by Royal or Ministerial Decree. However, the BFC can enact "recommendations" on commercial practice, which are normally followed by the practitioners in the field. If a regulated party refused to follow BFC's recommendations, the supervisor would have to impose the rules on a case-by-case basis, which would be cumbersome. For that reason, the BFC's requirements are set in general rules, which technically take the form of a "circulaire".

The regulation and supervision of the securities markets is assigned to a "market authority", an administrative agency operating close to the markets. It is planned to centralize all powers in the hands of the BFC next year.

The BFC can command the delivery of documents from persons or entities under its regulation and supervision. However, the BFC cannot command the testimony of witnesses (article 27, RD 185 of July 9, 1935).

Part 2. The duty to disclose material information

In order to offer a security for sale, the issuer must file with the BFC a prospectus with the information required to allow the public to make a judgement on the nature of the business and on the rights attached to the securities (Articles 26, 17 and 29 of the RD 185 of July 9, 1935). The prospectus must contain all material information and must have been previously approved by the BFC (article 29ter, RD 185). No transactions can be made before the prospectus is publicly available. The supervisor cannot oppose a prospectus based solely on its own determination on the quality of the investment, but it can object an offering if there is a risk that investors would be misled (strict disclosure technique). The "prospectus should be published […] at the latest on the day on which the public issue of securities starts" (art 11, RD 31 October 1991). In practice, prospectuses are available before the public offering starts and can be obtained most of the time from the issuer's website.

[37] Since August 2, 2002 the BCF is led by a Managing board, and acts under the overall supervision of a Supervisory board. The president of the BFC chairs both bodies. The management board is composed of the president and four members, two of which are directors of the Central bank. These members act in a personal capacity. The management board is in charge of the actual decision making regarding supervised banks, investment firms and securities issues. It can impose penalties. There are strict rules on conflicts of interest. The supervisory board composed of 10 members and the president, is in charge of the approval of budgets and account, and gives advice on general policy guidelines. It is not involved in decisions relating to individual firms or transactions. Half of the members of this board can be composed of persons linked to supervised entities.

The prospectus must provide the information requested in Schedule A, RD of September 18, 1990, including, among other items, the following – that largely correspond to the items to be published pursuant to the European directive of 1980:

1. The remunerations and other benefits of the members of the administrative, directive, and controlling bodies, as aggregate per each category of body (§ 6.2.Schedule A).
2. Total number of shares and options held by members of the administrative, directive, and controlling bodies (§6.2.1 Schedule A,).
3. Name and ownership of shareholders who, directly or indirectly, own 5% or more of the issuer's shares (§ 3.2.7 Schedule A). As long as it is known to the issuer, the name of the physical persons or legal entities that directly or indirectly, individually or jointly, exercise or could exercise the control of the issuer, should also be disclosed (§ 3.2.6 Schedule A). Pursuant to the 1988 EU directive, all persons who acquire or transfer securities representing 5% or more of the votes in a Belgian company listed on an EU exchange must disclose their ownership to the Stock Exchange and notify the BFC.[38] Such information is published in the press.
4. Description of the issuer's main activities (§ 4.1 Schedule A). Per request of the BFC, information about the terms of material contracts, among other matters, is detailed in the prospectus.
5. Information about interests of the members of the administrative, directive, and controlling bodies in unusual transactions made by the issuer (§ 6.2.2 Schedule A).[39]

The prospectus must state the name and position of the physical persons who assume liability for the content of the prospectus and are required to sign the document (Article 29 of the RD 185, and §1.1 and §1.2 Schedule A, RD of September 18, 1990). It must be signed by at least two directors on behalf of the board. In general, the auditor's name must be included with an indication that the financial information has been verified (§1.3 Schedule A, RD of September 18, 1990). The prospectus is distributed under the responsibility of the issuer. The distributor is not required by law to perform a due diligence review of the information contained in the prospectus and is not likely to perform one as a matter of commercial practice.[40] The distributor may not make any statement that is different from the information contained in the prospectus. If the distributor circulated information that was not in conformity with the content of the prospectus, he would be acting outside her mandate and therefore be solely liable for her act.

Part 3. Sanctions for the failure to disclose

[38] The articles of association of a listed company may reduce the reporting threshold from 5% to 3%.

[39] According to company law, contracts with directors and controlling shareholders have to be subject to special procedures (i.e., intervention of independent directors) and extensive disclosure in the annual report. This subject is extensively dealt with under general company law. Article 523 of the Companies Code (ex. art 60, Companies Act) deals with all conflicts of interest between a director and the company, in listed and unlisted companies. It requires special voting procedures, verification by the auditor and reporting to the general meeting. The report of the board of directors and of the auditor is published in the annual report. There are stricter rules on conflict of interest between a listed company and its controlling shareholders or the group from which it depends. In the case of groups, three independent directors shave to draw up a report, assisted by an independent expert. This report is submitted to the board, which will decide. The board's decision is published in summary form, along with the auditors' opinion on the figures underlying the decision.

[40] According to a recent decision of the Brussels Appeals Court (2-2002), a distributor of eurobonds was not held liable for its failure to perform a due diligence review of a Canadian issuer, but would have been liable for the information contained in the prospectus. In practice, the bank had indemnified the disappointed investors on a voluntary basis. The case relates to the public offering of eurobonds, with the distributor acting as a principal. Most of the time this is not the case in the offering of shares of domestic issuers, where the distributor will act as an agent of the issuer, and the primary responsibility would be on the issuer.

3.1 Administrative Sanctions

Administrative sanctions can only apply against professionals, such as auditors or members of the official institute of auditors. However, in case of false statements or omissions of material information from the prospectus, the BFC cannot impose a sanction directly, but may apply to court to that effect. In case of false statements or negligent omissions in a prospectus, the auditors are also subject to professional sanctions imposed by a professional body (article 19 of Law of July 22, 1953). The law of August 2, 2002, art 36 broadened considerably the sanctioning power of the BFC to all types of disclosure, especially ad hoc disclosure these penalties and other sanctions will be "applicable to any person infringing the rules that have been introduced by the new act". This would include sanctioning false, misleading or defective statements.

3.2 Judicial Sanctions

The judiciary may impose fines and imprisonment on directors, accountants, and other persons if they are responsible for intentionally or unintentionally giving false or misleading information in a prospectus (article 42, 8°, RD 185). However, distributors are not criminally liable in case of a defective prospectus, unless the distributor has itself drafted the prospectus.

The court may also restrict or prohibit the appointment of directors, who have been found criminally liable for a defective prospectus, as administrators or managers of companies (RD 22 of October 24, 1934). Fines by the judiciary are also applicable against the issuer (Article 42, 8°, RD 185), and against the accountant (article 171, §2, of the Companies or the request of any interested party, including associations for the protection of the rights of investors, can issue stop orders against the issuer and its directors in case of an illegal offering of securities (i.e., offering securities without having given notice to the BFC; article 220 of Law of December 4, 1990).

3.3 Stock Exchange Sanctions

The market authority of the stock exchange may suspend from quotation or delist an issuer as a sanction. Before the 2002 law, it could also impose sanctions on listed companies, mainly delisting. However the powers of that authority will be transferred to the BFC and the authority dissolved.

Part 4. Investor's right of restitution for losses

In case of losses due to false statements or omissions of material information in the prospectus, investors can obtain restitution before a commercial judge on the basis of the general rules of civil procedure, or before a criminal tribunal upon the conviction of the violator. A class action is not available under Belgian law for this purpose.

If the defective prospectus constitutes a criminal offense, as it would be the case for intentional conduct of those preparing the prospectus, the easiest way for an investor to obtain restitution would be through a judicial procedure before a criminal tribunal. The case will then be investigated by the public prosecutor, and the investor may claim restitution for damages directly to the criminal court during the trial.

Regarding civil compensation of losses, the Civil Code provides that any person who causes damages to another is liable to repair the damages caused by her fault (Article 1382). In general, the violation of any law (including regulatory requirements), whether intentionally or not, will result in civil liability and entitle the victim to sue for all damages caused. The persons mentioned in the prospectus, who are also required to sign it, are jointly liable for compensating the damages resulting directly from the omission or

the untruthfulness in the prospectus (Article 32, RD 185).[41] Therefore, the usual civil remedy would be damages against the directors of the company, and according to general negligence law, also be attributed to the company itself, leading to joint liability.

Accountants are liable if their contribution to the prospectus was material and they signed the financial statements included in the prospectus. This might be the case if the accounts, that were approved by the accountant, proved to be false (art. 170 §2, Companies Code) Here again, the general rules of negligence would lead to liability of these auditors.

The distributor, on the other hand, would be liable only if she offered securities acting as a principal without support of the issuer (in practice, distribution takes place with support of the issuer). The distributor has no legal duty to undertake a due diligence and can rely on the information disclosed by the company. As the underwriter, the distributor is not necessarily involved in the preparation of the prospectus, and its liability would be limited to the information relating to its intervention as an underwriter. In summary, the distributor would generally not be liable for the contents of the prospectus. Exceptionally, civil liability towards the issuer and the investor may arise under contract law for negligence in the distribution process, e.g. on circulating promotional material that proves to be false or misleading, or having other false statements made by sales agents.

If the controlling shareholder is selling securities, she would only be liable as a seller. The liability of the controlling shareholder would then only be related to that part of the information for which she is responsible. In this case, de facto the prospectus would be prepared by the company, and hence its liability could be invoked in case of false or misleading elements in its statements. Therefore, investors could not recover losses from the shareholder if she does not sell securities, or she is not involved in the preparation of the prospectus or in the information provided therein.

In order to obtain restitution in court, the plaintiff must establish that (1) the fraudulent, misleading or omitted information was material, in the sense that a reasonable investor would have considered that information as an important factor in reaching her investment decision[42]; (2) she could reasonably have been expected to have relied on the prospectus; (3) there were actual losses; (4) the losses were caused by the defective prospectus; and (5) the defendant acted negligently, with or without intent. In general, a violation of a legal duty would constitute negligence and lead to liability provided causation has been proved.

The law does not establish any specific defense. In order to avoid liability, the defendant must rebut the investor's allegations. A shareholder is neither responsible for acts or omissions of directors and officers of the corporation nor for the company's liabilities[43]. In general, the Supreme Court does not allow corporate veil piercing.

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[41] There is no difference between false or fraudulent information, misleading information, and omitted material information.

[42] As an example, it has been held that the omission that the bonds were subordinated is a material element, although in the circumstances of the market at that time they had no obvious impact in determining the interest rate. The standard is that of the "normal man" (in this case the normal investor).

[43] Under Art 530 of the Companies Act, the controlling shareholder is civilly liable for the acts or omissions of the corporation if after the company's insolvency it is established that she acted as a *de facto* director and committed "manifestly gross errors in the management of the company" (e.g., running the company without adequate accounting). This rule would not apply to prospectus liability, although legal scholars speculate as to what extent this provision could be used in other cases.

Rescission of the acquisition of the shares and the refund of the price paid is a remedy under the common law of contracts. Rescission could be held applicable if error on the substance of the transaction or fraud by the other contracting party has been discovered. If there is fraud by a third party, only damages can be granted. If the error does not relate to the nature of the transaction or of the security, no rescission, but only damages may be claimed. There would normally not be a course of action if the error relates to the value of the security.

Most cases on securities liability are settled out of court in order to avoid reputation damage. If a case is not settled out of court, it would take between 4 to 5 years to obtain a final decision by the judiciary. There is a general right for any plaintiff to take recourse against any first instance decision, and even submit the case on the merits to the Court of Appeal, what would take another 2 to 3 years . All these cases can also be taken to the Supreme Court as a *'cour de cassation'*. The latter court will deal, not with the merits, but only with the legal issues invoked. In practice there have been few court cases dealing with prospectus liability.

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SECURITIES LAW OF BRAZIL[44]

Part 1. The regulator and its supervisory and regulatory powers

The Brazilian Securities Exchange Commission (Comissão de Valores Mobiliários – CVM) is the authority in charge of the regulation and supervision of the securities markets. The main regulator of banks is the Central Bank of Brazil (Banco Central do Brasil), while the main regulator of insurance companies is the Private Insurance Authority (Superintendência de Seguros Privados). Banks and insurance companies with shares traded in the stock exchanges shall also comply with CVM regulations.

The CVM is managed by a chairman and four commissioners appointed by the President of the Republic, who shall be individuals of faultless reputation and acknowledged competence in matters relating to capital markets. If absent, the chairman and the commissioners of CVM shall be substituted as provided for in the internal regulations. As of February of 2002, the chairman and commissioners of CVM shall only loose their mandate by virtue of (a) resignation; (b) a final and unappealable adverse judgement; or (c) a disciplinary administrative proceeding Law (10,411 of 26 February 2002). Before then, they could be dismissed at the exclusive discretion of the President of the Republic at any time, without any other type of formality.

CVM shall regulate the matters expressly provided in the Brazilian Securities Law (6,385/76) and in the Brazilian Corporation Law (6,404/76). The regulations issued by CVM are not subject to approval of other governmental authorities but must be in line with the policies defined by the National Monetary Council, which was created by Law No. 4,595/64 (the "National Financial System Law") for the purposes of formulating money and credit policy.[45]

CVM shall control the activities and services of the securities market, as well as control and inspect publicly-held companies. CVM may command the delivery of documents and the testimony of witnesses, under any circumstances, from persons or entities under its direct supervision, such as: (i) those pertaining to the distribution of securities system; (ii) publicly-held companies, (iii) investment funds; (iv) independent auditors; and (v) consultants or analysts of securities. Under Decree 3,995 of 31 October 2001, CVM may also command the delivery of documents and the testimony of witnesses from any individuals or entities whenever any irregularity occurs, for purposes of verifying the occurrence of illegal acts or non-equitable practices. Before then, the CVM could command the delivery of documents and the testimony of witnesses from any individuals or entities which took part in the market, whenever there was

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[44] Our original answers to the Securities Law Questionnaire were based in the legislation in force on December 2000. However, as previously mentioned, both the Brazilian Securities Law (6,385/76) and the Brazilian Corporation Law (6,404/76) have been amended as a result of the Brazilian Corporation and Securities Laws reform that was implemented by means of Law No. 10,303, Provisional Measure No. 8 (further converted into Law 10,411 of 26 February 2002) and Decree No. 3,995, all enacted on 31st October 2001. According to the provisions contained in said legal instruments, the Brazilian Corporation Law reform would be (i) immediately effective as regards new companies; and (ii) effective as of 1st March 2002 (120 days after publication) as regards existing companies. In addition, on 11th January 2003, the New Brazilian Civil Code (Law 10,406 of 10 January 2002) entry into effectiveness, thereby providing for substantial changes to our previous Civil Code (Law 3,071 of 1 January 1916). Where necessary, we have updated our answers to reflect the laws and regulation in effect in March of 2003.

[45] The CVM shall propose to the National Monetary Council the approval of general rules on brokers and stock exchanges (e.g., conditions regarding the authorization of brokers, the constitution and closure of stock exchanges, the exercise of disciplinary authority by stock exchanges over their members, the imposition of penalties). Provisional Measure No. 8 of 31 October 2001, further converted into Law 10,411 of 26 February 2002, has amended article 18 of the Brazilian Securities Law (6,385/76) to set forth that the general rules on brokers and stock exchanges shall be edited by CVM, rather than proposed by CVM to the National Monetary Council.

sustained suspicion of fraud or manipulation destined to create artificial conditions of demand, offering or price of securities.

The powers of the CVM to regulate the securities market under the law do not exclude the authority of stock exchanges[46] with regard to their members and the securities traded thereon. The stock exchanges and organized over-the-counter market entities shall, in their capacity of ancillary entities to CVM (i.e. self-regulators), inspect their respective members and the operations performed by them. As a result, while both the regulation and control of the securities market are under the exclusive jurisdiction of the CVM, the inspection of the market is, to a certain extent, shared by the CVM with the stock exchanges and organized over-the-counter market entities.

Part 2. The duty to disclose material information

In order to make a public offer of shares, an offering document (prospectus) shall be prepared, submitted to CVM's approval and made available to the public during the term of the offering. However, the presentation of a prospectus may be waived at CVM's discretion, whenever the shares to be offered in the market represent a volume which is insignificant in relation to the amount of issuance. The prospectus must be available to the public where shares are sold during the distribution period (Article 19 of CVM Ruling 13/80) but need not be delivered to investors before shares are sold.

The prospectus is a document containing basic data on the issuing company. It should provide the information required in Exhibit I of CVM Ruling 13/80, as well as the management report and financial statements, with the respective independent auditors' opinion referring to the latest fiscal year ended, <u>the latest annual information and subsequent quarterly information reports</u>, <u>in addition to any other material fact</u>. On this regard, the following should be noted:

In connection with annual and quarterly information reports that shall be attached to the issuer's prospectus, it is important to clarify that, under article 16 of CVM Ruling 202/93, as further amended, a publicly held company shall provide to CVM, to the stock exchanges and make available to investors, the following periodical information: (i) Financial statements or consolidated financial statements, as the case may be, accompanied by the management's reports and the independent auditor report, within 3 months after the closing of each fiscal year or in the same day such information is published in the press or made available to shareholders; (ii) Standard Financial Statements (DFP) form, within the same term indicated in item (i) above; (iii) Call for the holding of general shareholders meeting, in the same day such call is published in the press; (iv) Annual Information Report (IAN) form, within 5 months as from the closing of the each fiscal year, or within one month after the holding of the ordinary general shareholders meeting; (v) Summary of the decisions taken by the ordinary general shareholders meeting, in the day following the holding of the meeting; (vi) Minutes of the ordinary general shareholders meeting within 10 days of its holding; (vii) Certificates of securities issued by the company, in case there has been changes thereto; (viii) Quarterly Information Report (ITR) form, accompanied by the Special Revision Report issued the independent auditor, within 45 days after the closing of each quarter, with the exception of the last quarter. The Annual Information Report (IAN) form shall be updated whenever a fact that changes the information provided therein occurs, within 10 days counting as from the occurrence of the fact.

The Annual Information Report (IAN) form shall disclose information on the following subjects: (a) the ownership stakes of shareholders representing more than 5% of the voting shares; (b) the composition of the corporate capital of the controlling shareholders up to the level of stakes held by individuals; (c)

[46] Under Decree 3,995, the Future and Commodities Exchanges and the Clearing and Settlement entities shall also keep their authority regarding their members and the securities traded thereon.

current composition of the issuer's board of directors and executive officers; (d) the compensation of the directors and officers, as well as their participation in the issuer's profits; (e) composition of the issuer's subscribed and authorized capital; (f) profits distributions in the last three years; (g) interests held by the issuer in controlled or affiliated companies; (h) brief history of the issuer; (i) characteristics of the business sector; (j) products and services offered; (l) raw material and suppliers; (m) main clients; (n) firm orders in the last three fiscal years; (o) production process; (p) trading and distribution processes and export market; (q) main patents, trade marks and franchises; (r) main properties; (s) corporate or income projections; (t) other information deemed as important for the better understanding of the company; (u) investment projects; (v) environmental issues; (x) litigation issues; and (xi) related parties transactions.

Accordingly, although not specifically required by applicable regulations to be included in the prospectus, information on the subjects listed above will ultimately be disclosed to the public as part of the offer, considering that the both the Annual Information Report (IAN) form and the Quarterly Information Report (ITR) form will be attached to the prospectus.

1. It is not necessary to disclose in the prospectus the salaries, compensation, and share ownership of directors and officers of the issuer.[47] However, information on the compensation of the directors and officers, as well as their participation in the issuer's profits has to be included in the Annual Information Report (IAN) form that needs to be disclosed by publicly held companies to the market each year, and shall also be attached to the prospectus.
2. If the company is being incorporated through a public offering, it must disclose: (a) the name and number of shares of the founding shareholders (Exhibit I, item 16, "h"); (b) the obligations assumed by the founding shareholders, the contracts signed in the interest of the future company and the amounts involved therein (Exhibit I, "b"); (c) the special advantages to which the founding shareholders and third parties will be entitled (Exhibit I, "c").
3. Alternatively, if the public offering is carried out by an existing company, the prospectus must disclose the composition of the corporate capital - total amount of the subscribed, authorized and paid-up corporate capital, total amount of shares, types and classes of shares (Exhibit I, item 1). In this case, although not specifically required to be included in the prospectus, information on (a) the ownership stakes of shareholders representing more than 5% of the voting shares and (b) the composition of the corporate capital of the controlling shareholders up to the level of stakes held by individuals, will have to be included in the Annual Information Report (IAN) form that needs to be disclosed to the market each year, and shall also be attached to the prospectus. Note also that, if the public offering is carried out by an existing company, CVM Ruling 13/80 does not require that the prospectus describes: (a) material contracts entered by the issuer; and (b) all the transactions in which directors, officers and controlling shareholder have an interest. However, several pieces of information in connection with the issuer's business will have to be included in the referred Annual Information Report (IAN), including: (a) characteristics of the business sector; (b) products and services offered; (c) raw material and suppliers; (d) main clients; (e) firm orders received in the last three fiscal years; (f) production process; (g) trading and distribution processes and export market.
4. According to the Code of Self-Regulation of the National Association of Investment Banks for Public Offering of Securities (the "ANBID Code"), the distributors shall observe the minimum standards set forth therein, including references to the issuer's business and activities. In addition, the minimum standards set forth by the ANBID Code also require that the prospectus describes

[47] Upon hiring, officers must declare subscription bonuses as well as their holdings of shares, stock options, and convertible debentures issued by the companies or its affiliates. At the annual shareholders meeting, shareholders representing at least 5% of the capital may demand additional disclosure of by the officers regarding securities owned and their employment contract and benefits (Article 157 of Law 6404/1976).

material contracts made outside the ordinary course of business and transactions with related parties (i.e., transactions entered into with controlling entities, affiliated companies, companies subject to common control, or companies part of the same economic group). Note that the ANBID Code does not require disclosure of transactions in which directors and officers have an interest, or transactions where related parties have an indirect interest.

5. CVM Ruling 13/80 sets forth that any "material fact" concerning the issuer shall be disclosed in the prospectus. The expression "material fact" is defined by CVM Ruling 358/2002[48] as any resolution passed at general meetings or decision made by the management bodies of a publicly-held company, as well as any act or event related to the company's business, which may have a substantial bearing on (i) the price of the company's securities; (ii) the investors' decision to trade in such securities; and (iii) the investors' ability to make a learned decision on the exercise of any rights inherent to the company's securities they hold. In addition, Article 9 of the ANBID Code sets forth that risk factors capable of affecting the investment decision of investors shall be included in the offering document.

The prospectus must be signed by the legal representative of the issuer (Exhibit 1 of Ruling 13/80). The controlling shareholder, as founder of the company, is required to sign the prospectus whenever the company is to be incorporated through a public offering, but she is not required to do so when the issuer is an existing company. The accounting firm signs the Auditing Report of the Financial Statements, rather than signing the offering document.

The officers of the issuer are responsible for the accuracy of the information submitted to the CVM. Moreover, the distributor shall strive to verify the sufficiency and quality of the information given to the market during the entire distribution period, as required for decision-making by investors. Therefore, the distributor is under the obligation to act with diligence regarding the verification of said information and is therefore required to perform a due diligence review of the information contained in the prospectus. The distributor assumes civil responsibility for the compliance of its obligation to act with diligence regarding the verification of the accuracy and quality of the information in the prospectus. According to the prevailing legal doctrine, in order to avoid administrative or civil responsibility, the distributor shall act with the necessary independence from the issuer, carrying out a professional and independent review of the information provided to CVM and to the market for purposes of the public offering.

The distributor may also be liable for representations made in connection with the public offer that were not included in the prospectus. Specifically, it could be argued that the distributor is liable for representations made outside the prospectus if these influenced investors' decisions. Such a claim would be based on the distributor's obligation to verify the sufficiency and quality of the information given to the market during the entire distribution period.

The accounting firm is only liable for reviewing the financial statements and preparing the audit report and for adopting auditing procedures required for this purpose. Accountants are not held liable for the preparation of the prospectus itself.

The controlling shareholder may only be held liable for actions taken in abuse of her controlling power, such as to induce, or attempt to induce, any officer or audit committee member to take any unlawful

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[48] "Article 2. It shall be deemed as material, for the purposes of this Ruling, any decision taken by the controlling shareholder, by the general shareholders' meeting or by the members of the management bodies of a listed company, or any other act of fact of a political-administrative, technical, business or economic-financial nature which has occurred or is related to the company's business, that might influence in a relevant manner: (i) the price of the securities issued by the listed company or related thereto; (ii) the investors' decision to buy, sell or hold such securities; (iii) the investors' decision as to the exercise of any of the rights inherent to their condition of holders of the referred securities."

action, or contrary to their duties under this Law and under the bylaws, and contrary to the interests of the company, to ratify any such action in a general meeting

The CVM has the power to oppose an offering document should it consider that the prospectus fails to provide the required material information. However, provided that all the requirements listed above are met and that CVM agrees that all material information have been included in the offering document, CVM would not have the power to oppose such document based solely on the investment quality of the securities. The registration of the offering may be denied by CVM due to the unfeasibility or imprudence of the undertaking or lack of integrity of the founders in the case of incorporation of a company.

The law does not establish a "waiting period" during which the securities may be offered but actual sales may not be committed, agreed, or finalized. However, CVM Ruling No. 13/80 admits the possibility of the issuer receiving reservations for subscription of shares prior to the granting of registration of the public offering. Such reservations may only be confirmed after registration is granted.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions for omissions of material information

The basic sanctions that may be imposed by CVM are described in the Securities Law. Under Article 9, to prevent or correct abnormal market situations, CVM may: (1) suspend the trading of securities or declare a recess of a stock exchange; (2) suspend or cancel the registrations provided for in the Securities law; (3) publish information or recommendations for the purpose of informing or advising market participants; and (4) prohibit market participants, under the penalty of fine, from performing any activities it may specify, which it considers to be harmful to normal market functioning. Note that the cancellation of the registration of a previously existing issuer would hurt existing shareholders by reducing the liquidity of the issuer's securities. Therefore, it is unlikely that the CVM would cancel the registration of a publicly-traded company if the prospectus of a given offering is misleading.

The CVM may, under Article 11, impose the following penalties on the violators of any provision of the Securities Law, the Corporation Law, or its resolutions, as well as any other legal provisions which are the CVM's responsibility to enforce: (1) warning; (2) fine; (3) suspension from duties of a director or member of the inspection committee of a public company, from an entity taking part of the distribution system, or from other bodies which require authorization by, or registration with, the CVM; (4) temporary disqualification, up to a maximum period of 20 years, from occupying the posts mentioned in the previous item; (5) suspension of the authorization or registration for the execution of the activities covered by the Securities Law; (6) cancelation of the registration or of the authorization to carry out the activities covered by the Securities Law; (7) temporary prohibition, up to a maximum period of 20 years, from practising certain activities or transactions, to the entities that compose the distribution system or other entities that depend on authorization by, or registration with, the CVM; and (8) temporary prohibition, for a maximum period of 10 years, to operate, directly or indirectly, in one or more types of transaction in the securities market. The penalties envisaged in items (3) through (8) only apply when the offense is repeated or there has been a serious breach, as defined by the rules of the CVM. Note that CVM may suspend an administrative procedure if the defendant or accused signs a consent decree promising to: (1) refrain from the activities or acts regarded as illicit by the CVM; and (2) amend the irregularities, including offering compensation for losses.

Directors or officers who have intentionally omitted the material information from the offering document would be in breach of their obligation to disclose any and all material information regarding the Issuer (Article 2 of CVM Ruling No. 31/84, Article 157, § 4 of the Brazilian Corporation Law). Moreover, the

officers of the issuing company are responsible for the truthfulness of the information provided to CVM for purposes of the public offering, under (Article 14 of CVM Ruling No. 13/80). As a result, they could be subject to the following sanctions: (a) warning; (b) suspension from duties and temporary disqualification; (c) fines; and (d) to obey orders issued by CVM pursuant to Article 9 of the Securities Law. Under Brazilian law and applicable regulations, the obligation to disclose any and all material information regarding a corporation is expressly incumbent upon directors. Thus, except for the potential obligation to disclose/publish the omitted information, it is unlikely that the issuer would be subject to any sanction if the prospectus is inaccurate, considering that liability for the disclosure of any and all material information is expressly incumbent upon the issuer's Directors or Officers.

If a distributor was negligent in the preparation of the offering document, she would be in breach of her obligation to verify the sufficiency and quality of the information given to the market during the entire distribution period (Article 14 Ruling 13/80). The distributor would then be subject to the following sanctions: (a) warning; (b) fines; and (c) to obey orders issued by CVM pursuant to Article 9 of the Securities Law. In addition, if the public offering is deemed to have been carried-out in conditions different from the conditions established in the registration with CVM, the distributor's license may be suspended and she may be temporarily disqualified (Art 35 of Ruling 13/80).

If an accountant was negligent in the preparation of the financial information included in the offering document, she would be in breach of her obligation to verify facts that could substantially affect the business and financial statements of the company (Article 25 of CVM Ruling 308/99). As a result, she could be subject to the following sanctions (a) warning; (b) license suspension and temporary disqualification; (c) fines; and (d) to obey orders issued by CVM pursuant to Article 9 of the Securities Law.

Finally, a controlling shareholder can be subject to the penalties of Article 11 of the Securities Law for actions taken in abuse of her controlling power, which are deemed serious breaches of securities regulations.

3.2 Judicial sanctions for omissions of material information

In addition to the administrative sanctions described above, a director or officer who fraudulently omits material information from the offering documents could be subject to imprisonment and payment of fines, under Article 177 of the Brazilian Penal Code[49]. Also a distributor may be held criminally liable whenever material information is omitted from the offering document with the intent to induce or maintain the investors in error (Article 6 of Law 7492/86[50], applicable to financial institutions). In contrast, the accountant may not be held criminally liable even if aware that the prospectus is misleading, except if material information is fraudulently omitted from the issuer's financial statements.

[49] "Article 177. To promote the incorporation of a joint-stock company, making, in the prospectus and or in an announcement to the public or to the general meeting, false statement about the incorporation of the company, or hiding by means of fraud facts related to the company: Penalty – Confinement for one to four years, and a fine, in case the fact is not deemed as a crime against popular economy. § 1. The same penalty is applicable, in case the fact is not deemed as a crime against popular economy, to: I – the director, the manager or member of the audit committee, of a joint-stock company, who makes, in the prospectus, report, balance sheet, or in an announcement to the public or to the general meeting, a false statement about the economical conditions of the company, or hides by means of fraud, totally or partially, facts related to the company."

[50] "Article 6. - To induce into or maintain in error, a partner, investor or competent government entity, as regards a transaction or financial situation, by withholding information or providing false information: Penalty - Confinement for two to six years, and a fine."

Under the terms of Articles 9 and 11 of the Securities Law, the CVM may at its own initiative and authority (*ex officio*) impose the sanctions described thereat[51]. However, the Brazilian Federal Constitution sets forth that the law may not exclude any damages or threatened damages from the appreciation by the judiciary authorities. Accordingly, in case an investor presents a claim to the CVM that she has suffered damages resulting from the omission of material information from the offering documents, and the CVM decides that no sanctions shall be imposed, such investor will still have the right to take judicial action against the liable parties. Should such claim be found valid by the Court, then the judiciary will be able to, in addition to determining the payment of the losses and damages suffered by the investor, order the liable parties to stop from taking a specific action, and order the undertaking of specific actions. Hence, the authority given to the CVM does not necessarily exclude the ability of the judiciary to impose similar sanctions.

3.3 Sanctions that can be imposed by the stock exchange for omissions of material information

Stock exchanges in Brazil have not been granted by law the power to impose sanctions in case of misleading material information in the prospectus. However, under Resolution 922/64 of the National Monetary Council, stock exchanges may establish their own requirements for the admission of securities to trading, as well as the conditions for the suspension and cancellation of such admission. In addition, stock exchanges have authority to (a) decree its own recess; (b) suspend the activities of a broker or of the broker's managers in order to protect investors; (c) suspend trading of securities; and (d) cancel trades that have been carried out in breach of applicable rules and regulations.

Part 4. Investor's right of restitution for losses

In case of losses due to misleading material information in the prospectus, investors can obtain restitution from the liable parties through a judicial proceeding before a civil judge. A class action procedure is also available to investors for this purpose. In fact, under Article 1, item III of Law 7,913/89, without prejudice to the restitution action that is available to investors, the Public Prosecutor's Office, either *ex officio* or at the request of CVM, shall take legal measures the required to avoid damages or to obtain restitution for damages caused to investors, specially when there has been omission of material information on the part of whom was required to disclose it, of if the material information has been provided in an incomplete, false or misleading manner.

The general rule regarding civil liability for illicit acts is set forth by article 159 of the Brazilian Civil Code, which determines that whoever, by omission or commission, negligence or imprudence, violates rights or causes damages to others, must indemnify said damage. Accordingly, the following three basic requirements must be present to trigger civil liability for a defective prospectus: (i) the damage; (ii) the agent's (malicious or culpable) conduct; and (iii) the causal relationship between the damage and the agent's conduct. Note that Articles 186 and 927 of the New Brazilian Civil Code, which became effective on 11 January 2003, amended article 159 of the previous Civil Code, by setting forth that there shall also be obligation to indemnify, irrespectively of the agent's (malicious or culpable) conduct, in specific situations provided in the law, or if the activities regularly conducted by the agent of the damage imply, by virtue of their nature, risk of damages to third parties' rights. Accordingly, although strict liability remains the rule in the New Brazilian Civil Code, the broad interpretation that may be given to the concept of "activities implying risks to third parties' rights" will eventually contribute to widen the cases where damages may be claimed irrespectively of the agent's conduct.

[51] Those that are subject to sanctions may appeal from the decisions taken by CVM to the Appeals Council of the National Financial System.

The burden of proof for investors in a prospectus liability case depends on the identity of the liable party in the following manner.

(a) *In case losses are to be recovered from the issuer's directors or officers*, the investor must prove: (i) that she suffered damages; (ii) that the directors/officers negligently failed to perform their obligation to disclose all material information regarding the issuer (please note that same legal scholars support that investors do not have to prove the negligence of the directors or officers, whenever they have acted in breach of the law or of the By-laws); and (iii) that her damages were caused by the omission of material information from the offering documents.

(b) *In case losses are to be recovered from the distributor*, the investor must prove: (i) that she suffered damages; (ii) that the distributor failed to perform its obligation to act with diligence in the preparation of the offering documents, therefore acting with negligence; and (iii) that her damages suffered were caused by the omission of material information from the offering documents.

(c) *In case of losses are to be recovered from the accountant,* the investor must prove: (i) that she suffered damages; (ii) that the accountant failed to perform its obligation to act with diligence in the preparation of the financial information included in the offering documents, therefore acting with negligence; and (iii) that her damages were caused by the omission of material information from the financial information included in the offering documents.

The following defenses could be presented against a judicial claim brought by an investor in prospectus liability case

(a) *Directors and officers* may avoid liability by showing: (a) that the relevant director or officer did not have the specific attribution to perform the duty to disclose all the material information regarding the issuer and was not aware of the omitted information[52]; (b) that the damages suffered by the investor were not caused by the omitted information; (c) that the omission occurred in relation to information prepared by experts (e.g. financial information prepared by the accountant) and the director or officer had no reason to believe that such information was inaccurate or incomplete; or (c) that the omitted information resulted from facts beyond the reasonable control of the relevant director or officer.

(b) *The distributor* may avoid liability by showing: (a) that the distributor advised the issuer's directors/officers that the omitted information should have been included in the offering document; (b) that the damages suffered by the investor were not caused by the omitted information; (c) that the omission occurred in relation to information prepared by experts (e.g. financial information prepared by the accountant) and the distributor had no reason to believe that such information was inaccurate or incomplete; or (d) that the distributor acted with diligence, having taken all possible measures to verify that the information provided by the issuer was truthful.

(c) *The accountant* may avoid liability by showing: (a) that the omitted information was not related to financial information included in the offering documents; (b) that the damage was not caused by the omitted information in the financial documents; (c) that the omission occurred in relation to information prepared by other experts and the accountant had no reason to believe that such information was inaccurate or incomplete; or (d) that the accountant acted with diligence, having taken all possible measures to verify that the information provided by the issuer was truthful.

As a general rule, under Brazilian Corporate Law, the liability of the shareholders of joint-stock companies is limited to the payment of the shares they subscribe in the company. Thus, controlling shareholders cannot be held liable due to acts or omissions of the corporation. However, the controlling

[52] Under paragraph 1 of article 158 of the Brazilian Corporate Law, Directors and Officers shall not be liable for unlawful acts of her peers, except when acting in collusion with them, when neglecting to investigate such acts or when, despite knowledge of them, they fail to take action to prevent such acts.

shareholder of a joint-stock corporation may be held liable for damages caused by acts practiced in abuse of her controlling power. Under article 117 of the Brazilian Corporate Law, among others, the following acts are deemed as acts practiced with abuse of power: (a) to promote the issuance of securities the purpose of which is not the interest of the company but rather to cause damage to minority shareholders, employees or the company's investors; and (b) to induce or attempt to induce directors, officers or members of the Audit Committee, to practice illegal acts, or to ratify the performance of such acts in the general shareholders meeting, against the best interests of the company. Thus, the controlling shareholder may be held liable for damages if the investor proves that the defective prospectus was caused by an action taken by the controlling shareholder (e.g., she induced the company's officers to intentionally omit material information from the prospectus). In this case, the piercing of the corporate veil would not be required, as the controlling shareholder (rather than the corporation) is the liable party in a case of abuse of shareholder power and, therefore, the investor may direct the restitution action against the controlling shareholder (rather than the corporation).

Finally, as per article 158, of the Brazilian Corporate Law, anyone who concurs in the performance of any act contrary to the law or bylaws with the intention of obtaining advantages for herself or for a third party shall be jointly liable with the officer or director who performs the act.

Brazilian Law does not expressly provide for an action concerning the rescission of contract in case of false information or material omissions in a prospectus. However, investors could direct an action against the issuer and its directors in order to have the public offering declared as void by the Court. This action would be based on article 147 of the Civil Code, which determines that an act may be declared by the Court as void in case of defect resulting from error, a malicious act, coercion, a sham mechanism or fraud. In this case, the investors would have to prove the existence of false information or that the information has been intentionally omitted from the prospectus. In case the Court declares the offering as void, the investors would have the right to receive the reimbursement of the price paid.

In a civil case of restitution for losses, the judiciary could take approximately two years to issue a first instance judgment, assuming that the defendant does not have a valid defense. Even without a valid defense, the defendant could resort to appeals or other type of recourses to delay the process. However, the judge could sanction the defendant if she is litigating in bad faith. After all available appeals filed by the defendant are resolved, it could take between three and five years to reach a firm and final resolution from the moment of filing the initial petition.

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SECURITIES LAW OF CANADA

Part 1. The regulator and its supervisory and regulatory powers

Each of Canada's 13 Provinces has an independent Regulator established under provincial securities laws. Securities laws are fairly consistent across the provinces of Canada. This summary refers to the securities law in force in the province of Ontario.

Generally, both the regulation and the supervision of the securities market in each province are the responsibility of the securities commission in that province. However, several other entities, such as self-regulatory organizations (SRO) registered under the securities law in each province, share this responsibility. These entities include registered securities exchanges (Toronto Stock Exchange, Montreal Exchange, Vancouver Stock Exchange, Alberta Stock Exchange) and the Investment Dealers Association (required for registration as an investment dealer). Also, a wide variety of courses are offered which qualify individuals to trade in, or provide advice with respect to securities. The Canadian Securities Institute, the Investment Funds Institute of Canada and the Institute of Chartered Financial Analysts offer these courses. Depository institutions and clearing agencies also play a vital role in the overall securities market.

The main regulator of the securities markets in the province of Ontario is the Ontario Securities Commission (OSC). According to section 3(4) of the Ontario Securities Act[53] (hereinafter referred to as "OSA"), in the province of Ontario, the Lieutenant Governor in Council appoints members to the OSC, who may serve a term up to five years and may be re-appointed. Members of the OSC cannot be dismissed at the will of the appointing authority.

Banks and insurance companies in most provinces are exempted from some registration requirements. However, Ontario has introduced a system of universal registration that includes "financial intermediary dealers," thus requiring banks, trust companies, credit unions and other entities (who trade in securities for non-investment purposes) to register. The OSC, however, is not the main regulator of banks and insurance companies in the province. Banks are regulated by the Office of the Superintendent of Financial Institutions pursuant to the *Bank Act s.c. 1991, c. 46*.

The OSC is responsible for the administration of the OSA, and may issue rules (e.g., prescribing requirements in respect of applications for registration) and make by-laws (e.g., governing the administration, management and conduct of the affairs of the Commission). Within 60 days after the delivery of a rule or by-law passed by the Commission, the Ontario Minister of Finance may approve, reject or return it to the Commission for further consideration[54]. The Commission may make rules in respect of, substantive matters as well as of requirements for registration (s. 143. (1)).

The Commission may appoint one or more persons to make an investigation as it considers expedient, and the person appointed to that effect may examine any documents from any person or company, and has the power to summon and enforce the attendance of any person, and to compel him or her to testify on oath and to produce documents.[55]

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[53] R.S.O. 1990, c.S.5, as amended.
[54] OSA 3.2 (5)-(9) and 143.3 (3).
[55] OSA s. 11 and 13.

Part 2. The duty to disclose material information

It is prohibited to trade in a security if the trade is a distribution of such security, unless a preliminary prospectus and a prospectus have been filed (OSA s.53). A copy of the final prospectus must be delivered to all purchasers of the security before final sales can be made. The OSC can refuse to issue a receipt for a prospectus, thus preventing its distribution, if it appears to the director of the OSC that the prospectus fails to provide material information or that the business of the issuer will not be conducted with integrity and in the best interests of its security holders. Section 65 of the OSA establishes a "waiting period" of at least ten days between the issuance of a receipt for a preliminary prospectus and the issuance of a receipt for the prospectus, during which time the issuer may solicit expressions of interest by purchasers but may not make final sales.

The prospectus must include any material facts necessary for it to contain full, true and plain disclosure of all material facts relating to the securities being distributed.[56] Among other specific requirements, the prospectus must include the following:

(1) A statement of Executive Compensation in a prescribed format whereby compensation is disclosed for each executive on an individual basis. (OSC 41-501 Form 40) The compensation of directors is not disclosed.
(2) Name and number of shares owned by each of the issuer's principal shareholders (i.e., person or company who is the direct or indirect beneficial owner of, or exercises control or direction over, more than 10% of any class of voting securities). Note that any person controlling or directing more than 10% of the voting rights attached to all voting securities of the company is subject to reporting requirements for insiders and are required to report their ownership, and any changes in it, to the company.
(3) Number and percentage of shares beneficially owned, directly or indirectly, or over which control or direction is exercised by all directors and executive officers of the issuer as a group.
(4) Particulars of every material contract, other than contracts entered into in the ordinary course of business, within two years before the date of the prospectus, and a complete list of all material contracts. To this effect, material contracts are defined as those that can reasonably be regarded as such by a potential investor.
(5) Any material interest, direct or indirect of any director, executive officer, or principal shareholder (or any of their associates or affiliates), in any transaction or proposed transaction within three years before the date of the prospectus that has materially affected or will affect the issuer. The test to determine if the indirect interest is material includes, among other things, an examination of the significance of the information to potential investors and an examination of the relationship of the parties to the transaction.

The prospectus must include a certificate on the truthfulness and completeness of the prospectus, signed by the chief executive officer, the chief financial officer, and on behalf of the board, any two other directors. A similar certificate must be signed by the underwriter, to the best of its knowledge, information and belief.[57]

Although the distributor is not expressly required by law to perform a due diligence review of the information contained in the prospectus, it is likely to do so as a matter of commercial practice, because the distributor would not be liable for a misrepresentation in a prospectus if it conducted a due diligence review (see Part 4 of this summary).

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[56] Ontario Securities Commission Rule 41-501 – General Prospectus Requirements, December 15, 2000 -- 23 .S.C.B Supp 767.
[57] OSA s. 58 and 59.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The Securities Commission has broad powers to sanction various parties in the public interest (Section 127(1) OSA). For example, the Commission may: (1) order that the registration or recognition granted to a company or person be suspended or restricted, (2) order a person to refrain from trading in securities; (3) order a market participant to submit to a review of its practices and procedures and institute such changes as it may be ordered, (4) order to amend, provide, or restrain from providing a prospectus, report, or any other document, and (5) order a person to resign as a director or officer of an issuer or prohibit her to become or act as director or officer of any issuer.

3.2 Judicial sanctions

It is an offense to make a statement in any application, preliminary prospectus, prospectus, information circular, etc. that in a material respect and at the time and in light of the circumstances under which it is made, is misleading or untrue or does not state a fact required by the securities law to be stated to make the statement not misleading (Section 122 OSA). This offense is punishable by a maximum fine of $1,000,000 or an imprisonment for a term not exceeding two years. Every director or officer of a company who authorizes, permits or acquiesces in the commission of such offense by the company would be subject on conviction to similar penalties. No person or company would be held guilty of this offense if the person or company did not know and in the exercise of reasonable diligence could not have known that the statement was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which is was made.

Courts have very broad remedial powers, including the authority to issue orders to a person or company (1) to comply with the Ontario securities law or to rectify any past non-compliance, (2) to submit for review by the Commission practices and procedures and institute such changes as may be directed by the Commission, (3) to amend, provide, or restrain from providing a prospectus, report, or any other document, (4) rescinding or directing securities transactions, (5) prohibiting the voting or the exercise of other rights attached to shares, (6) appointing or replacing officers and directors, and (7) requiring compensation or restitution to an aggrieved person, or to pay general or punitive damages or to disgorge profits (Section 128(3) OSA).

3.3 Stock Exchange sanctions

Any person under the jurisdiction of the Toronto Stock Exchange[58] who has contravened a requirement of the exchange is subject to fines, reprimand, suspension, revocation, termination of status, or "any other penalty or remedy determined appropriate under the circumstances" (Rule 7-106).

Part 4. Investor's right of restitution for losses

Investors may recover losses caused by false or misleading information in a prospectus through a judicial proceeding before a civil judge. A class action may also be initiated for this purpose. (OSA s. 135) As explained above, restitution may also be ordered by the court as a sanction in addition to the imposition of a penalty of fine or imprisonment.

[58] Includes issuing companies and distributors. Directors and officers are not within the jurisdiction of the Toronto Stock Exchange as registered market participants, but may fall within jurisdiction if deemed to be Issuers or Distributors.

Parties are legally entitled to restitution under s. 130 OSA, which provides for civil liability in the case of misrepresentation in a prospectus. This section applies to the issuer, every director of the issuer at the time the prospectus or amendment to the prospectus was filed, every person who signed the prospectus (thus including main officers as explained above), every underwriter who is required to sign the certificate, and every person or company whose consent has been filed with respect to reports made by them, as in the case of an accounting firm that audited the issuer's financial statements, or a lawyer, as long as her opinion is required with respect to the specific aspects of a prospectus.

A controlling shareholder would not be held liable for misrepresentations or omissions in the prospectus if she has not been involved in the preparation of the prospectus. The controlling shareholder could, however, be liable under 130(1)(a) if such person is a "selling security holder" on whose behalf the distribution is made, or if she signs the prospectus or has given consent with respect to a statement made by her. The controlling shareholder cannot be held responsible for the liabilities of the corporation or for the acts or omissions of its directors and officers.

In order to obtain restitution, an aggrieved investor must prove that the prospectus contains a misrepresentation. Under s. 130 OSA it is presumed that the purchaser relied on the misrepresentation if it was a misrepresentation at the time of purchase, and the plaintiff is not required to establish causality. However, the defendant is not liable for all or any portion of damages under OSA s. 130 that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon.

The defendant may escape liability by establishing any of the defenses outlined in sections 130(2) to (5) OSA. No person or company is liable if she can prove that the investor purchased the securities with knowledge of the misrepresentation. Similarly, except for the issuer or selling security holder, no person or company would be liable unless she failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation or believed there had been a misrepresentation.

A civil case of prospectus liability may take between 18 and 24 months to be resolved in first instance. Including all possible appeals, it would take approximately six years for the case to reach final resolution. However, if the judge finds a request for appeal without merit, he could deny the appeal.

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SECURITIES LAW OF CHILE

Part 1. The regulator and its supervisory and regulatory powers

The Superintendency of Securities and Insurance ("SVS"), an autonomous institution with a special budget assigned on the Nation's budget and connected to the Chilean government through the Finance Ministry, is the main regulator of the Chilean securities market. The SVS is the main regulator of (i) issuers and brokers of publicly traded securities, (ii) stock exchanges, (iii) securities dealers associations, (iv) pooled funds and their managing companies (except pension funds and their manager), (v) public companies, and (vi) insurance and reinsurance companies. The Superintendency of Banks and Financial Entities is the main regulator of banks and financial companies[59].

The head of the SVS is the Superintendent of Securities and Insurance, who is appointed by the President of Chile as a person of his exclusive confidence and can be discharged at the will of the President of Chile at any time. The other members of the SVS are appointed by the Superintendent of Securities and Insurance.

The regulation and supervision of the securities market are mainly assigned to the SVS, yet certain areas of the Chilean securities market are regulated by both the SVS and the Superintendency of Banks and Financial Entities. The SVS may issue regulations in order to interpret the laws and regulations applicable to those individuals or entities under its supervision; to establish standards for the preparation and presentation of annual reports, financial statements and the accounting principles that shall apply to the same; to set up policies in order to secure the accuracy of the information contained in minute books and other documents determined by the SVS; among others. The regulations issued by the SVS are not subject to any kind of approval. Nonetheless, they may be revised on a case-by-case basis by the judiciary (Santiago Court of Appeals) if any person considers that the regulation is illegal and cause her detriments.

The SVS can command the delivery of documents only from persons or entities under its regulation and supervision (Article 4 of the Decree Law 3,538[60]). It can also order the testimony of representatives, managers, advisors and dependents of entities under its supervision, and of any other person who would have executed any kind of acts or operations with such entities.

Part 2. The duty to disclose material information

According to the Chilean Securities Market Law (18,045), a public offering of securities can only be made when those securities and the issuer have been registered with the Securities Registry maintained by the SVS. In order to make a public offering, the issuer must have previously distributed among interested investors, a prospectus approved by the SVS, and must have published a notice informing of the issuance of the shares or securitized bonds (this notice is not necessary in case of issuance of regular bonds).

The General Rule 30 ("Norma de Caracter General No. 30") issued by the SVS, describes the disclosure obligations regarding a public offer of securities. Characteristics of the issuance must be included in the prospectus, such as, in case of issuance of shares, the number of shares to be issued, number of series in

[59] Financial companies are similar to thrift companies. As of December 2001, only one financial company has been established in Chile.

[60] "Ley Organica de la Superintendencia de Valores y Seguros", the Superintendency of Securities and Insurance Organic Law

which the shares are divided, nominal value of the shares, placement term, and use of the funds to be obtained by issuer from the sale of the shares. Financial statements of the issuer must be available to investors together with the annual report, the prospectus, copy of the issuer's certificate of registration in the Securities Registry, and other information.

General Rule 30 requires that the prospectus include an indication of the number of shareholders (i) holding 10% or more of the Issuer's capital, (ii) holding less than 10% of the issuer's capital but an investment of more than 200 U.F. (approximately US$5,000), and (iii) holding less than 10% of the issuer's capital but an investment of less than 200 U.F. Notwithstanding the requirement above, the annual report of the issuer must contain a list of the 12 major stockholders of the company and the number of shares held by each one of them, and their percentage of participation in the issuer. Finally, anyone who directly or indirectly possesses 10% or more of the capital of a listed company, or who through the acquisition of shares comes to possess such percentage, must inform the SVS and all Stock Exchanges in which the company's stock is listed.

There is no requirement for the prospectus to include the salaries and remuneration of the issuer's directors and officers. However, Article 33 of the Corporations Law provides that the salaries earned by the directors of the company during the last annual period must be included in the annual report.

Except as reflected in the issuer's financial statements, there is no express requirement to include in the prospectus a description of any material contracts not made in the ordinary course of business or outstanding material contracts made in the ordinary course of business. However, information on material contracts out of the ordinary course of business shall be included in the annual report of the issuer, as part of the relevant information disclosed to the SVS by the issuer according to Article 10 of the Securities Market Law.

Information on transactions in which directors, officers and the controlling shareholder have a material interest should be divulged to the SVS and included in the annual report if considered relevant by the issuer.

General Rule 30 provides that the prospectus has to be signed by the same number of directors required by the issuer's by-laws to adopt the Board's resolutions, and by the General Manager. The directors and the General Manager signing the prospectus must declare under oath that the information provided for the registration of the securities to be placed in the Securities Registry is accurate, and that the issuer is not in default of payment.

The distributor is not required to sign the prospectus nor is she required to perform a due diligence review of the information contained in the prospectus. However, the distributor is likely to perform a due diligence review of the contents of the prospectus as a matter of commercial practice. If the distributor participated in the preparation of the prospectus, the prospectus must indicate the name of the distributor (or distributors) involved in the preparation of the prospectus and include a legend of responsibility mentioning that the information contained in the prospectus is of exclusive responsibility of the issuer and the distributor. In this case, the distributor assumes civil liabilty for the information contained therein, and must exert such care and diligence as individuals ordinarily employ in their own business. If some relevant information is not included in the prospectus and it can affect the terms or conditions of the issuance, the distributor can be held liable for the omission, unless she demonstrates that she exercised the due diligence required by law.

The distributor can provide investors with additional information not included in the prospectus, but she cannot divulge any false, inaccurate or misleading information. This additional information can include forecasts prepared by the distributor, but if they are incorrect and the distributor did not clearly state that

it did not imply the certainty of the forecast, she can be liable for the damages caused to investors, based on the general civil liability rule of Article 2329 of the Civil Code.

The accounting firm assumes responsibility for the information contained in the audited financial statements of the issuer. Accountants that falsely report on the financial status of issuers are subject to criminal liability.

The regulator can oppose an offering document if it considers that the information provided therein is incomplete. If the issuer disagrees with that interpretation, it can appeal to the Superintendent of the SVS, and in case the decision is not favorable to the issuer, it can file a case before the Santiago Court of Appeals. According to the law, the SVS cannot qualify the quality of the securities offered by the issuer, but it can require the issuer to include additional details in order to provide investors with information that the SVS considers relevant to ascertain the securities' risks when making an investment decision.

The public offering of securities and it subsequent sale can only be done once the SVS has issued the certificate of registration in the Securities Registry of the securities to be issued (and of the issuer if it has not been registered prior to the issuance). Once the certificate has been granted, the law does not require any special waiting period between the public offering and the sale of the securities.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions for omissions of material information

Administrative, criminal and civil sanctions can be concurrently imposed for violations to the securities laws. According to article 55 of the Securities Market Law, the directors and officers of a legal entity are responsible for the administrative, criminal and civil liabilities of the correspondent entity, unless it is recorded that they have not participated in the disputed act or that they have opposed to the same. Directors and officers shall demonstrate that they exercised the due diligence required in the performance of their duties in order to be exempt from any kind of liability.

Administrative sanctions can be imposed by the SVS pursuant to its attributions contained in Decree Law 3,538. Article 27 provides that corporations under SVS supervision that violate the law and its regulations may be subject to reprehension, fines, or even the revocation of its authorization of existence, which would produce their liquidation. Reprehension and fines can also be applied to directors and officers of these corporations. Furthermore, Article 4 of Decree Law 3,538 allows the SVS, among other things, to order rectifications in financial statements, appoint external auditors for entities under its supervision, and require those entities to publish information (or make the publications itself at the cost of the supervised entities). Finally, according to Article 15 of the Securities Market Law, the SVS can cancel the registration of a security if it can establish that the registration was obtained by providing false information.

Even if the distributor was not involved in the elaboration of the prospectus, she can be liable to indemnify damages as long as it is demonstrated that she was negligent in the performance of her duties such as promoting and selling the securities offered. The performance of the distributor's duties does not necessarily refer to the performance of a due diligence review of the prospectus, rather it requires exerting such degree of care and diligence as individuals would ordinarily apply to their own businesses. As in the case of the issuer, the SVS can cancel the authorization of existence of those entities that require such authorization, and it can also cancel the license of intermediaries of securities.

The SVS can also cancel the registration of an accounting firm, disqualifying the accounting firm to be appointed as external auditor of an open corporation. Finally, the SVS can issue regulations applicable to the external auditors appointed by the entities under its supervision and request any information related to the compliance of their functions.

Notwithstanding the above, pursuant to Article 46 of the Decree Law 3,538, Article 5 of the Organic Code of Courts, and article 20 of the Constitution of the Republic of Chile, the Judiciary can review and revoke administrative sanctions imposed by SVS by means of an appeal remedy filed before the Santiago Court of Appeals.

3.2 Judicial sanctions for omissions of material information

Imprisonment or employment restrictions can only be imposed by the Judiciary for the specific reasons contained in the Criminal Code and in the Securities Market Law. These sanctions are not applicable to legal entities but to their representatives.

Criminal sanctions usually require intention to deceive. That is the case of the cases of fraud ("estafa") contained in the Criminal Code (Chapter II, Title IX, paragraph 8) and of article 59 of the Securities Market Law. The representatives of the issuer, the distributor, and the accountant can be convicted on fraud charges if they prepared or used, with the intention to deceive, a prospectus in a public offer of shares containing false information or omitting material information. Article 59 of the Securities Market Law applies to accountants that report falsely and to issuer's directors and officers that make maliciously false declarations in a prospectus for a public offer. Maliciously false declarations include both intentional omissions of material information and intentional inclusions of false information. In addition to imprisonment, this provision also includes as an accessory sanction the prohibition to become a director or officer of a public corporation. Articles 28 and 29 of the Criminal Code include also a prohibition to perform public office or professional activities for convicted persons.

Finally, the Judiciary may impose certain sanctions such as fines, orders to undertake specific actions, or to refrain from certain actions. There is not a definitive scope of orders that may be issued by the Judiciary, although it is very likely that it would be ordered to stop any road show related to the securities, and to inform the investors about the misleading information.

3.3 Sanctions that can be imposed by the stock exchange for omissions of material information

The Stock Exchange can cancel the registration of the issuer from the Exchange Registry under certain circumstances, such as the cancellation of the issuer's registration in the Securities Registry kept by the SVS. The Stock Exchange cannot impose any sanction other than delisting, suspending, or canceling said registration, following the corresponding sanction imposed by SVS.

Part 4. Investor's right of restitution for losses

An investor may obtain restitution for losses, incurred by reason of defective information in a prospectus, through a judicial proceeding before a civil judge. A class action is not expressly recognized in the Chilean Commercial Law and would not be available for this purpose.

Restitution of damages may also be sought through a criminal proceeding. If the statement or omission in the prospectus constitutes a felony under the Criminal Code, the affected investor can appear before a criminal judge in order to obtain the conviction of the transgressor. Once the defendant has been convicted, the investor can request the criminal judge to award damages, or appear before a civil judge to obtain compensation through a subsequent civil action.

Civil restitution is based on Article 55 of the Securities Market Law and on the application of civil laws. If the prospectus negligently or deceitfully includes false statements or omits material, relevant or essential information, investors who have suffered losses due to the false statements or omitted information are legally entitled to obtain restitution from the issuer, its directors and responsible officers, the distributor (when involved in the preparation of the prospectus), and the accounting firm that audited the issuer's financial statements.

The distributor is not required to verify the accuracy of the information contained in the prospectus. If the distributor was not involved in the preparation of the prospectus and was not aware that it was defective, she is not liable for the information contained therein as long as she was diligent in the performance of her duties. Obviously, the distributor is liable if the information contained in the prospectus is false or misleading and she knew about it. There is no jurisprudence in relation to the responsibility of a distributor in relation to a prospectus.

The obligation to repair damages under Article 55 of the Securities Market Law should be read in conjunction with Articles 2314 and 2329 of the Civil Code. The latter stipulate that anyone who has committed a negligent or fraudulent act that has caused damage to another is obligated to indemnify the injured party. Therefore, Article 55 should be interpreted as requiring willful misconduct or negligence in order to create the duty to indemnify the investor for damages she might have suffered.

In sum, if the offering document included a false statement or omitted material information, investors must prove that the liable party knew, or should have known, that the statement was false or that information was missing. In addition, the investor needs to prove that there is a causal connection between the action or omission and the damages. Moreover, the investor can only argue that her damages were caused by the defective prospectus if the false or omitted information therein was material. Hence, the investor must also establish the relevance of the false or omitted information.

If the distributor was not involved in the preparation of the prospectus but knew of the omission or false statement therein, she could be held liable for deceitful distribution of the prospectus and not exerting the due diligence and care required. The requirements to hold liable the distributor are the same as those previously mentioned (that the liable party knew, or should have known, that the statement was false or that information was missing, etc.)

The issuing company itself can be held civilly liable for the information contained in the prospectus, if the board or general manager of the company approved the prospectus and it is demonstrated that the required diligence and care in the performance of duties was not exercised. Rescission of the contract, and reimbursement of the price paid, would also be available to investors in case of false information or material omissions in a prospectus, against the issuer if the board or general manager was negligent or acted with intent to deceive in the preparation of the document. The requirements to obtain restitution are exactly the same to those mentioned above, and there is no change in the burden of proof.

There are no specific defenses under securities laws for a case of prospectus liability. Under general rules, the defendant may be released from any liability if she can establish that she exercised the required diligence and care in the performance of her duties.

The controlling shareholder of the issuer is not liable for the contents of the prospectus. Furthermore, there is no statutory or case law allowing investors to pierce the corporate veil. As a result, the controlling shareholder of the issuer cannot be held civilly liable due to the issuer's liabilities of a corporation or the acts or omissions of its management.

A civil case for restitution of damages due to misleading information in a prospectus will take approximately between two and three years to be resolved by a first instance judge. Appeal is generally available as a matter of law for civil cases, and would apply as well to a claim for restitution for damages due to a defective prospectus in a public offer of securities. Including appeal to the Santiago Court of Appeals and to the Supreme Court, it may take five or six years to obtain a final decision from the time the initial claim is filed. The appeal before the Santiago Court of Appeal would be available even for a defendant that does not have a valid defense. The action before the Supreme Court would be available only if there are grounds for its exercise.

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SECURITIES LAW OF COLOMBIA

Part 1. The regulator and its supervisory and regulatory powers

The regulator for the securities market in Colombia is the Securities Markets Superintendency *("Superintendency")*.[61] The regulator for banks, insurance companies, pension funds and other entities that receive deposits and savings from the general public is the Banking Superintendency.

The Superintendency is governed by the General Board *("Sala General")* and the Superintendent *("Superintendente de Valores"*). The members of the General Board include the Minister of Finance, the Minister of Economic Development, the Banking Superintendent, the Companies Superintendent, the President's Designee, and the Securities Market Superintendent (who is not allowed to vote). In practice, the President appoints all those officials to their respective offices and may revoke their appointments at any time. Once in office, they become members by law of the General Board.

Both the regulation and supervision of the securities market are assigned to the Superintendency. Within the Superintendency, the General Board has ample regulatory and supervisory powers. In particular, the General Board has broad powers regarding the adoption or amendment of disclosure and listing requirements. However such power is limited by a congressional policy framework (*"Ley Marco"*). The Superintendent may issue General Instructions (*"Circulares Externas"*) implementing General Board's resolutions. Regulations issued by the General Board are not subject to the approval of other governmental authority. In accordance with applicable regulations, the President and the Minister of Finance have supervisory power ("*Control de Tutela"*) over all the members of the General Board and the Superintendent. However, the President and the Minister of Finance do not have the power to issue regulatory decrees regarding the securities market.

Finally, the Superintendency also has the power to supervise the securities market and execute other regulatory functions. It can generally command the delivery of documents and witnesses from issuers and their directors and officers when investigating a violation of the securities laws (Art. 6 of Decree 1608/2000, Art. 103 of Decree 2150/1995). It also has the power to subpoena witnesses from all persons. (Art. 3 Decree 2739 of 1991 and Art. 6 Decree 1608 of 2000). The power to subpoena documents from all persons, although not expressly provided in the law, may be available by appealing to the Superintendency's broad mandate to supervise and monitor the securities market (Art. 3 of Decree 2739/91).

Part 2. The duty to disclose material information

It is unlawful to sell shares to the general public without first delivering an offering document to the Superintendency and obtaining its approval. In addition, issuers must make the prospectus available to potential investors at the offices of the Superintendency, the issuer, the distributor, and the Stock Exchange. Shares may be sold without first actually delivering the prospectus to investors, except for certain particular cases such as offers for democratization-of-property (*"Oferta Pública para*

[61] Under the Constitution, the Executive power has the power to regulate securities markets (Arts. 189.24 and 189.25) following a policy framework issued by Congress (Art. 150.19(d)). The Executive's authority to regulate securities markets has been granted to the Superintendency by statute (Art. 33 of Law 35 of 1993). In 1995, the Constitutional Court ruled unconstitutional Decree 653 of 1993 which compiled all the securities regulations in force at that time. As a result, the securities market rules are to be found in many different laws and regulations.

Democratización Accionaria").[62] The law does not provide for a special waiting period between the public offering and the sale of the securities.

The Superintendency has the power to oppose an offering document if it considers that the prospectus fails to provide material information. However, the Superintendency may not refuse approval solely on its own determination that the investment is of inadequate quality.

Resolution 400/1995, issued by the Securities Market Superintendency, describes the contents of the offering document. The prospectus must include all information necessary to understand the issuer's business, financial statements, and the value of the securities offered. Among other relevant information, the prospectus must include a description of the shareholding of the company and information on the shareholders, including the disclosure of the identity and ownership of large shareholders. Any person holding more than 10% of the shares of the issuer is defined as a large shareholder. The disclosure in the prospectus of large shareholders must include information on shares beneficially owned by them. In principle, large shareholders are not obliged to disclose their ownership to the Superintendency but the Superintendent is empowered to request such information from them and to make it public. The prospectus must also describe the terms and conditions of all transactions, in the previous calendar year, between the issuer (or the issuer's affiliates) and the issuer's shareholders, directors and officers, as well as the number of shares held by them in the company. Notwithstanding the faculty of the Superintendent to request an issuer to disclose in the prospectus any information that she may judge necessary to be included therein, note that the prospectus need not disclose transactions in which directors, officers, or shareholders have an indirect interest (defined as transactions with legal entities controlled by the issuer's directors, officers or controlling shareholder, or with their relatives, employees, or other persons under their control.) Furthermore, there is no requirement to disclose the compensation of directors and officers. Finally, the prospectus need not to disclose the terms of material contracts entered by the issuer.

The Board of Directors generally approves the issuer's internal guidelines on the issuance and placement of securities (*"Reglamento de Emisión y Colocación de Valores"*), except when the by-laws establish that this approval must be granted by the general shareholder's meeting (Art. 1.2.2.1 of Resolution 400/1995). However, the directors are not expressly required to approve the offering document itself. Furthermore, the law does not require the Board to approve the content of the prospectus, therefore directors are not responsible for the contents of the prospectus. In contrast, the issuer's officers (*"Representantes Legales"*) must sign the prospectus in relation to the matters under their competence.

The legal representative, the statutory auditor[63], and, if applicable, the underwriter must sign a certificate acknowledging that they applied a due diligence review of the contents of the prospectus and certifying that the prospectus is accurate and complete (Art. 1.2.2.2. (10) of Resolution 400/1995). Therefore, the accounting firm that audits the issuer's financial statements must certify the prospectus, and is required by law to investigate up to professional standards the financial information contained in the offering document. However, note that the distributor is only required to sign such certificate when she gives advice on the issuance of securities.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

[62] Article 1.2.5.26 of Resolution 400/1995 as amended by Article 1, Resolution 704/1999 of the Securities Market Superintendency.
[63] In Colombia, issuers are obliged to appoint Statutory Auditors, or "Revisor Fiscal".

Administrative sanctions may be imposed by the Superintendency against anyone who violates any security regulations. The Superintendency does not need to demonstrate fraud or negligence on the part of the investigated party.

In all cases, investigations shall be commenced at the determination of the Superintendency or at the request of a third party (*"Denuncia"*). If the prospectus contains false or misleading information, the Superintendency is likely to initiate an investigation, serve notice of such proceeding to the investigated party and, if appropriate, impose a sanction on the issuer, its directors and officers, or the distributor. Sanctions could include suspending or canceling the registration of securities, imposing employment restrictions for officers and directors, or fines (Art. 3 of Decree 2739/ 1991 and Art. 6 of Law 27/1990). The Superintendency may also order supervised entities such as the issuer to stop illegal, unauthorized, or unsafe practices, and to perform the relevant corrective actions (Art. 3(33) of Decree 2739/ 1991 and Art. 33 of Law 35 of 1993). In case of false or misleading information in the prospectus, no sanctions apply to a distributor who is not involved in the preparation and certification of the offering document (even if she sells shares as an underwriter).

Finally, the Superintendency may impose fines on the auditors of the financial statements included in the prospectus if the prospectus contains false or misleading information (Art. 6 of Law 27/1990). In general, all administrative sanctions are directed to the accountant involved and not to the accounting firm. The authority with the power to supervise accountants is the Central Board of Accountants, which may sanction accountants with fines, suspension or debarring.

3.2 Judicial sanctions

Criminal sanctions may be imposed when a liable party has willfully included false statements or omitted material information with the intent to deceive investors in order to obtain a benefit for herself or to grant a benefit to a third party (Art. 356 of the Criminal Code of 1980). Therefore, criminal liability would arise against the parties involved in the preparation of the prospectus, such as the issuer's officers and the accountants. The underwriter who has signed the certification required under Article 1.2.2.2. (10) of Resolution 400/1995 can be held criminally liable for fraud if such certification was provided deceitfully in order to obtain a benefit for herself or to grant a benefit to a third party.

In addition, the issuer's officers may be sanctioned with imprisonment if they knowingly provide false corporate information to the authorities or issue false certifications (Article 43 of Law 222/1995). Directors, although not directly involved in the preparation of the prospectus, may be criminally liable if they are aware that the financial statements included in the prospectus omit material information as that would amount to tolerating fraud.

3.3 Stock Exchange sanctions

Stock Exchanges may only sanction their members and the issuers of listed securities. For example, the Bogota Stock Exchange may suspend or cancel a security from listing. In addition, if the distributor is one of its members, the Bogota Stock Exchange may sanction her with fines, suspending its trading, and requiring the removal of one of her directors or auditors. These sanctions apply to the investigated party without need to demonstrate her fraud or negligence.

Part 4. Investor's right of restitution for losses

Three venues are available to investors who have suffered losses due to false statements or omissions of material information in a prospectus. First, investors may start a judicial proceeding before a civil judge. They may pursue a civil claim individually or through a class action suit of at least 20 investors acting as

a plaintiff (*"Acción de Grupo"*). Second, investors may also pursue civil restitution before a criminal judge through a proceeding in accordance with the Criminal Procedure Code. Third, under Article 133 of Law 446 of 1998, investors may request that the Superintendency renders a share purchase without legal effect. To obtain damages from the responsible party, in this last alternative the investor must commence a second action before the judiciary. The judge in the second suit cannot reopen the issues related to the causes that rendered a share purchase ineffective (*"Cosa Juzgada"*).

The right to obtain restitution is regulated by general civil law rules (either under contract or tort law), in conjunction with specific securities law rules.

A cause of action under contract law can be established against the issuer who is a party to a share purchase contract or the underwriter who is party to the share purchase contract. In order to obtain restitution for losses, an investor will need to prove in a court of law the following:

a) the existence of a share purchase contract, as per article 1757 of the Colombian Civil Code, through proof of the acquisition of the shares;
b) either: (i) *the breach of a contractual undertaking*. In case of misrepresentations in a prospectus, the investor shall demonstrate that the offering document omitted material information, contrary to the certification of Article 1.2.2.2. (10) of Resolution 400/1995 as to the truthfulness and completeness of all material information in the prospectus; or (ii) *mistake*. The investor may demonstrate that due to the investor's mistake regarding the quality of the shares at the time of acquisition, under general contractual rules the share purchase agreement is null.;
c) the existence and extent of the damages (as provided in articles 1610, 1613, and 1616 of the Colombian Civil Code) if the investor seeks indemnification of damages rather than pure restitution; and
d) that the breach of undetaking was the proximate cause for the damages (according to article 2341 of the Colombian Civil Code).

On the other hand, a tort case can be brought against the accountant or the distributor (or any other party) who was not a party to the sale of the shares but was involved in the preparation of the offering document. In order to obtain restitution for losses in a tort case, the investor will need to prove in a court of law:

a) the breach of a legal duty; that the responsible party omitted material information from the prospectus, thus (i) breaching article 1.2.2.2(10) of Resolution 400/1995 regarding the certification of the truthfulness and completeness of all material information in the prospectus; or (ii) that any of the involved parties <u>negligently</u> breached, the duty not to harm anyone with her acts or omissions
b) the existence and extent of the damages,
c) that the breach of the legal duty was the proximate cause for the damages.

Defendants have no specific defenses under securities law in a case for losses due to false statements or omissions of material information in a prospectus. Under general laws, the defendant has available the following three defenses, as long as they are applicable: (1) *force majeure*, (2) an act of a third party and (3) the expiration of statute of limitations.

The controlling shareholder of a corporation cannot be civilly liable due to acts or omissions of the corporation. Furthermore, investors may not "pierce the corporate veil" in a case of omitted information from the prospectus. However, the controlling shareholder may be civilly liable when parent-subsidiary operations are not conducted on arms-length terms, or when such operations do not correspond to reality (as provided in article 31 of Law 222/1995).

A judicial proceeding before a civil judge for restitution for losses due to a defective prospectus could take roughly five years to be resolved in first instance (3 years) and appeal (2 years). If applicable, the recourse of cassation would require three additional years. However, the recourse of cassation is always

extraordinary, and will not be available as a matter of law, unless the amount in dispute is over the equivalent of 425 Colombian Minimum Monthly Wages (*"Salarios Mínimos Legales Mensuales"*) and it is arguable by one of the parties that lesser courts and judges made a mistake in the interpretation of evidence or the applicable law.

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SECURITIES LAW DENMARK

Part 1. The regulator and its supervisory and regulatory powers

The main regulators of the Danish securities market are the Danish Securities Council and the Danish Financial Supervisory Authority (the "DFSA") and to a more limited extent the Copenhagen Stock Exchange (the "CSE"). The DFSA is also the regulator of banks and insurance companies. If banks or insurance companies are applying for listing on the CSE, the regulations issued by the Danish Securities Council also apply and the banks and insurance companies are also subject to supervision by the Danish Securities Council.

The Minister of Economic Affairs appoints the 11 members of the Danish Securities Council. The appointees to the Danish Securities Council are not subject to approval or confirmation by others, however the Minister appoints 9 of its 11 members after recommendation from certain major organizations and bank authorities. The DFSA has no members but only employees. The DFSA is an agency under the Danish Ministry of Economic Affairs. The CSE, which is a private limited company, also only has employees. Any employees of the DFSA (and the CSE) may be discharged at any time subject to employment laws and individual employment contracts. As for the members of the Danish Securities Council, the members are appointed for 4 years, but may – in principle – be discharged during that term.

As mentioned above, the regulatory and supervisory powers are assigned to, and to a certain extent divided, between the Danish Securities Council and the DFSA. The regulations issued by the Danish regulators are prior to being issued submitted for consultation with certain securities market authorities but, in general, they are not subject to the approval by other governmental authorities. In addition to the regulatory powers assigned to the Securities Council and the DFSA, the CSE issues rules and guidelines governing the issuers of securities listed on the CSE.

Both the Danish Securities Council and the DFSA may command the delivery of documents from persons or entities under its regulation and supervision, including issuers of securities, when investigating a violation of securities laws (Section 87 and 87a the Securities Trading, etc. Consolidated Act of March 2001, hereinafter referred to as the “STA”). Similarly, they may, if necessary, command the testimony of witnesses employed by an entity under its regulation and supervision.

Part 2. The duty to disclose material information

It is generally prohibited to sell shares to the general public without having published a prospectus that complies with the applicable regulations on content requirements, and that has been approved by the CSE in case listing has been applied for (Sections 23 and 24 of the STA).

As the prospectus has to be approved by the CSE before being published, the CSE may deny giving its approval if the prospectus fails to meet the requirements of the CSE. If material information emerges after the publishing of the prospectus, the CSE may require that a supplement to the prospectus be published addressing such new material information. When the issuer applies for listing of its shares, the CSE may oppose such application if the listing is deemed by the CSE not to be in the interest of the investors or the general interest of the securities market.

Under the Guidelines on Securities Listing on the Copenhagen Stock Exchange A/S, (the "CSE Guidelines"), the prospectus shall be published no later than 5 days before the first trading (or subscription or listing day, depending on the type of the issue). Publishing of the prospectus is achieved by sending it to the CSE and the members of the CSE. A notice of where it can be obtained must also be published in the Danish official Gazette. Although delivery of the prospectus to potential investors is not expressly required by law, the form used for subscription of the offered shares is a part of the prospectus pursuant to CSE Guidelines. Thus, in order for the investors to subscribe for the shares, the prospectus has to be available.

A prospectus shall include the information which the stock exchange deems necessary to allow investors and their investment advisers to make an informed estimate of the assets and liabilities, financial position, results and prospects of the issuer, and of the rights attached to the securities offered. In general, a prospectus must be drawn up in conformity with generally accepted standards, and shall be presented in such a manner that it will be possible to understand the contents and to assess the importance of the information given. The specific information that must be disclosed in the prospectus is described in Schedule A to Executive Order No. 330 and in the CSE Guidelines, including the following:

1. An aggregate of the remuneration paid and benefits in kind granted for each of the administrative, management and supervisory bodies.
2. The total number of shares held by members of the administrative, management and supervisory bodies and options granted to them on the issuer's shares (Schedule a, 6.2.1).[64] Nonetheless, in practice, it is quite common to see also the disclosure of the number of shares held by each individual member of the board and management.
3. Under Schedule A, an indication of shareholders directly or indirectly holding above 20% of the issuer's capital is required, together with an indication of the persons who directly or indirectly, jointly or severally, control the issuer. In addition, the CSE Guidelines require disclosing the name and ownership of shareholders who directly or indirectly hold 5% or more of the total capital or votes. Note that anyone who holds shares in a listed company shall immediately notify the CSE and the company in question when such holdings represent 5% or more of the votes or of the capital.
4. There is not an express requirement to disclose the terms of every contract entered outside of the ordinary course of business. However, information on the issuer's dependency on patents or licenses and industrial, commercial or financial contracts, and on principal investments, must be included, as well as a description of important royalty or administrative agreements.
5. Information about the interests of members of the administrative, management and supervisory bodies in transactions with the issuer which are unusual in their nature or terms. Although there is no specific provision requiring disclosure of transactions with a controlling shareholder, such disclosure is considered to be required pursuant to the general clause in the STA on disclosure of material information, and in practice a description of such transactions is included in the prospectus. Material transactions conducted by or in the interests of "related parties"[65] are to be disclosed if they are out of the ordinary course of business.

Reporting requirements regarding insider ownership have since been tightened. The current rules require reporting the number of shares by share class in the company held by each member of the board of directors and the board of management directly and indirectly. Moreover, the prospectus shall state the shareholdings of each member of the board of directors and the board of management, broken down by share class after the offering and over-allotment, (Rules Governing Securities Listing on the CSE 35(1), CSE Guidelines 2.3.4).

Persons or companies are defined as "related" if one party has a controlling influence on the other party, or if the same party has a controlling influence on both parties. Moreover, persons or companies are connected if one party has a significant influence on the other party's operational or financial management.

The issuer's directors and officers are the main responsible persons for the contents of the prospectus. The prospectus shall contain a responsibility statement signed by the issuer's Board of Directors and Board of Management, which shall read: "We hereby confirm that, to the best of our knowledge and belief, the information contained in this Prospectus is in accordance with the facts and that, to the best of our knowledge and belief, the Prospectus does not omit anything likely to affect the import thereof, and that all relevant information from the minutes of the meetings of the Board of Directors, the audit reports, and any other internal document is contained in this Prospectus."

There is no statutory obligation of the distributor to exercise due diligence or verify the information included in the prospectus. However, a verification process is normally carried out in practice. Meanwhile, it is not expressly established in the law that the distributor assumes civil responsibility for the accuracy and completeness of the information in the prospectus, and the distributor's liability would be subject to the general principles on liability for damages.

The distributor has to make a statement as to the information contained in the prospectus. The distributor's statement shall read: "In our capacity [as managers] we hereby confirm that the Company and its accountants have made available to us all information requested and deemed necessary by us. The data provided or disclosed to us, including that data on which the financial information, market information etc. are based, have not been independently verified by us, however, we have gone through the information and compared it with the information contained in the prospectus and found nothing that is incorrect or inconsistent." It should be noted that this statement does not limit the liability of the issuer or that of its Board of Directors and Board of Management to the contents of the prospectus or the information that the issuer has offered to the distributor.

The issuer's auditor shall make a declaration in the prospectus in connection with its preparation. Although there are no formal requirements with respect to the wording of such declaration, the CSE has agreed with the Danish Institute of State-Authorized Public Accountants that the following wording may be used: "In pursuance of the rules and regulations of the CSE we hereby confirm that all material circumstances relating to the [Issuer] known to us and which, in our opinion, may affect the evaluation of the Company's and the Group's assets and liabilities, financial position and results (as stated in the said consolidated accounts), are contained in the prospectus."

The issuer's legal counsel is in general only liable towards the issuer for the advice given to the issuer, and thus is not liable towards investors on the basis of information contained in the prospectus. However, if the issuer's legal counsel is explicitly mentioned as the reference to specific sections in the prospectus, they may be held liable for the contents of such sections. In any case, the legal counsel is rarely quoted in Danish prospectuses.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

The board of directors and management are responsible for the content and the completeness of the information contained in the prospectus. To the extent that new circumstances, which may affect the assessment of the price of the securities, occur between the date of the prospectus and the closing of the subscription period, such facts must be published as a supplement in the same manner as the original prospectus. Should the issuer refuse to publish such supplement, it may be subject to administrative sanctions.

The DFSA and the Danish Securities Council may impose administrative sanctions and order to perform specific remedial actions to any party violating the Securities Trading, etc. Consolidated Act ("STA"). Specifically, Section 93 (3) of the STA provides that: "If a natural or legal person fails to meet his obligations under this Act or the provisions laid down in pursuance hereof, the Supervisory Authority or the Danish Securities Council may order the person concerned to remedy the matter. If deemed expedient, the Supervisory Authority or the Danish Securities Council may publish the order or suspend or remove the securities involved from the listing on a stock exchange or from the trading on an authorized market. Any person not complying with an order from the Supervisory Authority or the Danish Securities Council or giving incorrect or misleading information to the Supervisory Authority or the Danish Securities Council shall be liable to a fine, provided that the offence does not carry a more severe penalty under other legislation." In case of a defective prospectus, these orders may be directed at the issuer, its directors and officers, and the distributor (but not to the auditor). To illustrate, the issuer may be ordered to publish a supplementary stock exchange announcement rectifying or amending the information in the prospectus. The decision of the DFSA and the Danish Securities Council in this regard may be subject to judiciary review.

3.2 Judicial sanctions

The securities laws in Denmark provide for criminal liability that may arise due to false information or material omissions in a prospectus for a public offer of shares.

To the extent that the directors and officers have willfully or grossly negligent included false information in a prospectus, or omitted information and such omission could be characterized as fraudulent, the issuer may be prosecuted pursuant to provisions in the securities laws. Imposing criminal liability on the issuer's Board of Directors and Board of Management is very unlikely, according to leading Danish scholars (Peer Schaumburg-Müller and Erik Werlauff in U1997B.456 citing a ruling made by the City Court of Copenhagen in March 1994 in the C&G Bank case (17th department, case 73359/90).

3.3 Stock Exchange sanctions

According to Section 26 of the STA, a stock exchange may decide to delist a security from the exchange if it considers that the listing is no longer in the interest of investors, the creditors, or the securities markets. The Danish Securities Council shall issue rules governing suspension of listing and delisting. De-listing as a sanction will only be effected against issuers who repeatedly or grossly disregard or neglect applicable provisions and requirements, including the reporting requirements.

Part 4. Investor's right of restitution for losses

Investors may obtain restitution of losses incurred by reason of false information in a prospectus, or omissions of material information therein, through a judicial proceeding before a civil court. Since there are no provisions on prospectus liability in the securities laws, in order to be awarded damages, investors have to resort to the general principles established pursuant to the general tort law.

The statement of responsibility in the prospectus is the basis for the potential liability of the issuer's directors and senior managers, as well as of the distributor and auditor. Liability on the part of the auditors may be established by violation of statutory provisions applicable to auditors, or by breach of agreements or declarations applicable to the auditors. Liability on the part of the distributor may also be established on the basis of acts or omissions of the distributor resulting in losses for the investors.

Danish case law in the area of prospectus liability is not well developed. The Hafnia ruling is the leading prospectus-liability case regarding listed companies. In 1999 the Danish Maritime and Commercial Court ruled that the statement of responsibility does not impose "strict liability" on its authors unless "the statement contains information which is in conflict with the knowledge of those responsible for the prospectus".[66] Therefore, those responsible for the prospectus must have undertaken relevant measures for obtaining relevant information about the issuer in the context of the preparation of the prospectus. The 1999 decision by the Maritime and Commercial Court was appealed to the Danish Supreme Court. The Supreme Court ruled on the matter in June 2002 and this ruling is now the leading case in Denmark with respect to prospectus liability.[67]

Contrary to the Maritime and Commercial Court, the Supreme Court did not find the prospectus to be inadequate in terms of the level of information provided and thus, the Supreme Court did not find any basis for making the defendants, i.e. the issuer, the distributor, the accountants and board members liable in damages. The Supreme Court ruled that in order to hold the responsible parties, including the issuer, liable in damages towards investors, the inadequacies, i.e. misleading information or omissions in the prospectus, have to be considered in light of the information otherwise contained in the prospectus. Thus, considering the content of the prospectus, the misleading information or omissions has to be of material importance in an overall assessment of the company in order for liability in damages to be imposed.

The defendants were dismissed due to the following rationale applied by the court: (1) The serious financial situation of the company was evident from the prospectus, (2) the individual investor was therefore in a position to balance the risk against the chance of a profit, (3) the basis for criticism of a few points will have to yield to the general impression and (4) the causes for the company's collapse were different from those which gave rise to criticism.[68]

The following can also be concluded from the Hafnia case: (i) that not only the seller is required to show a duty of care (*caveat venditor*) but so is the buyer (*caveat emptor*), (ii) that the liability of the issuing agent (distributor) is a professional liability according to which (material) departures from the rules and standards of the profession triggers liability regardless of any individual excuses, (iii) that the auditors' liability may be triggered in the event of a violation of the rules of conduct, and (iv) that the issuer may become liable in cases where the proceeds have been received by the company in full or in part although this probably presupposes a considerable degree of negligence.

The liability of the issuer's Board of Directors and Board of Management is based on a principle of fault (or negligence in obtaining the necessary knowledge of the company).[69] In contrast, the liability of the distributor and the auditor (and of the attorneys when expressly mentioned in the prospectus as responsible for a specific section thereat) is based on professional standards. The difference between the fault/negligence based liability and the strict liability applicable to the distributor, auditors and attorneys can be explained by the fact that individual reasons/excuses may exonerate the directors and officers from liability whereas individual reasons will not exonerate a professional party from not complying with the standards applicable to him. The directors and officers have a broader margin of misjudgment.

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[66] The Hafnia ruling also states that prospectuses should provide investors with all information about the company which might be material to an investor. Briefly stated the requirement is that the prospectus should provide a true and fair description of the issuer and the securities.

[67] The ruling is published in the Danish weekly law report ("Ugeskrift for Retsvæsen") under the reference U2002.2067H.

[68] See commentary in U2002B.437 by Peer Schumburg-Müller and Erik Werlauff.

[69] The 1999 Hafnia ruling indicates that there may be individual reasons to exonerate the board members from liability, e.g. because they did not have knowledge of certain important matters.

There is no provision in the law imposing any liability on a shareholder (be it controlling or not) by reason of the actions or omissions of directors and officers of a corporation or because of the corporation's liabilities. Furthermore, there is no case law and no relevant court precedents in Denmark imposing such liability on a shareholder.

The basic liability rule is that an investor who wants restitution for losses suffered as a result of a defective prospectus must prove that: (i) she suffered a loss; (ii) the loss was caused by the false information, or the omission of material information, in the prospectus; and (iii) that such loss was foreseeable[70] given the circumstances (i.e., that the investor would not have subscribed the shares had she known the truth).

In order to be successful in a claim against directors or officers, an investor who has sustained a loss has to prove that the prospectus did not give a true and fair description of the company. A weakened requirement on the part of the investor to prove causation and foreseeablity applies in relation to the loss suffered by such investor since the investor has to prove that the prospectus was inadequate in terms of information. Upon a finding by the court that the prospectus did not give a true and fair description, it may be argued that the burden of proof as to whether the directors and/or officers acted negligently with regard to the contents of the prospectus is achieved, and that the directors and officers need to show an exercise of reasonable care in response. Case law is not sufficiently developed to be very specific about this, but according to market practice there should be a verification of the prospectus. From the Hafnia ruling it seems clear, however, that investors do not need to prove causation or foreseeability if the court finds that the prospectus did not give a true and fair description of the company (i.e., the court concluded that it could be assumed that the investor would not have subscribed the shares if the prospectus had given a true and fair description). The principles of the Hafnia ruling may be applied in other matters brought before the Danish courts in terms of liability in connection with share offerings.

In order to be released from civil liability, the defendant must rebut the proof presented by the plaintiff.

Rescission of the acquisition of shares is not an available remedy under Danish law.

A case for restitution for losses caused by a defective prospectus would typically be initiated at the Danish High Court or at the Commercial and Maritime Court, and may take between one and two years until first instance judgment. A first-instance judgment from these courts may be appealed to the Danish Supreme Court as a matter of law, even if the defendant does not have a valid defense. If the judgment is appealed, the case may be finally resolved in another one to two years. Thus, irrespective of whether the defendant has a valid defense, a firm sentence in a prospectus liability case may take between 2 and 4 years.

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Foreseeability refers to the reasonable anticipation that harm, injury or loss is a likely result from certain acts or omissions.

SECURITIES LAW OF ECUADOR

Part 1. The regulator and its supervisory and regulatory powers

The Superintendency of Companies generally supervises securities markets whereas the National Securities Council (NSC) is in charge of its regulation. Banks and insurance companies are regulated and controlled by the Superintendency of Banks.

The Superintendency of Companies regulates and supervises the securities market, limited-liability companies, and non-financial corporations. Specifically, the Superintendency of Companies regulates the administration, supervision and control of limited-liability companies, non-financial Ecuatorian and foreign societies branches. The Superintendency of Companies is headed by a Superintendent of Companies who is elected by the Congress for a four-year term from a threesome nominated by the President. She may be removed by Congress only after impeachment. The Superintendency of Companies has the power to examine the operations of the entities that participate in the securities market and to request any information required for that purpose. The Securities Market Law, however, does not grant the Superintendency the power to command or hear the testimony of witnesses.

The NSC is affiliated to the Superintendency of Companies, and has the responsibility of establishing the policies regarding securities markets and issuing the necessary regulations for the application of the law. It has seven members. Four of them are State authorities (the Superintedent of Companies, who presides the NSC, a delegate of the President of the Republic, the Superintendent of Banks, and the President of the Board of the Central Bank). The other three members are representatives of stock houses, fund and trust administrators, and issuers of stocks and bonds appointed by the President of the Republic from candidates proposed by the Superintendent of Companies. The members of the NSC can be discharged only for legal causes, and in the case of *ex-officio* members (i.e., the Superintendent of Banks, the President of the Central Bank), prior impeachment by Congress is required.

Regulations issued by the NSC are printed in the Official Gazette without prior approval by other government authorities. Of course, regulations issued by the NSC may be revised by the judiciary (Tribunal de lo Contencioso Administrativo) or, if they violate the law or the Constitution, by the Constitutional Tribunal.

Part 2. The duty to disclose material information

Prior to a public offering of securities, the issuer must register the securities in the Securities Market Registry and distribute a prospectus approved by the Superintendency of Companies. Copies of the prospectus must be provided to the stock exchange but it is not necessary to distribute the prospectus to potential investors before publicly offering the shares. Finally, the law does not provide for a special waiting period between the public offering and the sale of the securities, when issuer's shares may be offered but actual sales may not be committed, agreed, or finalized.

The prospectus must adequately disclose all the relevant information that may affect the investment decision or the price of the securities in the market. The prospectus for a primary public offering of shares of an existing company must include, among other general information the name and percentage of shares held by shareholders with more than 10% of the issuer's capital (Article 6 of the ROPV[71]).

[71] "Reglamento de Oferta Publica de Valores".

However, there is no requirement to provide information on the identity of the beneficial owners of shares held through corporations, trustees, brokers, agents, legal representatives or other intermediaries. Moreover, large shareholders are not required to disclose their ownership to the Superintendency, to the Stock Exchange, and/or to the issuer. Similarly, there is no legal requirement to disclose the stockholding of directors or officers, or their compensation. Likewise, there is no legal requirement to disclose the terms of outstanding material contracts and of material contracts not made in the ordinary course of business (as long as these are reflected in the issuer's audited financial information). Finally, there is no obligation to describe transactions in which directors, officers, or major shareholders have material interests, except that the affiliation of "related enterprises"[72] must be made explicit.

The issuer's legal representatives must declare under oath that the information included in the prospectus is truthful and complete, and are civilly and criminally liable for any false statement or omission therein (Art 14 of the LMV and Art 24 of the ROPV). The accounting firms, and their officers involved in the audit of the issuer's financial statements, are liable for the damages of their negligence (Art 198 of the LMV). In contrast, the distributor does not assume civil responsibility for the accuracy and completeness of the information in the prospectus. She is not required by law to perform a due diligence review of the information contained in the prospectus, and does not generally perform such review as a matter of commercial practice. Nevertheless, intermediaries (stock houses) are prohibited from divulgating false, inaccurate, or misleading information. An incorrect stock forecast may be considered false or inaccurate information, unless it was clear to the buyer that the underwriter did not imply the certainty of the forecast or the forecast was technically sound.

The prospectus must be approved if it complies with applicable norms. In practice, however, the Superintendency of Companies has some discretion to request information and could delay approval of the prospectus by requesting additional information. However, the Superintendency does not have the authority to oppose an offering document based solely on its own determination of the quality of the investment.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

Violations of the LMV are generally considered administrative contraventions, and as such subject to sanctions imposed by the Superintendency of Companies through an administrative resolution. Administrative contraventions include (Art 207 of the LMV): (i) conducting a public offering of securities without complying the established requirements, (ii) not disclosing truthful and complete information as required; (iii) violating the self regulatory norms of the stock exchanges, or (iv) issuing auditing reports to financial statement contravening legal norms and regulations and applicable principles.

The Superintendency of Companies shall impose administrative sanctions according to the seriousness of the fault and the damages caused. In case of a defective prospectus, administrative sanctions may be imposed on the issuer and its officers. However, administrative sanctions are unlikely to be imposed on directors unless they were involved in the preparation of the prospectus. These sanctions include (Art 208 of the LMV): (i) written reprimand, (ii) fine, (iii) removal from office, (iv) employment restrictions to act as an officer of the NSC or the entities that participate in the market, (v) suspension of the shareholders' voting right or prohibition to sell shares [ALFREDO: ARE YOU SURE THIS IS APPLICABLE UNDER THE CASE FACTS?], (vi) suspension or cancellation of the right to participate in the securities market,

[72] Art. 191 of the LMV describes "related enterprises" as corporations affiliated through common ownership or management criteria.

which may imply the dissolution of the company (for companies dedicated to securities markets activities), and (vii) reversing the operation.

Finally, the accounting firms providing auditing services to entities under the LMV must be registered before the Superintendency of Companies (Article 195 of the LMV). In case the auditing services are deficient, the Superintendency of Companies may apply, as sanction, (i) written reprimand, (ii) temporal suspension of auditing activities, and (iii) disqualification and debarring, when it is proven that the accounting firm did not comply with the applicable norms. In contrast, the Superintendency of Companies may not apply any administrative sanction in case of a defective prospectus on the distributor since she is not involved in its preparation and is not responsible for its content.

3.2 Judicial sanctions

Criminal sanctions in Ecuador may only be applied to physical persons. Therefore, legal entities may not be subject to criminal prosecution, but their legal representatives may be liable for their own conduct when such conduct has been legally defined as a criminal offense. In principle, the legal representatives of an issuer are civilly and criminally liable for the truthfulness and completeness of the information included in the prospectus.

Some criminal provisions in securities law may be applicable if a prospectus is defective, depending on the judge's interpretation of the specific circumstances. Specifically, maliciously providing false information to gain registration of a security may be sanctioned with imprisonment and fines (Art 215 of the LMV). Moreover, fraudulently providing false information in "the negotiations of a public offering", and knowingly providing false information "about the operations in which they have intervened" are criminal offenses most likely to apply to a distributor (Art 214 of the LMV). Finally, auditors are criminally liable when they conceal fraud or irregularities uncovered in their audit of the financial statements of the issuer (Art 215 of the LMV). Note that securities law does not expressly characterize omissions of material information in a prospectus as a criminal offense.

Beyond the sanctions in securities law, some provisions in the Criminal Code are applicable in case of a defective prospectus. Specifically, the legal representatives of an issuer are likely to be criminally liable under the definition of perjury since they declare under oath that the information included in the prospectus is truthful and complete. Charges on "estafa" (or fraud, defined as engaging in actions directed to deprive somebody from her property through deceit) may be brought successfully against the legal representatives of the issuer, if knowledge and intent can be established judicially. Other parties, like officers of the distributor and of the accounting firm, may also be subject to criminal liabilities for fraud.

3.3 Stock exchange sanctions

According to the Code of Ethics of the Quito Stock Exchange, the issuers admitted to listing must comply with the disclosure requirements established in the applicable laws, regulations, and self-regulatory norms. Moreover, the participants in the securities markets are required to meet the standards set forth in the Code of Ethics. Violations may be subject to sanctions including suspension or debarring of intermediaries, and suspension or cancellation of the issuer's listing.

Part 4. Investor's right of restitution for losses

In a prospectus liability case, investors may seek restitution for losses through a judicial procedure before a civil court. In addition, if the false statement or omitted information is a crime under the LMV or the Criminal Code, investors may appear before the criminal judge and pursue damages once the defendant is

criminally convicted. A class action suit is not available for restitution for losses caused by a defective prospectus.

The basic principle regarding restitution for losses under the LMV is that persons (physical or legal) who have caused damages due to violations of securities laws are liable to repair those damages (Article 205). Such reparations are to be pursued in accordance with general rules of civil liability. According to the Civil Code[73], a person must repair any damages that may be attributed to her intentional or negligent actions.

To obtain restitution of losses from the issuer in a prospectus liability case, the investor must prove in a court of law that: (i) she suffered losses; and (ii) losses were the consequence of an intentional or negligent violation of the securities laws. In order to establish causality, the investor must establish that she relied in the information contained in the prospectus, and that the inaccurate information was material (i.e., it affected the price and produced losses). Auditors are responsible for damages caused by their actions and reports. The normal rules on evidence apply against accountants in a prospectus liability case.[74]

The issuer's legal representatives are responsible by law for the truthfulness and completeness of the information included in the prospectus. In contrast, directors are only civilly liable for the content of the prospectus if they participated in the preparation of the offering document.[75] Similarly, the distributor is generally not civilly liable since she is not required to be involved in the preparation of the prospectus and thus, does not have a legal or contractual duty to oversee the truthfulness and completeness of the prospectus. In addition, a criminal action cannot be initiated against the distributor as a company, but only against the individuals involved. Therefore, restitution for losses is only available from the distributor's officers, directors, or employees when they have committed fraud and are ordered to repair the crime. Thus, to obtain restitution for losses in a prospectus liability case, the investor must prove in a court of law that the involved officers, directors, or employees of the distributor: (i) knew that the prospectus contained inaccurate or misleading information; and (ii) performed illegal acts with intent to deceive investors.

Shareholders are responsible for the liabilities of the company only up to the amount of their contribution to the company's capital. Therefore, investors cannot pursue the collection of the company's liabilities from its shareholders. Moreover, shareholders are not liable for acts or omission of the directors or officers of the company. However, in case of an illegitimate agreement aimed to depriving a third party of its property and rights, courts can order any party to reinstate a previous legal and economic situation under the Law for the Judgement of Collusion Agreements. As a result, shareholders may be liable to restitute damages should the provision of this law be applicable.

A prospectus liability case may take approximately three years to reach first instance judgement. Appeal is available as a matter of law, regardless of the merits of the case. Appeal will likely be granted even if

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[73] See Articles 2241 and 2256 of the Civil Code.

[74] Article 198 of LVM makes auditors and their officers and employees responsible for damages due to "slight" negligence (or "negligencia leve"). In fact, the LMV does not impose a standard of civil liability different that what is provided for in the Civil Code. The latter (article 29) defines three degrees of negligence in managing the business of others: (i) *gross negligence* is the lack of care that even negligent and imprudent people apply to their own affairs; (ii) *slight negligence*, or plain negligence, is the lack of care that men ordinarily employ in their own affairs, or that of a good family father; and (iii) *slightest negligence* is the lack of the assiduous diligence that prudent men apply to the management of their own important businesses. Negligence, without any other qualification, means "slight" negligence.

[75] Directors are responsible for resolutions of Board Meetings but these do not address the contents of the prospectus.

the defendant does not have a valid defense and may take an additional two or three years, assuming the defendant resorts to all the defenses and recourses generally available under the civil procedure rules. An extraordinary recourse of *casación* might be granted before the Supreme Court only in those cases where issues of law need to be addressed. Appeal to the Supreme Court could take one year.

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SECURITIES LAW OF EGYPT[76]

Part 1. The regulator and its supervisory and regulatory powers

The securities market in Egypt is regulated and supervised by the Capital Market Authority ("CMA"). Banks are regulated and supervised by the Central Bank of Egypt ("CBE") and insurance companies by the Egyptian Insurance Supervisory Authority.

According to the Capital Market Law[77] (CML), the Board of the CMA has the following seven members: (a) the Chairman of the CMA, who is appointed by a Presidential Decree for a renewable period of 3 years; (b) the Deputy Chairman of the CMA, who is also appointed by a Presidential Decree for a renewable period of 3 years; (c) the Deputy Director of the CBE; and (d) four members appointed by the Prime Minister upon the recommendation of the Minister of Economy and Foreign Trade for a renewable period of 2 years. The members of the Board of the CMA can only be removed for legal causes.

Although the CMA is the authority entrusted with the regulation and supervision of the securities market in Egypt, Executive Regulations to the Capital Market Law are enacted through a Decree of the Minister of Foreign Trade. For example, Executive Regulations shall stipulate the rules governing the offering of shares for public subscription (Article 1, CML) and define the additional information content of the prospectus (Article 5, CML). The Executive Regulations shall also stipulate the rules and procedures governing the trading operations, clearance and settlement, and the publishing of trading information (Article 20, CML). The Executive Regulations shall stipulate the rules governing the organization of stock exchanges, the trading operations therein, clearance and settlement, and the publishing of trading information (Articles 20 and 26, CML). In contrast, the rules governing the administration of stock exchanges, and their financial affairs, shall be subject to a Presidential Decree (Article 25, CML). Finally, the Stock Exchange ("SE") has limited powers to regulate stock exchange transactions.

The CMA's authority is completely independent. Its decisions and regulations are not subject to the approval of any other governmental authority. On the other hand, regulations issued by the SE are subject to the supervision of the Chairman of the CMA. According to Article 7 of Decree 51[78], if the Chairman of the CMA does not object to the decisions of the board of the SE within 15 days of his notification of such decisions, then the decisions shall become applicable. If she does object, she will return the decisions to the board of the SE for reconsideration. The board of the SE can maintain its decisions, despite the objections of the Chairman of the CMA, by a two-third majority vote.

When investigating violations of securities laws, the staff of CMA has access to the registers, books, documents and information in the company's office, the stock exchange and other offices where these documents may exist. Executives in charge of such entities shall provide them with statements, abstracts, and copies of documents as they may require. The law does not, however, grant the regulator with the authority to command testimonies.

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[76] We are indebted to Mr. Abdel Hamid Mohamed Ibrahim, the Chairman of the Capital Market Authority for his helpful comments.
[77] Law No. 95 of 1992.
[78] Presidential Decree No. 51 of 1997 regulating the Cairo and Alexandria Stock Exchange.

Part 2. The duty to disclose material information

The offering document must be a prospectus that meets the requirements set forth in the CML, the Corporate Law[79], and their Executive Regulations[80]. The prospectus must be first approved by the CMA and then published in two prominent daily newspapers, at least one of which is published in the Arabic language.

The CMA can object to the prospectus within two weeks from its submission if it finds that the information provided is insufficient or inaccurate. Although a prospectus must be approved and published, shares may be privately marketed as soon as a prospectus has been presented to the CMA for approval. The law provides for a subscription period to the offered shares of no less than 10 days and no more than 2 months. The shares will be allocated to the subscribers at the end of the subscription period or when all the offered shares have been subscribed to, whichever is earlier, provided that the minimum period of subscription has elapsed. Once a subscription has been committed during this period, a subscriber may not withdraw from it at will.

The prospectus must include, among other information, the business history of the company, the name and percentage of shares held by each shareholder who owns more than 5% of the issuer's capital, and audited financial statements (Article 5, CML).[81] The prospectus must disclose the names and remunerations of the members of the Board of Directors and the Managing Directors, and the number of shares owned by each of them (Decree 96). In contrast, there is no requirement in the law to disclose: (1) the indirect ownership of shares of directors and officers in the issuer through other corporate entities; (2) the terms of outstanding material contracts or contracts made outside of the ordinary course of business; (3) transactions in which directors, officers and controlling shareholders have a direct or indirect material interest; or (4) any information that a reasonable investor would consider important for an investment decision.

If the issuer is incorporated at the time of the IPO, all its founders must sign the prospectus. Otherwise, the prospectus must be signed by the board of directors' representative (whether it be the managing director or the Chairman). The distributor is obliged, by an internal decision of the CMA, to sign the offering document along with the company's auditor. Although she is not required by law to perform a due diligence review of the information contained in the prospectus, the distributor is likely to perform such due diligence review as a matter of commercial practice.

A distributor may be held liable for representations not included in a prospectus that, without being fraudulent or false, turned out to be incorrect due to her negligence in conducting a professional evaluation. This is an application of the general principle that any person who causes damage as a result of an intentional or negligent mistake is civilly liable (Article 163, Civil Code).

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[79] Law No. 159 of 1981.

[80] Decree of the Minister of Economy and Foreign Trade No. 135 of 1993 ("Decree 135") issuing the Executive Regulations of the Capital Market Law, and Decree of the Minister of Investment and International Cooperation No. 96 of 1982 ("Decree 96") issuing the Executive Regulations of the Corporate Law.

[81] The spirit of the law requires that the prospectus provide information about 5% shareholders whether they are normal shareholders or beneficial owners of shares. This understanding is confirmed by the Executive Regulations of Law No. 93 of 2000 that regulates the Deposition and Central Registry of Shares. According to said regulations, beneficial owners are to be considered as normal shareholders with regard the application of certain regulations relating to transacting in certain shares when the shareholder's shares in the capital of the company exceeds a certain percentage.

The controlling shareholder very often participates in the preparation of the prospectus because of the impact that the prospectus may have on the value of her shares, but she is not required to do so. Therefore, the controlling shareholder may be liable under the law, provided that her involvement in the prospectus preparation is proved.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The CMA and the Stock Exchange may sanction the distributor, brokers, and other practitioners in the capital market if they breach their obligation to conduct their profession in accordance with the instructions of the CMA. Other entities, such as the issuer, are under the regulations of the CMA mainly with regard to the listing of shares. Therefore, they can be sanctioned by the CMA or the Exchange only for violations related to the listing of shares.

The Chairman of both the CMA and the Stock Exchange may suspend trading of any security in case its transaction causes harm to the market or its participants (Article 21, CML).

If the distributor violates securities laws and its regulations, the CMA may suspend or revoke her license. The CMA may also convene a board meeting of the distributor, appoint an observer on the board, dissolve the board and appoint a commissioner to manage the distributor temporarily, or instruct the distributor to increase the guarantee amount deposited with the CMA.[82] Although a preventive measure, this last order is sometimes used by the CMA as a way to penalize the distributor.

In contrast, auditors may not be sanctioned by the CMA or the Stock Exchange. As long as the mistakes committed by the auditor are unintentional, she is only subject to civil liability and not criminal liability.

3.2 Judicial sanctions

Courts may sanction persons who offer or sell securities in violation of the law, or make intentional misstatements in a prospectus with imprisonment and fines (Article 63, CML). The responsible directors are liable for those penalties as well as the company warrant for the payment of the applicable fines (Article 68, CML). In case of repeat offense, the court may also deprive the violator from up to 3 years of business conduct through which the crime was committed.

The parties may be subject to criminal sanctions only for intentional act or omission. When the act or omission is unintentional, the parties may only be subject to administrative sanctions, where applicable.

3.3 Stock Exchange Sanctions

The Chairman of the Stock Exchange may suspend the trading of any security in case it harms the market or its participants (Article 21, CML). She may also revoke transactions which violate the law or its regulations or which have been conducted with price manipulation.

Part 4. Investor's right of restitution for losses

Investors are entitled to obtain compensation through a civil proceeding for damages they suffered as a direct result of false statements or omissions in the prospectus. A class action is not available for this purpose.

82 Articles 30 and 31 of the Capital Market Law

The liable parties include the issuer, the issuer's directors, and the issuer's auditors. According to Article 102 of the Corporate Law, shareholders may claim compensation if they have suffered damages as a result of a mistake made by the company's directors. Thus, a director would be liable vis-à-vis the shareholders even if she is unaware of the false statement or omission in the prospectus, as long as such statement or omission is a mistake or fault in the director's performance of her duties. Article 109 of the Corporate Law establishes the shareholder right for compensation against the Company's auditor for her mistakes in performing her duties. In contrast, corporate law does not specifically establish a right to obtain compensation from the distributor for her mistakes in issuing the prospectus. Therefore, a claimant must rely on general principles of law as established under Article 163 of the Civil Code to claim compensation in this case. Specifically, the distributor would assume civil liability under the general principles of the law if she knew that the prospectus contained untrue statements.

Article 46 of Decree 135 does not provide for the liability of the issuer in a prospectus liability case. However, Article 46 requires that, after the establishment of a firm, the prospectus be issued by the issuer who would bear the responsibility for the information contained therein.[83] In fact, prospectus must be signed by the issuer's directors in their capacity as such (i.e. as if the issuer itself signed it). As a result, the issuer is made responsible for the actions of its directors when acting in its name (Article 55 of the Corporate Law).

Recovery in a prospectus liability case is governed by general laws. Specifically, Article 163 of the Civil Code provides for the civil liability of any person who commits a fault that causes damages to another person. To obtain compensation, the plaintiff must prove to the court that: (1) the defendant has made a mistake; (2) the plaintiff has suffered losses; and (3) the losses were directly caused by the mistake of the defendant. As long as the false statements or omissions of material information in a prospectus violate the law, they are considered a fault and therefore an unlawful act. The fault could either be intentional or unintentional, as in the case of negligence. If the defendant committed a fault intentionally, she may find herself not only civilly liable but also criminally liable under Article 63 of the Capital Market Law (see Part 3). In sum, a plaintiff in a prospectus liability case must prove that: (1) the false statement or the omitted information from the prospectus results from the defendant's negligence, if not gross negligence, in the performance of her professional duties; (2) she suffered losses; and (3) the defendant's negligence is the direct cause for her losses. The defendant may avoid liability by disproving any of those three elements of the plaintiff's claim. In particular, the defendant may avoid liability by showing that the harm was caused by: (1) an event over which the defendant had no control (e.g., an unexpected event or an event of "*force majeure*"); or (2) a mistake of either the investor or of a third party (Article 165 of the Civil Code).

Since the distributor is not liable for the contents of the prospectus under Corporate Law, an investor seeking restitution for losses must prove that the distributor knew about the omissions of material information in the prospectus.

Rescission of the acquisition of shares may prove in practice to be difficult because third parties may have acquired rights during the process. However, under Article 125 of the Civil Law, a party may rescind a contract in case the other party commits a fraudulent action that led that party to enter into the contract. By application of this rule of the law, the investor may request the rescission of the acquisition of shares agreement on the basis that the prospectus was prepared in a fraudulent way and that if the information contained in the prospectus was not false, he would not have acquired the shares.

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[83] The founding shareholder must sign and, therefore, bear responsibility for the information contained in the prospectus issued at the establishment of the company.

The controlling shareholder of a corporation cannot generally be held civilly liable for the acts or omissions of the corporation.[84] The legal personality of the corporation is completely independent of the personalities of its shareholders (Article 53 of the Civil Code and Article 2 of the Corporate Law). As a result, it is not possible to pierce the corporate veil.

A prospectus liability case may take between 2 and 3 years to be resolved by a first-instance court. The process is generally slow because courts ask an expert to assess the fault attributed to the defendant and to quantify the losses suffered. According to the Egyptian Civil and Commercial Procedural Code, all litigants have the right to appeal their cases to a higher court. Therefore, every defendant has the right to appeal the first-instance judgment even if she does not have a valid defense under the law. Appeal to the higher court may take between 1 to 2 years. Hence, from the time the case is filed, it may take between 3 and 5 years to produce a firm and final sentence in a prospectus liability.

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[84] Shareholders are, however, liable in one special case. Specifically, founding shareholders are personally liable for the information contained in the prospectus to subscribe the capital of a yet-to-established company (Article 46 of Decree 135). In that case, the founding shareholders prepare the prospectus and issue it.

SECURITIES LAW OF FINLAND

Part 1. The regulator and its supervisory and regulatory powers

The official regulator of Finland's securities market is the Financial Supervision Authority ("FSA"). The FSA also supervises banks, credit institutions and investment firms while insurance companies are subject to the watch of the Insurance Supervision Authority ("ISA"). In addition, there are also a number of self-regulatory organizations, such as the Helsinki Exchanges and the Finnish Central Securities Depository ("FCSD"), both of which have certain regulatory powers based on law. The rules of the Helsinki Exchanges and the FCSD, which contain detailed supplementary regulation concerning mainly listing, trading and clearing, are subject to the approval and ratification of the Ministry of Finance.

The Board of Directors of the FSA consists of the Director General of the FSA, the Director General of the ISA and three ordinary members appointed by the Parliamentary Supervisory Board of the Bank of Finland (Chapter 2 of the Act on the Financial Supervision Authority, "FSAA"). The president of the Republic of Finland appoints the Director General of the FSA and the Council of State appoints the Director General of the ISA. Generally, members of the Board of Directors of the FSA may only be discharged in case of a material misconduct or a material breach against the obligations or duties of such member. The Parliamentary Supervisory Board consists of nine parliament members elected by the Finnish parliament and it is responsible for certain general administrative functions of the FSA.

Generally, the supervision of the Finnish securities market and the entities operating in such market is solely within the authority of the FSA, while the regulation of the financial markets supplementing the provisions of law is divided between the Ministry of Finance and the FSA. It should be noted that the Ministry of Finance does not, unlike the FSA, have a general authority to issue regulations but issues regulations only based on a specific authorization in law. For example, the contents of the listing particulars and the prospectus is, as of December 2000, regulated by Decisions of the Ministry of Finance on Listing Particulars (197/1998, the "LPD") and on the Prospectus (905/1994).[85] Stock exchange rules and any amendments thereto shall be confirmed and approved by the Ministry of Finance, which shall prior to the confirmation and approval of the rules, request a statement from the FSA (SMA, Chapter 3 – Section 4). The regulations and guidelines issued by the FSA are not subject to the approval of other governmental authorities even though the FSA operates in connection with the Bank of Finland. Moreover, the standing order of the FSA (provisions on internal administrative matters and authorizations, on the basis of which the regulations and guidelines are issued) is subject to the approval of the Parliamentary Supervisory Board.

The FSA may command a supervised entity, an issuer of securities, a party liable to prepare a prospectus, a party required to disclose changes in its holdings to a target company and the FSA, a statutory insider, a party launching a tender offer, or a party required to launch a mandatory tender offer, to provide the FSA with notifications, accounts, records or other documents it deems necessary for the performance of its supervisory duties (Section 1 of Chapter 7 of the SMA). The FSA is so far not vested with powers to command witness testimonies but shall report a matter to the police for further investigations if it believes that a breach of the provisions of the SMA and/or Chapter 51 of the Penal Code of 1889 has occurred.

[85] It should be noted that the Decision of the Ministry of Finance on Listing Particulars and the Decisions of the Ministry of Finance on the Prospectus have since then been replaced by new Decrees of the Ministry of Finance (539-540/2002), which became effective on July 1, 2002.

Part 2. The duty to disclose material information

Any person who offers securities to the public in Finland must publish a prospectus or listing particulars. Listing particulars shall be published by the issuer, another party offering the securities and the distributor if, among other reasons, the securities are listed on the stock exchange, or its listing will be applied for within three months of the offer (Section 3 of Chapter 2 of the SMA). There is no requirement to actually deliver the offering document to each potential investor, but the prospectus or listing particulars must be made available to them, free of charge. The prospectus or listing particulars is in practice made available at the offices of the stock exchange, of the issuer, and at places for subscription.

The listing particulars may be published after approval by the FSA. The FSA shall deny the publication of the offering document if it evidently contains misleading or inadequate information. The listing particulars shall be published at least two banking days before the commencement of the offering. Sales cannot be committed or finalized during this period of time. The offering, after it has commenced, may not be closed before the end of the first day of the offering (Section 3 of the LPD).

Any offering document, whether prepared in connection with a public offering or a private placement, must disclose sufficient information on factors that may have a material effect on the price of the securities, and allow investors to make a founded evaluation of the issuer and its securities (Section 2 of Chapter 2 of the SMA). The LPD provides that the listing particulars shall contain detailed information of the issuer and the securities in question, including the following:

1. The aggregate of the salaries and remunerations paid and benefits in kind granted to the members of the supervisory board, and to the board of directors and the managing director and his deputy, as well as the aggregate number of shares held by them (Section 12 of the LPD). Whilst there is no express rule on disclosing the indirect ownership of directors and officers, the FSA, based on the general provisions and principles of the SMA, requires that also shares owned by undertakings controlled by a director/officer (and/or through related forms of indirect ownership) are included in the prospectus.
2. As long as known to the issuer, the name and proportion of voting rights and ownership of shareholders who, directly or indirectly, hold at least 5% of the issuer's capital or voting rights (Section 13 of the LPD). Note that shareholders of private companies are generally obligated on the basis of the Companies Act to disclose their holdings to the issuing company and otherwise they cannot use their rights as shareholders. In contrast, there is no requirement to disclose holdings in private companies to the FSA of the Stock Exchange, unless the shareholder is deemed a statutory insider. Information on holdings in private companies is not made public.
3. There is no explicit requirement to disclose any description of specific contracts, whether made in the ordinary course of business or not. Nonetheless, the prospectus must include details of the investments and investment policy of the issuer as well as certain benefits and transactions, unusual in their nature or conditions, between the issuer and its directors (Sections 12, 16 and 19 of the LPD). In addition, there is the general duty to provide all of the information that will be of material importance to future investors and that may have a material effect on the value of the securities. Based on the above general rule, the FSA requires that at least unusual and material transactions, agreements or arrangements between the issuer and its directors, officers, shareholders or third parties be disclosed in the prospectus.
4. The specific risk factors relating to the issuer and the field of business of the issuer as well as a description of the financial position and future prospects of the business of the issuer (Sections 15 and 20 of the LPD).

The listing particulars shall contain, among other items, a declaration by the members of the Board of Directors or exceptionally some other administrative, management and supervisory body of the issuer (or another organization or party offering the securities), stating that, to the best of their knowledge, the information contained in the listing particulars (or in the part for which they are responsible), is accurate and complete in all material respects and contains no omission of any material facts likely to affect the import of the document (LPD, Section 4 - Chapter 1).

There is no requirement that the distributor and the attorneys who advised in the transaction sign the listing particulars. However, the name and contact details of the distributor as lead manager of the issue, and of the attorneys as professional adviser in the preparation of the listing particulars, shall be included in the offering document. In general, the attorneys involved may only become liable towards the issuer or the distributor on the basis of their general obligations towards the issuer and the distributor as attorneys and the relevant contracts between them that define the duties of the attorneys in connection with the offering.

The auditors are required to issue a statement certifying that they have audited the annual accounts presented in the listing particulars, as well as the bookkeeping and management of the financial periods in question, and that they have issued audit reports thereon (LPD, Section 5 - Chapter 1). Such statement shall be included in the listing particulars.

As of December 2000, there was no express rule of law or regulation requiring the distributor to conduct a due diligence review regarding the information included in the offering document[86]. However, a due diligence review is always conducted by the distributor in practice since anyone who, on the basis of an authorization or assignment, handles the issuance of a security on behalf of another, shall make available to investors sufficient information concerning matters which may have a material effect on the value of the security (Section 3 of Chapter 2 of the SMA). The distributor acting as lead manager of the offering is further responsible (together with the issuer/offeror) for the preparation of the listing particulars or prospectus. As a result, the distributor has a *de facto* obligation to investigate the company and conduct a due diligence review concerning the issuer and she shall be responsible for at least all information that she has received in connection with the due diligence review or that was otherwise available to her during the process.[87]

The issuer and the distributor may also be held liable for representations in connection with the sale of the issuer's shares that are not included in the offering document. According to the SMA, securities shall not be marketed by giving false or misleading information or by using a procedure that is contrary to good practice or otherwise unfair. Further, anyone who causes damage through acts violating the provisions of the SMA or rules or regulations issued under the SMA shall be held liable to compensate such damages.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

[86] Please note that the requirement to conduct a due diligence review or a due inquiry regarding the issuer has now been regulated in the new guidelines of the FSA and the revised provisions of the SER, effective as of September 2002.

[87] Since September 2002, the distributor has been required to issue to the Helsinki Exchanges a statement to the effect that the company applying for listing and/or issuing and offering the securities meets the requirements for listing contained in the SER.

There are, as of December 2000, no true administrative sanctions available to the FSA concerning false information or omissions to disclose material information in a prospectus.[88] The FSA may order a conditional fine to be paid by, *inter alia*, the issuer, distributor or accountant for the fulfillment of the duty of disclosure (SMA, Chapter 7 - Section 1). If, after the conditional fine has been issued, the party in question fulfills its disclosure obligations within the timeframe set out in the conditional fine decision of the FSA, the fine does not become due. In practice, it may be very difficult for the FSA to order a conditional fine payable upon a party neglecting to supplement a prospectus, as the offering period during which time the information is relevant to the investors usually lasts only for a few days. No other fines or sanctions are available to the FSA with respect to an issuer of listed securities. The regulator cannot command the undertaking of any specific actions other than order the issuer to provide it with information, which it may require and request to be delivered.

The FSA can on the basis of its supervisory duties prohibit a supervised entity, such as a distributor, from taking a specific contemplated action or implementing a decision in a case such action or decision is in breach of the securities laws or the regulations of the FSA, such as in the case of a defective prospectus (FSAA §13). The only specific action that the FSA may order the distributor to perform is to provide information required for FSA's supervisory duties (FSAA § 11). An operating license of a supervised entity may be cancelled only by the Council of State or the Ministry of Finance, usually on the basis of a recommendation of the FSA.

3.2 Judicial sanctions

Anyone who willfully or through gross negligence fails to disclose to the market material information having an effect on the value of the securities and required by the SMA to be disclosed or, while discharging the above duty of disclosure, discloses false or misleading information shall be sentenced by a competent court to a fine or imprisonment. In practice this means that, in order for the sentencing into criminal sanctions to become relevant, the parties either have been aware or should have been aware of the omissions or deficiencies contained in the prospectus (Penal Code, Section 5 - Chapter 51).

The provision is also applicable to a legal person, i.e. the issuer and/or the distributor and/or the accountant, all of which can in theory be sentenced to a fine imposed on a corporation (however, we are not aware of any fines imposed on corporations for securities market violations). It should be noted that members of the Board of Directors sign off the prospectus or listing particulars as a collective and that the issuer generally has a primary responsibility for the information contained in an offering document. In addition to fines, physical persons including any director or officer guilty of an information crime can be sentenced to imprisonment for a maximum of two years. The judiciary is further able to order offenders to do and/or refrain from doing or taking certain things or actions by issuing an injunction or a judgment granting affirmative relief.

In addition, anyone who willfully or through negligence omits to disclose material information in a prospectus shall, unless the omission is minor or subject to the sanctions sentenced pursuant to the Penal Code, be sentenced to a fine for a securities market offence in accordance with Section 3 of Chapter 8 of the SMA.

3.3 Stock exchange sanctions

The Rules of the Stock Exchange (SER) issued by the Helsinki Exchanges allow for the delisting of a security only in case trading in the security is no longer possible and provided that no material harm will be inflicted upon investors as a result. The Board of Directors of the Helsinki Exchanges may, however,

[88] Please note that a revised Act on the Financial Supervision Authority has been approved by the parliament in January 2003 and will be come effective during the spring. Pursuant to the revised, act the FSA is granted more administrative powers such as the right to issue public warnings on any party acting in the securities markets.

decide to transfer a listed security to a watch list if, among other reasons, the issuer does not meet the conditions on the admission to listing pursuant to the SER or rules issued pursuant to the SER, and this defect can be regarded as significant.

Where material information has been omitted from an offering document, the only situation where the omission could lead to the Board of Directors of the exchange resolving to transfer the security to a watch list, would be that the company, pursuant to the omitted new information, no longer meets the requirements for listing, as provided in the SER. A security can also be transferred to the watch list if the issuer, *inter alia*, continuously breaches the law or the SER or if the preconditions for the reliable price formation of and trading in a security have materially weakened.

The Helsinki Exchanges also has the power to impose what is known as a disciplinary charge for breaches of the obligations of a listed company under the SMA, rules and regulations issued pursuant the SMA, or the SER. The disciplinary charge may also be issued and ordered payable by the distributor for breaches of law, applicable rules, regulations and guidelines, or the relevant broker agreement. The maximum and minimum amounts of the disciplinary charge are stipulated in the Rules of the Disciplinary Board of the Helsinki Exchanges. As non-listed companies that have made public their intention to apply for listing are subjects to the SER, disciplinary charges may be imposed also on such companies for breaches of the disclosure obligations under the SMA, regulations issued pursuant to the SMA and/or the SER. Therefore, it is possible that the disciplinary board could issue and order payable a disciplinary charge for an omission to provide material information in an offering document.

The Helsinki Exchanges does not have the power to issue any sanctions or penalties on a listed company's directors or officers or its auditors by reason of a defective prospectus.

Part 4. Investor's right of restitution for losses

In Finland, investors may obtain restitution for losses caused by a defective offering document only through a judicial proceeding before a competent court[89]. There is no statutory administrative action available to investors to obtain restitution for losses.[90]

Section 2 of Chapter 9 of the SMA provides the basis for civil liability when the prospectus, in violation of the SMA, includes false statements or omits material information. Specifically, under said legal provision, any person who causes damages to another through actions violating the SMA or regulations issued pursuant to the SMA shall be liable to compensate the losses caused. Therefore, the issuing company represented by its Board of Directors as a collective shall be liable under Section 2 of Chapter 9 of the SMA for damages caused due to defective information included in the offering document. As the SMA imposes disclosure obligations relating to offerings of securities only on market participants such as the issuer or the distributor offering the securities, the liability of individual directors or officers under the SMA is not likely.

As regards directors, officers and executives, only members of the Board of Directors and the Managing Director have express obligations relating to the management of the company under the Companies Act (734/1978, as amended). A group of shareholders representing a minimum of 10 per cent of all outstanding shares may, pursuant to the Companies Act, in a limited number of situations file a claim

[89] In Finland there are no separate courts for civil and criminal proceedings.

[90] However, an investor may, under the general principles and provisions of administrative law, report the matter to the FSA, or file a claim with the FSA concerning the actions of an entity subject to the supervision of the FSA.

against the Managing Director or a member of the Board of Directors of the company for breaches of the Companies Act or the Articles of Association of the company or based on damages caused by such person to the company. No other officer may likely be held liable for damages caused by the issuing company to third parties.

The lead manager/distributor offering securities to the public pursuant to an assignment from the issuer is also responsible for the information contained in the prospectus or listing particulars and specifically required to participate in the preparation of the offering document (Section 3 of Chapter 2 of the SMA). As lead managers/distributors may, based on the above rule, become liable for the information presented in an offering document, they are typically actively involved in the preparation process. Co-managers acting solely as underwriters are not required by the authorities to conduct a due diligence review and their responsibility is limited to the information they have received during the offering process. It is unlikely that managers other than the lead manager would be held responsible for omissions in the prospectus or listing particulars, even though this is theoretically possible.

The auditors are liable for the information they have audited and that has been included in the listing particulars.

A controlling shareholder cannot generally be held liable due to acts or omissions of the directors or officers of a limited liability company, or for the company's liabilities. The shareholders' knowledge of the company's affairs is usually limited. In case, however, the controlling shareholder sells in the offering a part of her shares to investors, she is required to co-sign the listing particulars or prospectus and can have liability for certain parts of the information contained in and omissions of the document. According to the Companies Act, a shareholder is liable to compensate only damages caused to the company, another shareholder or a third person, through a willful or grossly negligent act in breach of the provisions of the Companies Act or the Articles of Association of the company.

The compensation of damages under the SMA is based on an act or omission that breaches the obligations of a party under the SMA or provisions issued pursuant to the SMA. To obtain restitution, the plaintiff must prove that: (i) the false statement or the omitted information is material for purposes of Section 2 of Chapter 2 of the SMA[91]; (ii) the plaintiff suffered damages caused by the defective prospectus; (iii) the defendant is responsible to provide the defective information; and (iv) there is a causal connection between the false statement or material omission and the damages caused to the plaintiff. There are generally no defenses available under securities laws to the issuer, its directors, the distributor, or the accounting firm that acted as the issuer's auditors.

The court shall, based on the information provided to the court by the parties, make a case-by-base assessment whether the issuer, its directors, the distributor, or the auditors have fulfilled their obligations under Section 2 of Chapter 2 and/or other disclosure provisions of the SMA, as well as the provisions of the LPD. Where Section 2 of Chapter 9 of the SMA is not applicable (as when the defendant is not responsible for a violation of the SMA or a provision issued pursuant to the SMA), compensation of damages must be sought on the basis of general tort law. Under the general provisions of tort law and the Act on the Compensation of Damages, financial damages are compensated only if such damages are caused (i) by an act subject to criminal sanctions, (ii) in the course of a public authority misusing its powers; or (iii) there are other exceptionally weighty reasons. In court practice, there are few cases where financial damages have been compensated on the basis of exceptionally weighty reasons and the

[91] There is no clear interpretation as to what would be considered material information for purposes of Section 2 of Chapter 2 of the SMA. The FSA has, however, issued certain guidelines as to what information is deemed by the FSA to constitute material information. Unfortunately, there is only a limited amount of case law available in this respect.

preconditions for compensating financial damages on the basis of general tort law have been set very high. Therefore, as the compensation of financial damages under general laws is exceptional and unusual, it is unlikely that damages would be awarded pursuant to general tort law from the issuer's officers, shareholders, or lawyers, or any other party not responsible for the offering document pursuant to the SMA, unless such damages are based on actions or omissions subject to criminal sanctions.

The cancellation of an offering and a related share capital increase is generally not possible as a result of a defective prospectus or corresponding reasons of securities laws. The issue of securities can only become void or be cancelled pursuant to the provisions of the Companies Act, such as on the basis of deficiencies in the formal decision making of the issuer company. Therefore, investors can generally not seek rescission of the acquisition of issued shares and refund of the monies paid. However, in cases where existing already issued shares have been sold by a majority shareholder, such subscription is based on a private contractual arrangement, which can, in principle, be cancelled and the monies repaid on the basis of general contract law, such as on the basis of fraud or the transaction clearly being unfair to one of the parties.

A first-instance District Court would likely take between two and three years to adjudicate a prospectus liability case. The defendant may always appeal the first-instance sentence to the Court of Appeals. A final ruling of the Court of Appeals would normally be available within three to four years from the filing of the initial complaint. An appeal to the Supreme Court may also be possible. In the past, the Supreme Court has reviewed some 10 per cent of all appeals made on the basis of rulings of the Court of Appeals. The grounds for the Supreme Court granting a leave are set out in law. Specifically, according to Section 3 of Chapter 30 of the Finnish Procedural Code, the Supreme Court shall always make a case-by-case analysis of the appeals made and grant a leave if (i) the unanimity of Finnish court practice concerning the interpretation of law in similar cases so requires ("precedent rule"); (ii) a procedural or other type of error or mistake has been committed during the trial allowing the verdict to be cancelled; or (iii) there are other material reasons. Generally the Supreme Court only applies the "precedent rule".

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SECURITIES LAW OF FRANCE

Part 1. The regulator and its supervisory and regulatory powers

The supervisory and control authority of securities markets is the *Commission des Opérations en Bourse* (COB) while the body responsible for regulating securities markets is the *Conseil des marchés financiers* (CMF). The regulation of banks is shared by the Comité de la Réglementation Bancaire et Financière (issues professional rules and standards), the Commission Bancaire (ensures that banks comply with mandatory rules and imposes sanctions in case of non-compliance), and the Comité des Etablissements de Crédit et des Entreprises d'Investissement (authorizes the provision of investment services). Insurance companies are supervised by the Commission de Contrôle des Assurances.

The main function of the COB is to control the information made available to the investors and the public and to ensure the smooth running of the markets. The COB is an independent administrative authority comprising a President appointed by Government Decree for a six-year term and the following 9 members: (i) a senior member of the Council of State[92] appointed by the Vice-President of said Council; (ii) a senior member of the *Cour de Cassation*[93] appointed by the President of the *Cour de Cassation*; (iii) a senior member of the *Cour des Comptes*[94] appointed by the President of the *Cour des Comptes*; (iv) a representative of the Central Bank appointed by the Governor of the Central Bank; (v) a member of the Financial Markets Board[95] appointed by the members of said Board; (vi) a member of the National Accounting Board[96] appointed by the members of said Board; (vii) three qualified personalities appointed by the President of the Senate, the President of the House of Representatives and the President of the Economic and Social Council. These nine members are appointed for a four-year term and may be re-appointed once. No member of the COB may be discharged at the will of the appointing authority.

The COB may issue regulations regarding the functioning of the markets under its control or prescribing rules of professional practice applicable to persons or entities involved in offering securities to the public (Art. 621-6 of the Monetary and Financial Code). The COB may lay down rules and regulations which shall be binding upon all actors of the certified stock exchanges. These rules and regulations are set after consultation of the relevant market authorities, submitted to the Secretary of the Treasury for approval and thereafter published in the Official Gazette.

In France, the regulation of the securities market is the public mission of the CMF. It sets and controls implementation of the rules of professional conduct, the general principles for the organization and functioning of the markets as well as the rules applicable to public securities offerings (regulation authority). The CMF has 16 voting members appointed for a four-year term by the Secretary of the Treasury. In addition, the CMF has two non-voting members: a government commissioner and a

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[92] The main function of the Council of State is to furnish legal advice to the French government and to give its comments on proposed laws and decrees. A separate division of the Council of State acts as an administrative tribunal which reviews the legality of decisions of French administrative agencies, including all tax disputes.

[93] The Cour de Cassation stands at the apex of the judicial pyramid and is the supreme court for all private law matters. Its main function is to review decisions of the lower courts. Review by the Cour de Cassation is limited to questions of law.

[94] The Cour des Comptes (National Accounting Office) assists Parliament and the government in supervising implementation of the finance laws.

[95] The Financial Markets Board is a self-regulatory professional body. It comprises 16 members who are appointed for a 4 year term by the Secretary of the Treasury.

[96] The National Accounting Board is an advisory body whose role is to issue an opinion on any and all proposed EU, domestic or international accounting rules and to propose measures, make comments or recommendations on accounting issues. It is governed by a President, six vice-Presidents and a general secretary.

representative of the Central Bank. The President of the CMF is elected by its members. Members of the CMF may not be discharged at the will of the appointing authority, but a member shall be deemed to have automatically resigned if she fails to attend three consecutive meetings.

The COB has the authority to generally command delivery of documents or witness testimony from any person when investigating a violation of the securities laws (Article 5B of Order of 28/09/67 and Article 621-6 of the Monetary and Financial Code).

Part 2. The duty to disclose material information

Every issuer offering securities to the public must publish an offering document with information on the issuer's organization and its financial situation and evolution. A draft of the prospectus shall be submitted to the COB by the issuer's representative. The prospectus must be approved by the COB prior to its distribution. Once approval has been granted, the issuer must publish the draft prospectus on the COB's web site and make it available to the public at the issuer's offices, other places where the subscriptions are received, and the exchange. In addition, the draft prospectus must be delivered to every person to whom the securities have been offered for subscription (Article 6 of Order of 28/09/67 and Article L 412-1 of the Monetary and Financial Code). Therefore, it is prohibited to sell shares to the general public without first delivering a prospectus to potential investors. Once the prospectus is approved, the issuer may freely determine when to place the financial instruments and when they shall be admitted on the market. The placing of financial instruments admitted to trading may be done, in whole or in part, at the same time as they are initially admitted on the market or immediately beforehand, at the issuer's discretion.

In the event the COB refuses to approve a prospectus, the refusal must be grounded, and may not be based only on the regulator's opinion on the quality of the investment. The COB's approval implies neither the approval of the transaction as a sound investment, nor a favorable assessment of the position of the company. When examining an offering document, however, the COB may request that that the issuance be rated by a specialized agency.

The prospectus must include all information required by investors to make an informed assessment of the issuer's financial situation and activities and the rights attached to the shares, as defined by an Instruction by COB (Articles 3 and 4 of COB Regulation 98-01 and Article 7 of COB Regulation 98-08).

Under the Instruction for the Application of Regulation 98-01 of December 2001 (hereinafter referred to as "Instruction 2001") which complements COB rules and regulations 98-01. The prospectus must include the following information:

1. Amount of total remunerations and benefits of any nature received directly or indirectly by each of the issuer's directors and officers (item 6.2.0).
2. Options granted to every director and officer, and shares subscribed or purchased by exercising the options (item 6.2.1), and the total percentage of capital or voting rights held by directors and members of administrative and supervisory bodies (item 3.3.1).
3. Name of shareholders or group of shareholders, as long as known to the issuer, holding directly or indirectly, individually or jointly, 5% or more of the issuer's capital or voting rights (item 3.3.1).
4. Summary information on the issuer's dependency on licenses, industrial, commercial and financial contracts, and investment policies (items 4.2 and 4.4),
5. Nature and relevance of transactions entered between the issuer and its directors, main officers, and shareholders holding voting rights above 5%, which are unusual in nature (item 6.2.2). Moreover, the prospectus must disclose information regarding the nature and scope of regulated agreements. Under French law, "regulated agreements" are agreements between a stock company

and one of its directors, officers or shareholders holding more than 5% of the voting rights, either directly or through an intermediary. The term "intermediary" means any relatives or corporate entities in which said officer, director or shareholder has a majority interest, but does not include employees and other persons under their control. Under this provision, transactions in which directors, officers, or the controlling shareholder have a direct or indirect material interest are generally disclosed in practice.

The prospectus may be signed by the Chairman of the Board of Directors or the Chairman of the Executive Board or the Managing Director as the company's legal representatives certifying that the material information therein is true and complete, and may be subject to criminal, administrative and civil liability in case of false information, and to administrative and civil liability in case of omissions or inaccurate or imprecise information.[97] The accountant[98] also must sign the prospectus and is liable for the financial information included therein.

The distributor ("Introducteur") also signs the prospectus and is required by law to perform a due diligence review of the information contained in the prospectus.[99] The *Introducteur*'s intervention is only mandatory when companies are seeking admission to trading on the *Nouveau Marché*. For all other regulated markets, the intervention of an *Introducteur* is not required. Its role and liability regarding the preparation of the prospectus are transferred to the issuer's directors and officers. The distributor is only required to review the information contained in the part of the prospectus she has prepared and for which she is liable.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

The COB is the only competent body for imposing sanctions in case of breach and violation of its rules and regulations. The courts are competent to hear the recourse against sanctions imposed by the COB. The judiciary may not directly impose sanctions in case of breach and violation of COB rules and regulations, except if said breach or violation also constitutes a criminal offense (e.g. market manipulation, offense of false information, insider trading). In this case, two procedures shall be concurrently initiated: an administrative procedure (before the COB) and a criminal procedure (before the judiciary) against any persons, issuer, its directors or officers, the distributor or the accountant, having committed the offense.

The COB has the power to impose administrative sanctions in case of breach or violation of the COB rules and regulations. Specifically, a responsible party can be subject to administrative sanctions in case

[97] In December 2000, the prospectus was to be signed by the Chairman of the Board of Directors or Chairman of the Executive Board (Instruction of January 1992).

[98] The term "accountant" in this context must be understood as referring to the statutory auditors (i.e. an independent firm or person who verifies and certifies the accounting information of the issuer).

[99] Under French law, the term "distributor" could apply to both the "*Introducteur*" (i.e., a security firm or investment bank who advises the issuer with regards to the Initial Public Offering and helps prepare the prospectus), and to the "*Prestataire de Service d'Investissement*" (i.e., a security firm and investment bank with a special authorization to sell the shares of the issuers to investors). Only the *Introducteur* assists in preparing the prospectus. Regarding the other aspects of an initial public offering, in particular the selling of financial instruments to investors, both the *Introducteur* and the *Prestataire de Service d'investissement* must be involved. For purposes of this chapter, the term distributor refers to an *Introducteur* (unless otherwise noted, or clearly required by the context as when it applies to the distributor who sells the shares to investors).

of: (i) intentional or negligent breach or violation of COB rules and regulations 98-01 (non-compliance with the prospectus requirements as defined in the Instruction of December 2001), and (ii) intentional or negligent breach or violation of COB rules and regulations 98-07 (failure to provide proper information to the public, i.e. intentionally or negligently providing inaccurate, imprecise or deceptive information and/or knowingly distributing such information, which applies also to omissions of material information,).

Sanctions are specified in Articles L 621-14, L 621-15, L 621-18 of the Monetary and Financial Code, which provides for sanctions in case of breach of COB rules and regulations. Pursuant to said Articles, the COB may: (i) impose monetary penalties or sanctions which cannot exceed FRF 10,000,000; (ii) order to stop practices that violate securities laws; (iii) publish the sanction imposed; and (iv) order that corrective documents be issued and published.

These sanctions may be applied in case of false information or omitted material omissions in a prospectus against issuers and directors, and against a distributor when acting as an *Introducteur*[100], and the auditors.

In addition, in case of false or omitted information, the COB may refuse to approve a prospectus (Article 8 of the COB rules and regulations 98-01), and it can also request to the stock exchange the suspension of trading of a financial instrument, should it deem it necessary in order to protect the public savings (Article 42-II 2°of the Law dated 02-07-1996).

3.2 Judicial sanctions

In case of violations to the law or regulations or to protect the interests of investor, the COB may request a judicial order against the violator to obey the law, stop the violation, or remedy its effects (Article L 621-17 of the Monetary and Financial Code). In addition, in case of a violation of COB rules and regulations, the COB may request the President of the Court of First Instance to impose temporary restrictions on the professional activities of persons who committed the violation (i.e. the issuer's directors or officers, the distributor, or the auditors, in a case of a defective prospectus) (Article L 621-13 of the Monetary and Financial Code).

A person who spreads with the public, through any means or media, false or misleading information regarding the situation of an issuer whose shares are traded at a regulated market, or regarding the perspectives of a financial instrument, shall be punished with two years of imprisonment and a fine of FRF 10,000,000 (Article L 465-1 paragraph 4 of the Monetary and Financial Code). This provision may be applicable in case of intentional omissions from a prospectus or intentional false or misleading statements included in a prospectus when such omissions or statements are likely to have an impact on prices. In contrast, false statements or omissions of material information which are unlikely to have an impact on prices can be sanctioned administratively by the COB but do not constitute a criminal offense.

3.3 Stock exchange sanctions

The admission of a financial instrument to trading shall be decided by the stock exchange operator, notwithstanding the COB's right to oppose the offering. The stock exchange operator may decide, under the applicable rules of the exchange, the suspension of the trade of a security, after having informed the issuer, the President of the COB, and the President of the CMF (Article 42-II 2° of the Law dated 02-07-1996). Moreover, the President of the COB may request the Stock Exchange Operator to suspend the

[100] But not against the *Prestataire de Service d'Investissement*. The *Prestataire de Service d'Investissement* sells shares but is not involved in the preparation of the prospectus, and is liable only for the investment services it provides, for which it may be imposed disciplinary sanctions, pecuniary and monetary sanctions, and the revocation of the special authorization.

trade of a security if the rights of investors are threatened (e.g., by a breach of information requirements set forth in COB rules and regulations).

Part 4. Investor's right of restitution for losses

While the duties and obligations regarding the information in a public offer prospectus are described in the securities laws, the right to obtain restitution is established under civil law. Investors may obtain restitution for losses caused by misstatements or omissions in a prospectus through a civil action in torts under Article 1382 of the French Civil Code as well as three other proceedings discussed below. Civil claims may be pursued through a class action suit (Art. L 225-120 Commercial Code).

Article 1382 of the French Civil Code establishes that a person is obligated to give redress for every act of hers which causes injury or loss to another. Under this provision, the following parties are liable for a false or misleading prospectus: (1) the issuing company itself; (2) the issuer's directors and officers; (3) the accountant that certifies the financial and accounting information contained in the prospectus for such information; and (4) the distributor (when acting as an *Introducteur* for the information that she contributed to the prospectus).

The controlling shareholder is not required by law to be involved in the preparation of the prospectus or to sign it. Therefore, investors may not generally "pierce the corporate veil" and go after the assets of the controlling shareholder in case of false or omitted information from the prospectus. However, under Article 1382 of the Civil Code, a controlling shareholder may be held liable if she participates in the preparation of the prospectus and her participation and actions causes the investor's damage. The liability of the controlling shareholder is generally limited to the amount of her contributions to the company. Her liability exceeds the amount of her contributions to the company only when the she interferes in the management of the company (e.g., when she pressures the directors to take a decision prejudicial to the interests of the company that causes a loss to third parties).

Under Article 1382 of the French Civil Code, restitution from the issuers and directors requires that the investor proves that (i) the prospectus omitted material information or contained untrue statements; (ii) the investor suffered a loss by reason of the defective information; (iii) the investor relied on the prospectus for her investment decision; and (iv) the liable party had a positive duty regarding the information included in the prospectus, by establishing that the liable party signed the prospectus or was involved in its preparation, and culpably failed to fulfill such duty. Therefore, under the general civil law rules, the investor must prove negligence, if not intent. In addition to the preceding, restitution from the distributor and the accountant requires that the investor proves that her loss was caused by the information prepared by the liable party respectively.

The securities laws do not provide for specific defenses that the liable parties may resort to in a case of prospectus liability. Therefore, their defense would be limited exclusively to rebutting the plaintiff's allegations, according to the general civil procedure rules.

In addition to Article 1382 of the French Civil Code, restitution for losses may also be available under the following three proceedings. First, under Article L 465-1 of the Monetary and Financial Code, investors can obtain compensation for their losses by joining a criminal proceeding in a case of "false information offense" (i.e., knowingly spreading false or deceptive information among the public regarding the prospect or position of an issuer, which may have an impact on the quotations). Second, under Article L. 621-19 of the Monetary and Financial Code, the COB may grant restitution for losses to investors. Third,

with the consent of all parties, the COB may appoint a conciliator to settle a dispute between an investor and an issuer. During this procedure, each party retains her right to submit the case to the judiciary.

Investors may not request the rescission of the sale or subscription contracts against the issuer since such contracts may not be entered into directly with the issuer. Instead, sales or subscription contracts may only be entered into between investors and *Prestataires de Service d'Investissement* (Articles L 421-6 and L 421-7 of the Monetary and Financial Code).

It may take three years for the Court to render a first-instance decision in a case of restitution for losses incurred by reason of untrue or omitted information in a prospectus. A request for appeal will be admitted as a matter of law, regardless of the merits of the case. The Court of Appeals would render an enforceable decision in approximately two to four years. The main function of the *Cour de Cassation* is to verify that the decisions of the lower courts have been taken in compliance with the law. The *Cour de Cassation* does not re-examine the merits of a case. Appeals to Cassation may only be lodged for lack of jurisdiction, procedural formal defect or irregularity, breach of law, inconsistency of judgments, or abuse of power.

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SECURITIES LAW OF GERMANY

Part 1. The regulator and its supervisory and regulatory powers

There are three different types of regulatory authorities in German securities market, including federal authorities, state authorities and the supervisory bodies of the respective stock exchange. The Federal Securities Supervisory Office ("*Bundesaufsichtsamt für den Wertpapierhandel*"), the main regulator of securities, is an independent federal supervisory and regulatory authority. It regulates securities trading, including insider trading issues, information requirements and conducts rules pursuant to the Securities Trading Act ("*Wertpapierghandelsgesetz*", WpHG). The Stock Exchange Supervisory Agencies ("*Börsenaufsichtsbehörden*") are state authorities, and responsible for the supervision of the stock exchanges. The Trading Supervisory Offices ("*Handelsüberwachungsstellen*") are supervisory bodies of every stock exchange. The main regulators of German banks and insurance companies are the Federal Banking Supervisory Office and the Federal Insurance Supervisory Office, respectively.

Following the adoption of the Law on Integrated Financial Services Supervision on 22 April 2002, the Federal Financial Supervisory Authority *("Bundesanstalt für Finanzdienstleistungsaufsicht"-"BAFin")* was established on 1 May 2002. The functions of the former offices for banking supervision, insurance supervision and securities supervision have been combined in a single state regulator that supervises banks, financial services institutions and insurance undertakings across the entire financial market and comprises all the key functions of consumer protection and solvency supervision.

The President of Germany appoints the President of the Federal Securities Supervisory Office upon recommendation of the Federal Administration. The Federal Administration shall hear the specialized ministries of the states in charge of stock exchanges in making its recommendation. The Stock Exchange Supervisory Agency is the minister of trade and commerce of the respective state, and the appointment of its ministers is governed by state laws. The director of the Trade Supervisory Office is appointed by the "*Boersenrat*", a body of the stock exchange representing the participants of the stock exchange, upon recommendation of the exchange`s management and in consent with the respective Stock Exchange Supervisory Agency. There are no special legal provisions concerning the discharge of members of the Federal Securities Supervisory Office or Stock Exchange Supervisory. Regarding the Trade Supervisory Office, § 1 b BoersG provides that its members (not only the director) cannot be discharged without their consent, except when the Stock Exchange Supervisory Agency approves the discharge.

The Federal Government is authorized to adopt by regulation, with the consent of the Federal Council, provisions on the requirements for admission to trading, the language, content and time of publication of the prospectus, and the admissions procedure[101]. The Federal Securities Trading Supervisory Office is the only agency granted with the power to issue regulations pursuant to various sections of the Federal Securities Trading Act, and its regulations are not subject to the approval of other governmental authorities. The Securities Advisory Board ("*Wertpapierrat*") advises the Federal Securities Trading Supervisory Office regarding the issuance of administrative orders. The Securities Advisory Board consists of representatives of the states and assists the Federal Securities Trading Supervisory Office in its supervisory duties. In all other respects, the Federal Securities Trading Supervisory Office is granted regulatory power. From 1 May 2002 the Federal Financial Supervisory Authority has taken over the tasks and powers of the Federal Securities Supervisory Office.

The Federal Supervisory Office may require the issuer to submit information and documents in so far as it is necessary to monitor compliance with the issuer's obligation to immediately publish any material

[101] Stock Exchange Act *(Börsengesetz)* Sec. 38.

information which comes within his sphere of activity and which is not publicly known[102]. When investigating a violation of insider trading laws, the Federal Supervisory Office has power to require investment services enterprises and enterprises domiciled in Germany and admitted to trading on a German stock exchange to furnish information and submit documents[103]. It may also require listed companies and their shareholders, former shareholders, and investment services enterprises to furnish information and submit documents, in so far as it is necessary for monitoring compliance with the notification and disclosure requirements in the event of changes in the percentage of voting rights in listed companies[104]. In order to monitor compliance with requirements regarding investment services, the Federal Supervisory Office may require investment services enterprises, its employees and proprietors, and the related enterprises to furnish information, submit documents, and conduct examinations without immediate cause[105].

Finally, the Stock Exchange Supervisory Agencies may, to the extent necessary for the fulfillment of its duties and without any specific reason, demand information and the submission of documents from the exchange, the enterprises and exchange traders admitted to participate in exchange trading, and the Official Exchange Brokers (Kursmakler) (together the "trading participants"), and may conduct inspections[106]. Moreover, each exchange shall, in accordance with the requirements laid down by the Stock Exchange Supervisory Agency, establish and operate a Trading Supervisory Office (*Handelsüberwachungsstelle*) as an exchange body to monitor trading on the exchange and the settlement of exchange transactions[107].

Part 2. The duty to disclose material information

According to the Securities Sales Prospectus Act[108], the offeror shall publish a prospectus, known as a "sales prospectus," for securities which are offered to the public in Germany for the first time and are not admitted to trading on a German stock exchange. As from 1 July 2002 such prospectus requirement applies for securities which are not offered to the public for the first time, unless a prospectus relating to these securities has been published in the past. Meanwhile, the Stock Exchange Act[109] requires the publication of a listing prospectus for securities which shall be admitted to a German stock exchange. The sales prospectus has to be published at least one business day before the public offering which means before sales may be effected[110]. Delivery of the prospectus to potential investors is, however, not expressly required. Trading of listed shares can begin no earlier than three days after the publication of the prospectus. Nevertheless, during those three days the securities may be offered and actual sales may be committed or agreed.

Prospectus disclosure requirements of a sales prospectus are enumerated in the Sales Prospectus Ordinance[111], and in the Stock Exchange Admission Regulation[112] for listing prospectuses. A listing

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[102] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 15(5).
[103] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 16(2) & (3).
[104] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 29(1).
[105] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 35(1).
[106] Stock Exchange Act *(Börsengesetz)* Sec. 1a.
[107] Stock Exchange Act *(Börsengesetz)* Sec. 1b.
[108] Securities Sales Prospectus Act *(Verkaufsprospektgesetz)* Sec. 1.
[109] Stock Exchange Act *(Boersengesetz)* Sec. 36(3)2.
[110] Securities Sales Prospectus Act (Verkaufsprospektgesetz) Sec. 9(1).
[111] Sales Prospektus Ordinance (Verkaufsprospekt-Verordnung).
[112] Stock Exchange Admission Regulation (Börsenzulassungsverordnung).

prospectus must disclose any factual and legal circumstance which is material for the assessment of the securities, including the following:

1. The total compensation (salaries, profit-sharing bonuses, expense allowances, insurance payments, commissions and any kind of fringe benefits) granted to the members of the management and supervisory bodies for the last financial year concluded separately for each body[113].
2. To the extent known to the issuer, the name of the shareholders who own, directly or indiretly, at least five per cent of the shares (or who have the right to exercise directly or indirectly at least five percent of the voting rights), and the persons or companies who, directly or indirectly, are in a position to exercise a determining influence on the issuer[114]. Note that any person whose shareholding in a listed company reaches, exceeds or moves below 5 per cent, 10 per cent, 25 per cent, 50 per cent or 75 per cent of the voting rights by purchase, sale or by any other means is obliged to immediately, and at the latest within seven calendar days, notify the company and the Federal Securities Supervisory Office in writing of having reached, exceeded or moved below the above mentioned thresholds and of the size of his percentage of the voting rights and is further obliged to indicate his address and the day on which he has reached, exceeded or moved below the respective threshold[115]. The company is required to publish the notification received immediately, at the latest within nine calendar days of its receipt, in the German language in at least one supra-regional official stock exchange gazette (*überregionales Börsenpflichtblatt*)[116].
3. The aggregate number of shares owned by the members of the management and the supervisory bodies of issuers, although disclosure of indirect ownership is not explicitly required[117].
4. A description of extraordinary transactions, outside of the issuer's business or unusual as to form or subject, with members of the management and the supervisory bodies[118].
5. Generally the business of the issuer has to be described, including extraordinary events which influenced the course of the business in the past, the issuer's dependence on certain agreements of material importance to the business and its profitability, and information about investments[119].

The Sales Prospectus Ordinance stipulates that the sales prospectus has to be signed by the offeror.

A listing prospectus issued under the Stock Exchange Admission Regulation has to be signed by both the issuer and a financial institution admitted to participate in the trading on the relevant stock exchange. According to Section 3 of the Sales Prospectus Ordinance and Section 14 of the Stock Exchange Admission Ordinance, both prospectuses shall identify those who are responsible for its content, and shall contain a statement made by such persons or companies that to their knowledge the information is correct and no material circumstances have been omitted. In case of a listing prospectus the signing financial institution assumes civil responsibility independently from its role as distributor. In fact, the distributing underwriters regularly sign the prospectus. Although the distributing underwriters are not required by law

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[113] Stock Exchange Admission Regulation, Sec. 28(2)2.

[114] Stock Exchange Admission Regulation, Sec. 19(2)5. Note that this provision is unclear regarding the requirement to disclose beneficial ownership and there is no official statement as to its interpretation by the authorities. In practice beneficial ownership is regularly not disclosed.

[115] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 21(1) and 22.

[116] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 25(1).

[117] Stock Exchange Admission Regulation, Sec. 28(2)4.

[118] Stock Exchange Admission Regulation, Sec. 28(2)5. According to the new Going Public Principles issued by the Frankfurt Stock Exchange on April 24, 2002 the prospectus shall disclose transactions with related parties, which also include relatives of the members of the management and the supervisory bodies and also entities in which members of such bodies hold an interest of more than five per cent or are part of the management. In addition to Sec. 28(2)5 of the Stock Exchange Admission Regulation there is no statutory requirement to describe transactions in which the controlling shareholder, directors, or officers have an indirect material interest.

[119] Stock Exchange Admission Regulation, Sec. 20.

to perform a due diligence review of the information contained in the prospectus, they are likely to perform one as a matter of commercial practice.

The distributor may in principle be held liable for misrepresentations made in connection with sale of shares and that were not included in the prospectus, depending on whether those representations are written or oral, and whether there is a contractual relationship between the distributor and the investor (e.g. financial advice rendered by the distributor).

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

In case of an offering of securities, the Federal Securities Supervisory Office shall prohibit the publication of the sales prospectus or the public offer of securities, if the sales prospectus does not contain the information required[120]. In case of a listing of securities, the failure to meet disclosure requirements will simply lead the Board of Admissions (*Zulassungsstelle*) of the respective Stock Exchange to deny approval of the listing prospectus and consequently to deny admission. Furthermore the publication of a prospectus which has not been approved, where approval is necessary, constitutes an administrative offence and may be punished by an administrative fine.

There are basically no other relevant administrative sanctions that may be imposed by the Federal Securities Supervisory Office or the Stock Exchange Supervisory Authority on the issuer, its directors and officers, the distributor, or the auditors, by reason of a defective prospectus in a public offer.

3.2 Judicial sanctions

Under the Criminal Code[121], any person (such as the issuer's directors, officers, or the accountants auditing the issuer's financial statements) who willfully makes incorrect favorable statements or conceals unfavorable information in a prospectus for a sale or subscription of securities, which is relevant under the circumstances for an investment decision, shall be punished by fines and imprisonment[122]. Distributors do not sign the prospectus and are criminally liable only if they knew about the false or omitted information.

Moreover, if someone is convicted for a violation of his professional duties, the court may prohibit her from engaging, temporarily or permanently, in the profession or trade[123].

3.3 Stock exchange sanctions

If it is considered necessary for the protection of the public and the proper conduct of trading in the stock exchange, its Board of Management (*Geschäftsführung*) may suspend or terminate the official quotation and revoke the admission to listing of admitted securities[124]. Furthermore, if the issuer of the admitted securities does not meet its obligations arising from the admission, the Board of Admissions (*Zulassungsstelle)* may publish this fact by an exchange notification. The Board of Admissions may revoke the admission to the Official Market if the issuer, after an appropriate period set for compliance, still has failed to fulfill these obligations[125].

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[120] Sales Prospectus Act, Sec. 8a and 8b.
[121] Strafgesetzbuch (StGB).
[122] Criminal Code Sec. 264a.
[123] Criminal Code Sect. 70.
[124] Stock Exchange Act Sec. 43; since July 1, 2002 this provision is contained in Sec. 38 of the Stock Exchange Act.
[125] Stock Exchange Act Sec. 44d; since July 1, 2002 this provision is contained in Sec. 43 of the Stock Exchange Act.

Part 4. Investor's right of restitution for losses

Investors may only obtain judicial compensation in case of incorrect or incomplete information included in a prospectus through a procedure before a civil court.[126] A class action is not available for this purpose.

Section 45(1) of the Stock Exchange Act provides that any purchaser of securities may claim the reimbursement of the purchase price and the usual costs incurred if material information in the listing prospectus is incorrect or incomplete. The parties liable for the contents of the prospectus are those who have assumed responsibility for the prospectus and those who initiated the issuance of the prospectus. Specifically, the issuing company and the financial institution which applies for the listing of the issuer and participates in the distribution of the shares have to sign the listing prospectus and are both liable for the content of the prospectus. By extending the liability to persons who initiated the issuance of the prospectus, the legislator intends to cover those parties which have an economic interest in the listing and therefore in the issuance of the prospectus, which under specific circumstances may be the controlling shareholder of the issuer. In contrast, the issuer's directors and officers, the auditors, and lawyers generally do not assume responsibility for the prospectus and do not initiate the issuance of the prospectus. In the context of a typical IPO, the issuer's controlling shareholders generally do not assume responsibility for the prospectus and do not initiate the issuance of the prospectus, unless they are also selling shares within the IPO.

In order to obtain the remedy described in Section 45(1) of the Stock Exchange Act, the plaintiff needs to prove that: (i) the prospectus was incorrect or incomplete in a material aspect; and (ii) she has acquired the respective securities after the publication of the prospectus. Section 46(2) of the Stock Exchange Act provides that the defendant may avoid liability by proving any of the following: (i) she was not aware of the incorrectness or incompleteness of the information in the prospectus and that such lack of awareness was not the result of gross negligence[127]; (ii) the plaintiff did not acquire the securities relying on the prospectus; (iii) the incorrectness or incompleteness of the prospectus is related to a fact which did not influence the stock price of the security; (iv) the plaintiff knew the incorrectness or incompleteness of the prospectus; or (v) a supplement to the prospectus was published before the acquisition of the securities was completed which would render the prospectus correct and complete.

Section 13 of the Sales Prospectus Act establishes that if material information in a offering prospectus is incorrect or incomplete, the provisions on listing prospectus liability from the Stock Exchange Act apply mutatis mutandis.

As explained above, under securities laws there is no civil liability against the auditing firm or the parties who did not assume responsibility for the prospectus. However, these parties may be held liable according to general civil law principles (e.g., tort). Restitution for damages caused by a defective prospectus may be claimed under Sections 823(2) and 826 of the German Civil Code against the issuer's officers and directors, and its auditors or lawyers, if they were aware that the prospectus was inaccurate or incomplete. Section 823(2) establishes a general civil liability of the person which causes damage to another by means of a criminal offence like fraud pursuant to Section 266 or investment fraud pursuant to Section 264a of the German Criminal Code (see above *Judicial sanctions)*. Section 826 of the German Civil Code establishes a liability of the person which causes damage to another by acting in the intent to cause damage in violation of public policy. In order to obtain restitution from a party that did not assume

[126] Investors are not entitled by law to receive restitution of losses during a trial before a criminal judge, or through an administrative procedure.

[127] The scope of "gross negligence" is basically similar to the one developed for the concept of recklessness under the US prospectus liability regime.

responsibility for the prospectus, an investor would have to prove that: (i) the defendant knew that the prospectus contained inaccurate or incomplete information or alternatively that the defendant acted with intent to cause damage to the investor in violation of public policy; and (ii) that the behavior of the defendant caused the investor's losses.

These general provisions apply also to the issuer and the distributor; since the investor would have to prove each precondition of the liability mentioned above, including the knowledge and the intent of the defendant, in practice investor claims are very rarely based on these sources of liability.

In a civil case for restitution for damages due to prospectus liability as described in the Stock Exchange Act and in the Securities Sales Prospectus Act, a first-instance decision may be available within one year. This decision may in principle be appealed to the Higher Regional Court (*Oberlandesgericht*), and further to the Federal Supreme Court (*Bundesgerichtshof).* In the worst case, it may take up to four more years to get a final sentence if the defendant resorts to every procedural defense available under the law, including appeals. However, the Higher Regional Court may reject an appeal against a decision of the court of first instance if such appeal obviously has no merit. Further, if an appellate decision is rendered by the Higher Regional Court, the court may exclude a further appeal to the Federal Supreme Court as part of such judgment. On motion by a party, the Federal Supreme Court then only may accept an appeal if it deems the legal issues at hand to be of fundamental importance, which is very rarely the case. Therefore, if there is no valid defense by defendant, or if the case does not have any merit at all, a final decision may be reached in less than two years.

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SECURITIES LAW OF GREECE

Part 1. The regulator and its supervisory and regulatory powers

The official regulator of the Greek securities market is the Capital Market Commission (CMC). Banks and insurance companies are regulated and supervised by the Bank of Greece (BoG) and the Minister of Development, respectively.

The Board of Directors of the CMC consists of 9 members, who are subject to approval and confirmation by several authorities. The Board's President and 2 vice-Presidents are directly appointed by the Minister of Economy and Finance, and their appointment must be confirmed by Parliament according to paragraphs 3, 4 and 5 of the Parliament Regulation. The remaining 6 members are chosen out of an 18 person candidate list. The Bank of Greece (i.e. the Central Bank), the Board of Directors of the Athens Stock Exchange, the Institutional Investors Union, the Greek Industries Board, the Athens Stock

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[128] Stock Exchange Act *(Börsengesetz)* Sec. 38.
[129] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 15(5).
[130] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 16(2) & (3).
[131] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 29(1).
[132] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 35(1).
[133] Stock Exchange Act *(Börsengesetz)* Sec. 1a.
[134] Stock Exchange Act *(Börsengesetz)* Sec. 1b.
[135] Securities Sales Prospectus Act *(Verkaufsprospektgesetz)* Sec. 1.
[136] Stock Exchange Act *(Boersengesetz)* Sec. 36(3)2.
[137] Securities Sales Prospectus Act (Verkaufsprospektgesetz) Sec. 9(1).
[138] Sales Prospektus Ordinance (Verkaufsprospekt-Verordnung).
[139] Stock Exchange Admission Regulation (Börsenzulassungsverordnung).
[140] Stock Exchange Admission Regulation, Sec. 28(2)2.
[141] Stock Exchange Admission Regulation, Sec. 19(2)5. Note that this provision is unclear regarding the requirement to disclose beneficial ownership and there is no official statement as to its interpretation by the authorities. In practice beneficial ownership is regularly not disclosed.
[142] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 21(1) and 22.
[143] Securities Trading Act (Wertpapierhandelsgesetz) Sec. 25(1).
[144] Stock Exchange Admission Regulation, Sec. 28(2)4.
[145] Stock Exchange Admission Regulation, Sec. 28(2)5. According to the new Going Public Principles issued by the Frankfurt Stock Exchange on April 24, 2002 the prospectus shall disclose transactions with related parties, which also include relatives of the members of the management and the supervisory bodies and also entities in which members of such bodies hold an interest of more than five per cent or are part of the management. In addition to Sec. 28(2)5 of the Stock Exchange Admission Regulation there is no statutory requirement to describe transactions in which the controlling shareholder, directors, or officers have an indirect material interest.
[146] Stock Exchange Admission Regulation, Sec. 20.
[147] Sales Prospectus Act, Sec. 8a and 8b.
[148] Strafgesetzbuch (StGB).
[149] Criminal Code Sec. 264a.
[150] Criminal Code Sect. 70.
[151] Stock Exchange Act Sec. 43; since July 1, 2002 this provision is contained in Sec. 38 of the Stock Exchange Act.
[152] Stock Exchange Act Sec. 44d; since July 1, 2002 this provision is contained in Sec. 43 of the Stock Exchange Act.
[153] Investors are not entitled by law to receive restitution of losses during a trial before a criminal judge, or through an administrative procedure.

[154] The scope of "gross negligence" is basically similar to the one developed for the concept of recklessness under the US prospectus liability regime.

Exchange Members Union, and the Greek Banks Federation all propose three members each to this list. The Minister of Economy and Finance then appoints 1 person out of the three candidates proposed by each of the above bodies. The Minister of Economy and Finance is entitled to discharge a member of the CMC only in the event that such member commit any serious disciplinary offence or be convicted for any criminal offence inconsistent with the exercise on his part of public office.

The CMC is, besides the BoG (a company limited by shares and independent by operation of law), the foremost securities market supervisory and regulatory authority in Greece (albeit itself being subject to Ministry of Economy and Finance supervision). The CMC issues prudential rules and rules of conduct pertaining to capital market-related issues, approves public offerings, issues and revokes licenses for the operation of brokerage, investment services and mutual fund management firms, supervises the strict compliance of listed companies with securities laws, strikes out from the relevant register such listed securities as it deems fit, and oversees in their entirety the operation of domestic capital markets, imposing, wherever necessary, the requisite disciplinary and administrative sanctions. By way of remnant of the previous regulatory approach, when the relevant legal framework was exchange-driven and not, as currently, investment-services-driven, a host of provisions subsist under the operation of the Athens Stock Exchange (the "ASE") and the Athens Derivatives Exchange (the "ADEX") (including the supervision of Members of the Exchange and listed companies) are subject to the regulation and supervision of the Board of Directors of the ASE and the ADEX. It follows that in certain, albeit incremental, respects, there is some degree of overlap in terms of regulatory and supervisory authority between the CMC and the aforementioned authorities as well as with the Minister of Economy and Finance.

The CMC advises the Ministry of National Economy and Finance with regard to the introduction and implementation of legislation in the relevant context. For example, following the recommendation of the CMC, the regulation of every new securities exchange is drawn up (Law 1806 - Article 19). Similarly, the Minister of National Economy, after the suggestion of the BoG and the Board of Directors of the CMC, regulates the underwriting business (Law 2651/1998, Article 3). However, the obligations of the issuers of securities listed on the Stock Exchange are established by Presidential Decree. Finally, the Minister of Finance may issue Rules of Conduct for Investment Services Firms (Law 2396/1996, Article 7). The CMC may grant exemptions to the mandatory content of the prospectus to be published. The CMC is furthermore authorized to regulate some aspects of securities exchanges, e.g. to issue rules for market making in the ASE. The CMC may also issue "codes of best conduct" (e.g., The Code of Conduct for Companies Listed on the Athens Stock Exchange and Connected Persons) whose statues are compulsory for relevant regulated entities.

The CMC determines when to undertake regular or special inspections, how and by what organizations these inspections should be undertaken, and it obligates the physical or legal persons being inspected to submit regularly or specially, to the CMC or to the organizations undertaking the inspection, all the necessary documents for the inspection information. Listed firms, financial firms, mutual fund companies, and every other physical or legal person that participates in any way in the securities market, are obligated to provide to the CMC documents and data in their possession, which are necessary to the Commission to carry out its jurisdictions (Law 1969/1991, Art.76). In contrast, there is no provision granting the CMC power to subpoena witnesses.

Part 2. The duty to disclose material information

A prospectus approved by the CMC and the Board of Directors of the ASE must be distributed before a public offering of securities on the ASE. Access to copies the prospectus must be assured to investors but prior mandatory delivery of the prospectus to potential investors is not expressly required. The CMC and the Board of Directors of the ASE are entitled to proceed beyond a mere formal evaluation of whether the prospectus complies with the formal disclosure requirements set out in the relevant statutes, extending their supervisory control to the essence of the information contained therein.

Initial public offers last 3 to 4 working days and, upon conclusion thereof, the number of shares to be acquired by each investor is finalized. Furthermore, by decision of the CMC, a "book-building" procedure of similar duration is provided. IPOs have to take place at the latest three (3) months after the approval of the public offering by the CMC (ASE – Decision 23/28.6.1999). The prospectus has to have been published within 45 days prior to the date on which official listing becomes effective. According to a Decision of the ASE, official listing takes place 15 days after the listing approval by the Board of Directors of the ASE. There is no mandatory "waiting period" when the information in the prospectus is available to the public but sales cannot be committed or agreed.

Appendix A of Presidential Decree 348/1985 provides that the following information, *inter alia*, must be included in the offering document:

1. Remuneration and in-kind benefits granted to the members of the directing, managing, and supervising bodies as an aggregate for each category (paragraph 6.2.0).
2. Name and voting rights of the natural or legal persons which, separately or together, exercise or may exercise control over the issuer (Article 3.2.6). Similarly, name of the shareholders owning directly or indirectly 20% of the capital or more (Article 3.2.7). This provision includes also shares beneficially owned by large shareholders. In fact, according to a Decision of the ASE, all shareholders holding more than 2% of the share capital have to be notified to the ASE. Furthermore, according to Article 5.1 and 5.2 of Presidential Decree 51/1992, any natural person or legal person of public or private law, which, directly or through a third party, acquires or disposes of a holding in a company governed by Greek law with shares listed on the ASE or on one or more stock exchanges located or operating in an EU Member State must inform and make a formal declaration to the issuing company and to the competent supervisory authority (i.e. Board of Directors of ASE) as to the percentage of voting rights and percentage of the share capital held in the company if, as a result of the acquisition or disposal, the proportion of voting rights held by such person or legal entity reaches, exceeds or falls below the thresholds of 5%, 10%, 20%, 1/3, 50% and 2/3.
3. The total number of issuer shares held by the members of the directing, managing, and supervising bodies (paragraph 6.2.1). This provision is construed and applied as requiring each director and relevant officer to disclose their number of shares they hold, including any shares that they vicariously hold through companies which they or any of their close relatives may control.
4. Main activities of the issuer, including extraordinary events which have affected the issuer. Summary information relating to any dependence of the issuer on patents, exploitation licenses, industrial, commercial or economic agreements, or new methods of construction, provided these factors have a fundamental significance for the activity or the efficiency of the issuer. Investment policy, including description, with figures, of the main investments made in other undertakings over the past three financial years and the months already elapsed of the current financial year. Data relating to the research and development policy of new products and methods during the last three financial years, if these data are significant. Every litigation or arbitration, which may have or had, in the recent past, significant consequences on the economic situation of the issuer. Every cessation of the activities of the issuer, which may have or had in the recent past significant consequences on its economic situation.

5. The description of transactions of the issuer in which its directors, managing and/or supervision officers have an interest, as long as the said transactions are "out of the ordinary" because of their nature or terms, such as it would be the case in the purchases beyond the issuer's ordinary field of business activities (paragraph 6.2.2). Following a firmly established business practice, all major transactions involving directors, officers and controlling shareholders are, as a matter of course, required to be disclosed, including transactions involving legal entities controlled by the directors, officers or controlling shareholders, as well as natural persons within their sphere of influence (such as close relatives, spouses and any persons acting in their own name but for the account of the director, officer, or controlling shareholder).

The prospectus must be signed by the issuer of the securities, and by the (leading) underwriter of the issuer (Presidential Decree 350/1985, Article 3A). The distributor assumes civil liability for any damage sustained by investors in case the information in the prospectus is inaccurate or incomplete, but there is no express requirement to perform a due diligence review of the information in the prospectus (Article 3A). The distributor can be discharged of any liability upon proof that she has performed a due diligence review of the information in the prospectus. Therefore, as a matter of business practice, distributors are likely to perform a due diligence review of the contents of the offering document. Legal and financial due diligence have to take place under the supervision of the distributor through lawyers and certified accountants independent from the issuer. When advertising a public offer of securities, the distributor may not make any type of unfounded representations that might injure potential investors' interests, regardless of whether those representations are not included in the prospectus (Distributors (Underwriters) Regulations, Article 7).

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

If the CMC determines, after the approval of the prospectus, that it contains false statements or omits material information, it can revoke the approval, or subject the revocation to the amendment of the prospectus.

The CMC can impose a fine of up to 1,470,000 Euros to any natural persons or legal entities who publish inaccurate or deceptive information that can have an impact on the price of securities listed in an organized Stock Exchange Market (Art.72, para.2 of Law 1969/1991). In case of a defective prospectus, this provision applies to the issuer, its directors and officers, the accounting firm involved in the preparation of the financial information, and the underwriter can be administratively liable. The provision also applies to intermediaries who had knowledge or ought to have had knowledge that there was an effort, through the arranged exchanges, to distribute false inaccurate information, or contributed in any additional way to facilitating these exchanges. Additionally, the CMC may impose fines of up to 300,000 Euros (or 600,000 Euros in case of recurrence), to any natural person or legal entities who violates securities laws or any regulatory decisions of the Minister of National Economy or the CMC (Art.76, para.10 of Law 1969/1991).

Where the distributor has been negligent in the preparation of the offering document, the following administrative sanctions may be imposed upon them:

a) Her license may be revoked by the CMC (as long as the distributor is either a Brokerage Firm or an Investment Services Firm, but <u>not</u> if it is a bank), upon proof that her negligence is the result of a marked lack of any of the fundamental pre-conditions for their continued operation as an investment services firm (Art. 4 para. 5 of Law 1806/1988). This sanction may only encompass revocation of their licence in respect of the provision of underwriting services.

b) Fines of up to 295,000 Euros may be imposed by decision of either the Bank of Greece, where the infringing party is a bank, or the CMC, where the infringing party is not a bank (Art.3, para.2 of Law 2651/1988). The fine can be of up to 2,935,000 Euros under of the Distributors (Underwriters) Regulations (Part C', Art. 9.1.b), if the CMC establishes that any of the provisions of those regulations have been breached. The CMC may suspend or even discontinue the underwriting process should it consider that the breach of the securities laws would likely have an effect on the price of the securities.

c) Recommendations may be made to the underwriters, requesting them to comply with their duties under the Distributors (Underwriters) Regulations and/or undertake such action as will be dictated upon them and setting a time limit for their compliance (Art. 9, Distributors (Underwriters) Regulations). These recommendations have legal force and if ignored the CMC may not grant approval of the IPO or revoke an already granted approval.

3.2 Judicial sanctions

Intentionally including or publishing false or misleading information in a prospectus for a public offer of shares may constitute a crime under the general provision of fraud from the Penal Code as well as other legal provisions. Therefore, a criminal court may sanction with imprisonment and a pecuniary penalty any person who: (1) causes economic loss to another by persuading a third party to an action or omission through the representation of false facts, or by illegally concealing facts which she knows to be true, with the intent of appropriating of an illegitimate profit for herself or for another (Article 386 of the Penal Code; (2) knowingly divulges misleading or inaccurate information that can have an impact on the price of securities listed on the stock exchange (Article 72, para.1 of Law 1969/1991); (3) for the purpose of obtaining an illegitimate benefit or attracting investor interest, intentionally mislead the public and impact on the price of shares by making inaccurate representations through a prospectus that violates the provisions of securities legislation or the Stock Exchange Regulation (Article 34 of Law 3632/1928); (4) acting as members of the board of directors, officers and employees of legal entities, stock exchange representatives and brokers, knowingly publish false or inaccurate information concerning their undertaking (Article 76, para 8 of Law 1969/1991); and (5) acting as member of the Board of Directors or managing director of any company, knowingly resorted to false representations to the public via publications or written announcements (as in the case of a prospectus) for the purpose of instigating the public subscription of company shares having an impact on their stock exchange price (Article 56 of Law 2190/1920).

Therefore, the issuer's directors, officers, distributors, auditors, and lawyers can be criminally liable as long as they are intentionally involved in the preparation or use of a defective prospectus in a public offer of securities.

Art.67 of the Penal Code provides for the temporary prohibition and/or suspension of the relevant license for the exercise a regulated profession where the interested party has been guilty of gross negligence in the exercise of his functions and where a prison sentence of at least three months has been imposed by the court.

3.3 Stock exchange sanctions

The President of the Directing Committee of the Athens Stock Exchange is empowered to suspend the trading of a security when there is substantial risk to the functioning of the market or the protection of investors (Presidential Decree 350/1985, Art. 11, para.1). Such decision can be taken in case of false or misleading information in a prospectus as long as the exchange finds it can have such effect. The CMC, pursuant to a decision of the Athens Stock Exchange on this regard, can decide to delist a security from the Athens Stock Exchange, after an application by the offering company supported by a decision of the

General Assembly. The CMC can establish other conditions and procedures for the delisting of securities from the Athens Stock Exchange (Presidential Decree 350/1985, Art. 11, para.1 and 3).

Part 4. Investor's right of restitution for losses

Investors can obtain restitution for losses incurred by reason of a defective prospectus through a judicial proceeding before a civil court. A class action suit is not available for this purpose.

Article 3A of Presidential Decree 350/1985 firmly establishes the investor's right to restitution against the issuer and the distributor, in the event that the investor suffers losses due to false information or the omission of material, relevant, or essential information in the offering document. Furthermore, Article 3, Paragraph 2 of the Distributors (Underwriters) Regulations states that: "Underwriters ought to ensure that the offering document has been prepared in conformity with the law, particularly with regard to the accuracy, clarity, and up-to-date nature of its contents". Although this provision *stricto sensu* only imposes upon underwriters an obligation under administrative law, it is also construed as generating civil liability.

Greek law collectively employs the term "underwriter" for both the underwriter, as well as for the "distributor"[155], thereby equating their respective liabilities for the contents of the offering document. When an underwriter (in the strict sense of the term) and a distributor both participate in a public offer, the law leaves room for a contractual arrangement with respect to the allocation of responsibility between them. Nevertheless, both parties are jointly liable before the investors. The distributor is liable for the contents of the prospectus if the offering document refers to her as an underwriter. On the other hand, a sub-underwriter is not liable for the content of the prospectus if she operates under that capacity and the prospectus does not refer to her as an underwriter.

With respect to the distributor's liability, the investor bears the burden of establishing: a) that he has sustained damage, and b) a proximate connection between the distributor's alleged fault and the damage. The investor does not need prove fault: a presumption of fault operates against the distributor. The distributor bears the burden of reversing that presumption of fault by showing, *inter alia*, that she assessed the accuracy and completeness of the offering document, and priced the offering based on independent due-diligence reviews of the legal, accounting, and economic affairs of the issuer. Such reviews must be carried out by lawyers and certified accountants independent from the issuer.

Since the issuer and the distributor are jointly liable under Article 3A of Presidential Decree 350/1985, the same presumption of fault also operates against the issuer. However, the issuer enjoys no special defense under securities law, and to avoid liability she needs to prove that she did not act negligently. In practice, it is easier to establish the issuer's fault regarding material omissions or misrepresentations in the offering document because the information in the prospectus refers to the issuer. In addition, the issuer is also liable under general civil law contractual provisions, such as those included in the Civil Code (see below).

Unlike in the case of the issuer and the distributor, no *lex specialis* provision of securities law provides for the liability of the issuer's directors, officers, accountants, or other parties. As a result, investors have to rely on the *lex generalis* (general rule) provisions of Articles 914 and 919 of the Civil Code as grounds for tort claims for damages incurred due to their reliance on an inaccurate or incomplete prospectus. According to the said provisions, whoever "unlawfully and culpably", or "intentionally in a manner which

[155] Art. 26 par. 1 of Law 1806/1988 and to art. 1 par. α΄ of the Distributors' (Underwriters) Regulations.

violates the commands of morality", causes damage to another, is bound to make reparation to the injured party for any damage thus caused. The Civil Code thus follows the traditional view of delict, liability being founded on the existence of a perceived duty of care *simpliciter* coupled with an act or omission willfully or negligently committed by a person, whether unlawful or contravening *bonos mores (good morals)*.

Pursuant to the fundamental civil law principles (e.g., Article 71 of the Civil Code) underlying securities laws[156], the liability of legal entities (such as the issuer) *vis-à-vis* investors is to be judged based on the level of professional diligence and due care of the natural persons exercising control over those entities (whether in the capacity of company's directors or officers). The natural persons exercising control over the issuer have a duty to consider the interests (present and future) of the shareholders, when acting on behalf of the company. In the event that they should fail to attain the level of professional diligence required in their respective scope of authority, their acts or omissions are deemed to be those of the legal entity they manage. As a result, directors and officers, alongside the company, would be deemed jointly and severally liable for the full amount of the damages thus incurred. The negligent drafting of the offering document and the omission of material information would be instances of a breach of their duty of diligence and care, giving rise to liability for damages in respect thereof.

The accounting firm involved in the audit of the financial statement included in the prospects is only tortiously liable against investors. In order to recover damages, investors must show that the accountant did not conduct her professional duties with the level of diligence called for by law or commercial practice. The investor must also show that she suffered losses, and that her losses were caused by the accountant's misconduct.

In the case of a controlling shareholder who is not involved in the management of the issuing company (in which case his liability would be that of a director), he would not be civilly liable for the information included in the prospectus. Furthermore, pursuant to the "corporate autonomy" principle of corporate law, the assets of legal entities are separate from those of their members (in our case, those of the shareholders). Legal entities are liable for their own debts, and their members do not assume, as a matter of principle, any of the company's obligations. In exceptional circumstances, domestic case law (High Court and Appeal Court decisions) has recognized shareholder's liability to the company's creditors for the acts or omissions of the company. Such liability has, for instance, been deemed to exist where the controlling shareholder's personal estate is most intimately intermingled with that of the corporation, or where the entire share capital is held by the shareholder. However, no case law or legal theory supports the proposition that investors could go after the assets of the controlling shareholders in a case of losses due to a defective prospectus.

Liability in damages may alternatively be founded upon Article 386 of the Penal Code, in the event that the elements of fraud (material misrepresentation of facts, proprietary damage to another, intent to unlawfully enrich oneself) can be clearly established against any of the parties discussed above.

A civil case for restitution for damages would take approximately two years to reach first instance judgment. Any party may exercise the right to an appeal before the Court of Appeal (on both factual and legal grounds) and before the Supreme Court (on legal grounds alone). An appeal would likely be granted in both cases, even if the appellant does not have a valid defense. An appeal before the Court of Appeal would take between one and two years, and a similar time would be required to obtain a Supreme Court ruling. Therefore, it is likely that the time required for reaching a firm and final judicial resolution would be at least five years from the date of filing of the initial complaint. Note that the ruling of the Court Appeal may be enforced even if an appeal to the Supreme Court is pending.

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[156] See Presidential Decrees 348 & 350/1985, the Distributors (Underwriters) Regulations, etc.

This chapter was prepared with the help of:

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SECURITIES LAW OF HONG KONG

Part 1. The regulator and its supervisory and regulatory powers

The Securities and Futures Commission is the main regulator of Hong Kong's securities market. Primary regulatory and supervisory responsibilities of banking and insurance companies are entrusted to the Hong Kong Monetary Authority and the Office of the Insurance Commissioner, respectively.

The Chairman of the Commission is appointed by the Chief Executive, the highest political official of Hong Kong. The remainder of the Commission's members (an uneven number not smaller than 7) are appointed by the Financial Secretary. The members of the Commission can be discharged before the expiry of their terms if the appointing authority finds it desirable for the Commission's objectives. Nonetheless, half of the members of the Commission appointed as executive directors have employment contracts in practice. The legal consequence of summarily discharging the appointment of an Executive Director of the SFC under the Securities and Futures Ordinance is that there is a fundamental breach of the employment contract, which terminates the contract and entitles the executive director to claim damages.[157]

Both the regulation and the supervision of the securities market are generally assigned only to the Commission. The Securities and Futures Commission Ordinance ("SFCO"), however, enables the Chief Executive to give to the Commission written directions regarding the performance of any of its functions. The Commission may make rules regarding the listing of securities on the exchange (in which case they have to be consulted with the exchange and approved by the Chief Executive), and on other matters as prescribed by the law (Section 14 of the Securities Ordinance, or "SO"). Note that prospectus disclosure requirements are set out in the Third Schedule of the Company Ordinance and may be amended by the Chief Executive in Council (Section 38 of the Company Ordinance). Rules made by the Commission are considered subsidiary legislation and are subject to a review process by the legislature who may amend the rules, the effect of the amendment taking effect from the time the amendment is made.

Under the SFCO, the SO, and the Commodities Trading Ordinance ("CTO"), the Commission has ample powers of investigation. Should the Commission have reason to believe that a securities offence may have been committed, the Commission may appoint one or more investigators, who may command the delivery of any record or document which may be relevant to the investigation, or require any person, reasonably believed to have relevant information, to attend before the investigator and answer the questions raised by the him (Part V of the SFCO).

Part 2. The duty to disclose material information

There are two types of offering documents: the prospectus required by the Companies Ordinance and the listing document required by the Listing Rules of the Stock Exchange (the "Listing Rules"). Generally, it is unlawful to issue to the public any form of application for shares unless the form is accompanied with a prospectus complying with the requirements of the Companies Ordinance ("CO"), authorized for registration by the Commission, and registered with the Companies Registrar. If the securities are going to be listed, the Listing Rules must be also considered.

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[157] Where a contract is repudiated, the innocent party is normally entitled to elect whether to continue or treat the contract as at an end. However, it has been held that this normal principle does not apply in employment contracts, see: Ridge v. Baldwin [1964] A.C. 40, at p.64, a case in the House of Lords which has the force of legal authority in Hong Kong.

The power to authorize the registration of a prospectus is vested in the SFC which by the Securities and Futures (Transfer of Functions) Order of 1 February 2003 transferred such power to the Hong Kong Stock Exchange in relation to companies which have applied for listing of their securities in the Stock Exchange. Thus the function of vetting prospectuses are combined with the other vetting functions of the Exchange in the listing process. The Listing Document required by the Listing Rules is accordingly in practice combined with the prospectus. After an application for listing is made to the Stock Exchange, there is a staff vetting process which could take up to 3 months, at the end of which a hearing is scheduled before the Listing Committee which may either approve or refuse the application. If the application is refused, the application process is renewed after the reasons for refusal have been adequately addressed. Where the application is approved, the Stock Exchange issues a statement of authorization of the prospectus. The prospectus is then registered with the Registrar. The abridged form of the prospectus is advertised[158], and the public is invited to subscribe for shares in the issue within the time given in the advertisement. Meanwhile, the draft prospectus (called a "Red Herring" in the terminology of the market) would have been shown to potential institutional investors some weeks before the hearing of the Listing Committee in order to solicit expressions of interest[159]. Expressions of interest are recorded in a "book" kept by the Sponsor. Immediately before the registration of the Prospectus, the Sponsor would price the issue and offer the securities to the institutional investors who have been recorded as having expressed interest in taking the amounts recorded against their names. These investors are usually given 48 hours to come back with a firm commitment. Thus, prior to the closing of the public subscription portion of the issue, the subscription to the institutional "book" would be known. Upon the closing of the public subscription, if the issue is oversubscribed by the public at 15 times but below 50 times, then there is a clawback of 30% of the shares offered in the Initial Public Offer from the institutional portion[160].

Schedule 3 of the CO describes the matters that must be specified in the prospectus. The prospectus must provide sufficient information to enable a reasonable investor to form a valid opinion of the shares and the financial condition of the issuer. This information includes a statement of the persons holding or beneficially interested in any substantial part of the issuer's capital with indication of their holding.[161] The prospectus must also describe transactions relating to property where a director had any direct or indirect interest, or particulars of the nature and extent of any interest of a director in the promotion of, or in property to be acquired by, the company.

The contents of listing documents described in Part A of Appendix 1 of the Listing Rules include:

1 The aggregate of directors' fees, salaries, and allowances and other benefits in kind, and additional aggregate information (but not necessarily the identity) in respect of the five highest paid individuals' remunerations, as long as those individuals are not directors already considered (items 33(2), 33(3), and 46).

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[158] Since statutory liability for misstatements derive from the prospectus or a document which is deemed a prospectus, investors are as a rule warned in the abridged prospectus that they should consult the full prospectus and obtain professional advice before making an investment decision.

[159] The draft prospectus is not shown to the public until there is an invitation to subscribe for shares. The Red Herring is always couched in terms that it is not an offer.

[160] Practice Note 18.

[161] Note that holdings in excess of 10% of the issued capital must be disclosed to the listed company and the exchange within five business days under the Securities (Disclosure of Interest) Ordinance. Substantial shareholders are not defined in the Prospectus Rules as set out in the Third Schedule of the CO. However, substantial shareholders, defined as holders of 5% or more of the voting rights in the the listed company have to be disclosed in the Listing Document required under Listing Rules. So in practice, 5% shareholders are disclosed in the Prospectus which usually doubles up as the Listing Document.

2 A statement showing the shareholding of each director and the CEO in the issuer's capital[162], and the name and shareholding of any person who directly or indirectly holds 10% or more of the nominal value of any class of voting shares (as long as known to any director or the CEO) (items 45(1) and 45(2)).
3 The interests in the group's largest suppliers and customers of any directors, their associates, or shareholders holding more than 5% of the issuer's capital (item 28(1)(b)).
4 The terms and particulars of all material contracts outside of the ordinary course of business entered by any member of the group including the issuer (item 52).
5 Full particulars of the nature and extent of any direct or indirect interest of every director in any assets acquired of or disposed by any member of the group, and full particulars of any contract in which a director is materially interested (item 47).

The prospectus represents the minimum standard and must be signed by the issuer's directors and the opining experts. In the case of the listing document for a public offering, the issuer's directors must also sign a responsibility statement in the form of an undertaking under Appendix I to the Listing Rules. The Sponsor and an authorized officer of the Company sign a responsibility statement at the time of making the application[163]. Also, the Company's Sponsor and Solicitor (i.e., the attorney acting for the Company in the listing) sign a certificate to the Stock Exchange to the effect that he or she has explained all applicable requirements and procedures in the listing process to each director[164]. Thus, the obligation to assure compliance with the Listing Rules involves not only those parties who sign the offering document, but also the Sponsor, and under certain circumstances, the controlling shareholders and the attorneys consulted for the transaction.

In Hong Kong, a public offering is managed by a sponsoring distributor (known as the "Sponsor" under the Listing Rules), who may also (and usually does act as a Financial Adviser, an Underwriter, and a Broker/Dealer[165], which are usually different subsidiaries of the same group (generally, an investment bank). This group of functions are said, in general market terminology, to be performed by the "underwriter", although such statement would not be strictly correct, considering the different activities each function involves. The Sponsor deals with the Stock Exchange, and may be held liable by the Stock Exchange for any violation to the Listing Rules in the listing process. The Sponsor has to be a firm accepted by the Stock Exchange to advise issuers and their officers regarding compliance with the Listing Rules, and is usually licensed as an investment adviser under the SO. Although not expressly required, the Sponsor typically performs a "due diligence" review of the contents of the prospectus, since it can be subject to administrative sanctions by the Stock Exchange for breach of its Listing Rules, and to civil liabilities as explained below in Part 4[166].

The Financial Adviser advises on the corporate structure, and the corporation's future and present financing arrangements and connected transactions, as well as on mergers and acquisitions, if any. In small public offerings, the Sponsor usually plays the role of the Financial Adviser, while in large public offerings there could be a Financial Adviser, also licensed as an investment adviser, from a different group.

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[162] In this regard, see the Securities (Disclosure of Interests) Ordinance and specially Section 28 requiring disclosure of such interests in shares to the company and the exchange.
[163] Form C1.
[164] Form B.
[165] The Underwriter usually enlists the assistance of sub underwriters who are also broker/dealers. The lead underwriter has to file a Marketing Declaration regarding how the issue has been placed, by way of Form D.
[166] The Sponsor is expected to follow through with the issuer each part of the process of compliance with the Listing Rules, for example, that the statements made by the issuer are backed up by documentation or any statements of future prospects are backed by reasonable factual or research bases.

Underwriters *per se* undertake no other responsibility than buying the shares which are not sold. The Underwriter is either a securities firm licensed by the SFC under the SO or, more often, a well capitalized off-shore entity. Securities distribution is done by both private placement and public subscription, through a process which is set out in the listing document and subject to audit by the stock exchange.

Finally, brokers sell securities to the public. The Brokers are licensed as securities dealers under the SO and are subject to "suitability" and "best execution rules" under the Code of Business Conduct of the SFC. Private placements are also closed through licensed securities dealers who will provide the contract notes to the investors concerned and then report the transfers to the share registrars. Typically, the licensed brokerage entity within the investment bank performs the sale of the securities, and does not get involved as Sponsor, Financial Adviser, or Underwriter. Therefore, in one public offering there are potentially several licensed entities involved.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

The SFC upon consultation with the Stock Exchange can make rules providing for the cancellation of the listing of any securities if the SFC's requirements for listing are not complied with or the SFC finds the cancellation necessary to maintain an orderly market (Section 14, SO).

The SFC has the responsibility to ensure that the stock Exchange investigates the material omissions from the Listing Document and delists the issuer if necessary under the Listing Rules. If the Stock Exchange refuses to take action in defense of the market, the regulator can go to court to seek an injunction to prevent the persons involved from trading, and/or to suspend the trading of the stock by way of a direction to the Exchange under Rule 9 of the Securities (Stock Exchange) Listing Rules.

The SFC also has the power to license registered intermediaries (securities dealers and investment advisers) and supervise the internal processes of a distributor to ensure that the distributor, as a intermediary, complies with its legal duties. Therefore, the SFC may at any time make an inquiry on her activities and fitness to perform as a registered person, and may revoke or suspend the registration of such intermediary, or reprimand any of its officers (Section 56(2) of the SO). Where there is a defective prospectus, the primary suspect is the issuer and its directors. The SFC's functions in this respect will be to investigate if the Sponsor concerned had complied with his or her duty to properly advise the issuer and its directors and ensure that the representations made in the prospectus are backed up by proper documentation and if not, take disciplinary action against the Sponsor. In relation to a defective Prospectus, the breaches are primarily that of the Companies Ordinance, as to which the SFC has no direct powers of investigation[167]. However, as the next paragraph will show, there is at present an indirect method.

The SFC may appoint an inspector to investigate any fraud or misfeasance (Section 127 of the SO), and in case a party refuses to comply with a requirement of an inspector, the SFC may issue several types of orders, including restraining a person from disposing interests in securities, from acquiring securities, or from exercising voting rights, or directing a company not to make payment in respect of specified securities, not to register the transfer of securities, or not to issue shares to a shareholder under certain circumstances. A person aggrieved by such order may apply to the court for revocation, but if she

[167] This position is now remedied by the Securities and Futures Ordinance 2002, which will come into effect on 1 April 2003, which will enable the SFC to have direct powers of investigation of prospectus frauds.

contravenes the order she shall be guilty of an offence and liable on conviction to a fine. The inspector's report is studied by the SFC which, if it thought it desirable, would pass on a recommendation to the Director of Public Prosecutions in the Department of Justice for a prosecution in the criminal courts.

Finally, the SFC and the Hong Kong Society of Accountants (the self-regulatory body for accountants) and the Law Society (the self regulatory body for solicitors, ie attorneys) may take disciplinary action reflecting on the fitness and properness of the attorneys or accountants to deal with the Stock Exchange in listing matters. These disciplinary actions could result in suspension or the revocation of the practising licences of the professionals involved.

3.2 Judicial sanctions

The Companies Ordinance sets out both civil and criminal remedies for intentional and unintentional untrue statements in the prospectus.

Any person who authorizes the issue of a prospectus which includes an untrue statement (or to that effect, omits to state material information rendering the statement untrue) is liable to imprisonment and a fine, unless she proves that the statement was immaterial or that she had reasonable grounds to believe and did believe that the statement was true (Section 40A, CO). Therefore, criminal liability apply to directors and officers, even in case of negligent conduct, and upon other parties who may be considered to have "authorized" the prospectus. This could include the distributor, the controlling shareholder, the accountants, lawyers, the bankers, the experts who gave opinions in the prospectus, as they have all consented to the issue of the prospectus[168]. However, a person may escape liability if he or she proves that he or she had reasonable grounds to believe that up to the time of the issue of the prospectus, the statement was true. It is not clear, though, if the issuing company can be held criminally liable under this provision but it could be argued that where the prospectus is issued by authority of the board of directors, the company has authorized the publication of the prospectus. However, it would be surprising if a prosecution would be brought against the company since that would penalize all the members including those who were victims of the untrue statement.

Subject to penalties of fine and imprisonment, a person shall not, directly or indirectly, for the purposes of inducing the sale of the securities of any corporation, make with respect to those securities, any statement which she knows or has reasonable ground to believe to be false or misleading at the time and in the light of the circumstances, or to be rendered false or misleading by reason of the omission of a material fact (Section 138 and 139, SO). This provision may be applicable against the parties directly or indirectly involved in the preparation of the prospectus, including the issuer's director, officers, experts, and distributor, since they may be considered to be making a statement for inducing the sale of securities, as long as they knew that the statement was false or misleading.

Section 21 of the Theft Ordinance makes it a criminal offence for an officer of a body corporate or unincorporated association, with intent to deceive members or creditors of the body corporate or unincorporated association about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular. Members include intending investors[169].

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[168] However, a person shall not be deemed to have authorized the issue of a prospectus by reason only of his giving the consent required under s.38C of the CO, namely that he as a person giving an expert opinion, consents to the issue of his or her report with the prospectus. This means that the expert is still liable if there is a falsity in his report. However, if the expert consents in some other way to the report, for example, if he or she is advising in some other capacity on parts of the report other than the expert opinion accompanying the report, he or she may still be taken to have authorized the publication of the prospectus and is prima facie liable for misstatements in it.

[169] See: R v. Kylsant [1932] 1 K.B. 442.

Other actors in the public offering process may be criminally liable if they have counselled and procured the offense, and would otherwise be responsible only civilly and administratively, for their own statements in the prospectus.

3.3 *Stock exchange sanctions*

The Listing Committee of the Stock Exchange has ample powers to impose sanctions, in case of a breach of the Exchange Listing Rules, against the issuer or any of its subsidiaries, any of its directors or members of the senior management, any substantial shareholder, sponsor, or professional advisor, such as a lawyer or accountant retained to provide advise in relation to a matter governed by the Exchange Listing Rules. Specifically, the Listing Committee may: (1) issue a private reprimand or a public statement or even censure, (2) report the conduct to the SFC, (3) ban a professional advisor (or any of its employees) from representing a party, (4) state publicly the Exchange's opinion on the retention of office by a director of a listed company, and in the event such director remains in office, suspend or cancel the listing, (5) require a breach to be rectified or other remedial action to be taken within a specified period, and (6) take or refrain from taking any other action as it thinks fit. (2A.09 and 2A.10 of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited, referred also as the "Exchange Listing Rules").

The Stock Exchange can refuse to deal with an accountant or distributor through it powers to accept reports and qualifications of reporting accountants and sponsors under Chapters 3 and 4 of the Listing Rules. Also, under Chapter 8 of the Listing Rules, the Stock Exchange retains an absolute discretion to refuse a listing, and Chapter 6 establishes the Exchanges authority to suspend dealings in any securities, or cancel the listing of any securities, when the Exchange considers it necessary for the protection of the investors, and specially if the issuer fails in a material way to comply with the Exchange Listing Rules. Under the combination of these rules, the stock exchange can exclude accountants and sponsors who have been barred because of breaches of the Listing Rules. Undoubtedly this is a very strong penalty for professionals in the securities market.

Finally, the Stock exchange can fine a member for breach of the Rules of the Exchange (which include the Listing Rules). This sanction only applies to a sponsor who is a member of the Exchange, and cannot be imposed on an accountant.

Part 4. Investor's right of restitution for losses

Investors may obtain restitution for losses incurred as a consequence of untrue or misleading statements in a prospectus through a judicial proceeding before a civil court. According to Section 40 of the CO, every director of the issuer (director at the time of the issue of the prospectus or who has agreed to become a director or has authorized to be named as such in the prospectus), every promoter of the company who was a party to the preparation of the prospectus[170], and every person who has authorized the prospectus, shall be liable to pay compensation to all persons who subscribed shares on the faith of the prospectus, for any loss sustained by reason of any untrue statement included in the prospectus. The Company may also be classed as a person authorizing the prospectus if the prospectus was issued pursuant to a decision of the board of directors. In civil actions, the company would usually be joined since individuals may not be able to pay the damages sought.

[170] Promoters would not normally figure in companies applying for listing since they would have been in existence for some time. In the case of the Main Board in the Hong Kong Stock Exchange, a company would have had to exist for three years and have been deriving a net profit of HKD 20 million and in the two preceding years of an aggregate of HKD 30 million (see: Chapter 8).

For this purpose, Section 41A defines that a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is contained therein, or in any report or memorandum appearing to be incorporated or issued therewith. It has been long held in the English Courts (whose judgments are followed in Hong Kong) that untrue statements could also cover material omissions. Also, since a prospectus purports to comply with the information disclosures provided for in Schedule 3 of the CO, any material omissions could be interpreted as rendering the statements in the prospectus untrue.

As mentioned above, Section 40 (1) (d) of the CO makes every person who has "authorized" the issue of the prospectus liable for any untrue statement contained therein. Main officers can be expected to be intimately involved in the preparation of the prospectus (e.g., the company's secretary), and would therefore usually be regarded as authorizing the issue of the prospectus (or, in some cases, be regarded as directors, even if they are not necessarily named as such but are actually performing those functions). In view of the Sponsor's involvement with the preparation of the listing document and complying with the Listing Rules, it may also be asserted that the Sponsor (an affiliate of the distributor to this effect) authorizes the issue of the prospectus. A consenting expert authorizes the issue of the prospectus, and may be held liable, only with respect to his own statements but where he has advised on matters beyond the report accompanying the prospectus, the expert may be generally liable. Finally, the controlling shareholder, and attorneys involved in the transaction, as long as they have been consulted on the issue of the prospectus and to the extent of such involvement, would therefore be also considered as having "authorized" the issue of the prospectus[171].

Therefore, in order to obtain compensation of damages under Section 40 of the CO from the directors, the distributor, or experts as the auditors, the investor would need to establish that there is an untrue statement (or material omission) in the prospectus, that the investor relied in the prospectus, and that she incurred in losses caused by the untrue statement. A person may escape liability under Section 40 of the CO if any of the defenses described therein is applicable. Specifically, no person shall be liable if she proves that she had reasonable ground to believe, and did believe at the time of the allotment of the shares, that the statement was true. An expert, whose liability is limited in scope to statements made by her, has to prove also that she was competent to make the statement under such authority.

Apart from restitution, a victim of an untrue statement in a prospectus may claim rescission of the contract of allotment, since the contract of allotment would have been obtained by misrepresentation. The remedy is however subject to all the usual defenses of affirmation[172] or delay. Finally, recovery for losses is also possible based on common law theories of tort. Under these theories, proof of a duty of care owed by the person sued, reliance and causation of the economic loss is necessary.

It should be noted that if a party is sanctioned under Section 138 of the SO (see §3.2 of this chapter) for inducing the sale of securities by knowingly making an untrue or misleading statement, that person would also be civilly liable to pay compensation for damages to investors who sustained pecuniary losses as a result of having purchased or sold securities at a price affected by the statement[173]. To this effect, the investor needs to prove that the liable party knew that the statement was untrue or misleading (or was

[171] Controlling shareholders could well be liable with their nominee directors if it can be shown that they directed the actions of those directors, thus creating some form of agency relation. This liability arises under agency principles.
[172] For example, if the victim had already sold his shares once and had repurchased the shares in the market in order to sue. Also, if there has been inordinate delay in seeking the remedy.
[173] Section 141 of the SO.

rendered untrue or misleading due to an omission of a material fact), but prior conviction or criminal charges do not need to be established in order to start the civil action.

A case for restitution for losses caused by an untrue statement in a public offer prospectus would take approximately one and a half years in first instance, and up to five years when considering the appeals and execution process, which could include bankruptcy proceedings. However, in case the defendant does not have a valid defense, summary judgment is possible. In any case, it will take at least 8 months to assess damages and another 6 to get satisfaction through the enforcement process. Of course, a summary judgement is also appealable up to the Court of Appeal, and where there is an issue of great and general public importance, to the Court of Final Appeal. However, the fact that an appeal is on foot, does not stop the execution process unless there is a stay. A stay would be granted if there is a good showing of merits on appeal.

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SECURITIES LAW OF INDIA

Part 1. The regulator and its supervisory and regulatory powers

In India, the main regulator of the securities market is the Securities and Exchange Board of India ("SEBI"). Banks and insurance companies are regulated by the Reserve Bank of India and the Insurance Regulatory and Development Authority of India.

Members of the Securities and Exchange Board of India are appointed by the Government of India (GoI). Their appointment is not subject to approval or confirmation by any other authority. SEBI consists of: (i) the Chairman; (ii) two members from amongst officials of the ministries of the Central Government (GoI), dealing with finance and administration of the Companies Act, 1956[174]; (iii) one member from amongst the officials of the Reserve Bank of India; and (iv) five other members at least three of whom shall be whole time members. The Chairman and members referred to in (i), (ii) and (iv) are appointed by GoI. The member referred to in (iii) above is nominated by the Reserve Bank of India and then appointed by the GoI (Section 4 of the SEBI Act of 1992).

The GoI has the right to terminate the services of the Chairman and any of the members of SEBI referred to in (iv) by giving a notice in writing of not less than 3 months or 3 months salary and allowances in lieu of such notice. The GoI must remove any member of the SEBI in case of insolvency, conviction for certain offences, mental unsoundness, or abuse of her position. Finally, the GoI may supersede the SEBI, and the members of the SEBI must vacate their offices, in case, in the opinion of the GoI, the Board is unable to perform its functions and duties, or if necessary in the public interest (Section 17 of the of 1992).

The regulation of the securities markets is assigned by law only to the SEBI. However, the Board is bound by directions on policy that the GoI may give in writing (Section 16 of the SEBI Act of 1992). The Registrar of Companies has parallel jurisdiction under the Companies Act ("CA") to regulate and review the filing of a prospectus in her office and to ensure that its contents comply with the applicable provisions of the CA.

Regulations issued by the Securities Exchange Board require the previous approval of the Central Government. In addition, every rule and regulation made under the SEBI Act is required to be laid as soon as may be after it is made, before each House of Parliament while it is in session (Sections 30 and 31 of the SEBI Act). These rules and regulations must be placed for the consideration of Parliament for a total period of 30 days which may be comprised in one session or two or more successive sessions of Parliament. If before the end of the mentioned sessions the Houses of Parliament agree to make any modification in the rule or regulation or if both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or shall have no effect as the case may be. Any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

The SEBI Act grants the SEBI authority to command the delivery of documents and/or witness testimony from any person when investigating a violation of the securities laws.

[174] Substituted by the SEBI (Amendment) Act, 2002 w.e.f. 29.10.2002

Part 2. The duty to disclose material information

It is prohibited by Indian law to issue securities to the public unless a draft prospectus has been filed with the SEBI and with the Registrar of Companies. Unless the SEBI is satisfied of the disclosure being adequate, it is not bound to take on record the offering document and consequently no offer can be made to the public under such offer document. The Registrar of Companies may also refuse to register a prospectus if she is satisfied that it does not comply with any legal requirement. Prospectuses may not be opposed, however, on the regulator's determination of the investment quality of the securities.

Any form of application for shares must be accompanied by a memorandum containing the salient features, as prescribed, of a prospectus complying with the legal requirements. Although delivery of the prospectus to potential investors is not expressly required, it shall be delivered to any person who requests it (Section 56(3) of the CA). The law does not establish a mandatory waiting period when the issuer's shares may be offered and information may be provided to investors, but actual sales may not be conducted.

According to Section 11A of the SEBI Act, the Board may determine by regulation the disclosure of matters relating to the issue of capital. Based upon such authority, the SEBI (Disclosure & Investor Protection) Guidelines 2000 (hereinafter referred to as "D&IP Guidelines") provides that the offer document shall contain all material information to enable investors to make an adequate investment decision. Chapter 6 of the D&IP Guidelines describes the information that must be included in the prospectus:

1. Details of the remuneration of each director and managing director, and the terms of every contract fixing the remuneration of a managing director (6.19.11.a of the D&IP Guidelines). The remuneration of officers need not be disclosed in the prospectus.
2. Name and number of shares held by each of the ten largest shareholders, as well as the aggregate shareholding of the promoters group, which includes the promoters (persons in control of the company, instrumental in the plan to issue the securities, or named in the prospectus as such), immediate relatives, and some subsidiaries or related enterprises defined therein (Section 6.4.2. of the D&IP Guidelines). To the extent that it is known to the company or can be ascertained from public filings, the prospectus must provide information on shares <u>beneficially</u> owned by the largest ten shareholders. Note that large shareholders are periodically required to disclose their ownership to the Company which in turn is required to make disclosures to the Stock Exchange. This information is made publicly available by the Stock Exchange.
3. The number or shares held by each of the issuer's directors and officers. Note also that every company must maintain a register showing the number, description and amount of any shares of the company held by a director or trust for her, or of which she has any right to become the holder (Section 307, Companies Act).
4. The dates, parties to, and general nature of every material contract, not being a contract entered in the ordinary course of business (6.19.11.b of the D&IP Guidelines and Paragraph 11.ii Schedule II of the CA).
5. Full particulars of the nature and extent of the interests, if any, of every director or promoter in the promotion of the company or in any property acquired by the company, including the interests of the director or promoter as a member of a firm or company that is involved in the promotion of the company or any property acquired or to be acquired by the company (6.19.11.c of the D&IP Guidelines and Paragraph 11.iii Schedule II of the Companies Act).

The prospectus must be delivered to the Registrar and signed by every person who is named therein as a director or proposed director (Section 60, CA). An issuer's officer is not required to sign the prospectus

unless she has authorized the issue of it. The prospectus must include the name of the merchant banker acting as a distributor. The distributor does not have to sign the prospectus, but is required to conduct a due diligence and independent verification of the statements in it, and to sign a Due Diligence Certificate in the form prescribed in paragraph 6.3.3.1 of the D&IP Guidelines.

The accountant's consent as an expert has to be submitted with the prospectus to the Registrar of Companies (Section 60(3), CA,). If the accountant has undertaken any adjustment in the accounts as mentioned in Clause 32 of Schedule II to the CA, a written statement signed by the accountant setting out the adjustment and the reasons therefor is required to be given with the prospectus, to the Registrar of Companies (Section 60(1)(b)(ii), CA). The names of the auditors are also required to be stated in the prospectus (paragraphs 6.3.11 and 6.17.5, D&IP Guidelines). Finally, the accountant is required to prepare a report setting forth the information therein prescribed, which includes profits and losses, assets and liabilities, and the rate of dividends paid by the company in the preceding five years (paragraph 6.18, D&IP Guideline).

The name of the attorney is required to be stated in the prospectus (paragraph 6.17.5 of the D&IP Guidelines). The consent of the attorney to so act has also to be filed with the prospectus with the Registrar of Companies (Section 60(3), CA).

The legal effect of granting and signing the certificates and the reports specified above is that the distributor, the accountant and the lawyer are responsible for the accuracy of the contents of those certificates and reports. The distributor's and the lawyer's certificates are not attached to the prospectus. They have to be delivered to SEBI and to the Registrar of Companies. The accountant's certificate is attached to the prospectus. Consequently, these certificates amount to acknowledging and signing to the information provided or reviewed by the distributor, the lawyer and the accountant.

If a distributor makes a representation to her client or to the general public, which is not included in the prospectus and turns out to be incorrect due to her negligence in conducting a professional evaluation, she would be liable under general law to her client or to a member of the public who relied upon the representation.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The SEBI Act authorized the enactment of the D&IP Guidelines and other regulations by the SEBI (Section 11A and 11B, SEBI). SEBI may, for the protection of investors, regulate disclosure requirements regarding matters relating to the issue of capital, transfer of securities and other matters incidental thereto[175] (Section 11A, SEBI Act). In case of violations of disclosure requirements, SEBI may issue such directions as may be appropriate in the interests of investors in securities and the securities market (Section 11B, SEBI Act). These orders may be directed at the issuer, and at any person or intermediary related to the securities market. In case of violations to the D&IP Guidelines, the SEBI may issue any direction that the SEBI may deem fit under the circumstances, including: (1) an order to refund money to investors, (2) temporarily ban the access to the capital markets, or (3) direct the stock exchange not to list or allow trading in the securities (Paragraph 17, D&IP Guidelines).[176] A new section 15HB has been inserted which now authorizes the imposition of a penalty for non-compliance with these guidelines[177].

[175] Substituted by SEBI (Amendment) Act, 2002.

[176] However, the sanctioning provisions under the D&IP Guidelines and other regulations, framed under the SEBI Act (wherever they are referred to as being read with sections 11A and 11B of the SEBI Act) may not be effective

The SEBI may also suspend or cancel the registration (following the applicable procedure) of any intermediary who fails to exercise due diligence or violates the Guidelines (Paragraph 17.2.1, D&IP Guidelines). This sanction may be imposed against a distributor in a case of a defective prospectus.

The Companies Amendment Act, 2000 has introduced in the CA a new provision, Section 55A, which enables the SEBI to administer and regulate certain provisions of the CA relating to the issue and transfer of securities (and including those relating to the contents and issue of a prospectus), in so far as they apply to listed public companies, or to public companies which intend to get their securities listed on any registered stock exchange. The type of orders (both to refrain from an action or commanding the performance of other action) that the SEBI may impose under section 55A of the CA include the stopping of the publication of a prospectus which omits the disclosure of material information that is required by law.

As explained in Part 2 above, a distributor is required by law to participate in the preparation of the prospectus. However, if she does not participate in the preparation of the prospectus but sells securities as an underwriter or as a dealer, she is not exposed to the administrative sanctions described, which apply to a distributor who participates in the preparation of a prospectus.

The accountant is not administratively liable before the SEBI for untrue statements or omissions of material information in a prospectus, but she may face a disciplinary inquiry under the Chartered Accountant's Act, 1949. As per the Chartered Accountants Act, 1949, an accountant will be responsible only for a misstatement in the prospectus which is known to her and is not reported[178].

3.2 Judicial sanctions

If a prospectus fails to state the matters specified in the CA, any director or other person responsible for the prospectus (including the issuer, its directors and officers, and the distributor) shall be punishable with a fine, unless she can prove that she had no knowledge of the matter not disclosed, or she proves that the non-compliance arose from an honest mistake, or that it was in respect to matters that in the opinion of the court were immaterial or should reasonably be excused. (Section 56(1) and 56 (4), CA).

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now. The reason is that the SEBI Appellate Tribunal – Mumbai, constituted under the provisions of the SEBI Act, has held by a recent decision (delivered in the case of Sterlite Industries (India) Limited V Securities of Exchange Board of India on the 22nd October, 2001, and reported in (2001) 34 SEBI and Corporate Laws 485 SAT-MUM) that the power given to the SEBI to issue directions under section 11B of the SEBI Act does not authorize the imposition by the SEBI of any penalty. The power to impose a penalty has therefore to be found in the appropriate sections of the SEBI Act, principally sections 12, 15(A) to (H), 20, 24, and 27. To the extent that a penalty is authorized by these sections it can be imposed either by the SEBI or on a complaint by the SEBI to an appropriate court, by that court.

[177] Footnote number 4 above has to some extent been overtaken by the insertion of Section 15HB in the SEBI Act which reads as follows: "15HB. Penalty for contravention where no separate penalty has been provided.- Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to penalty which may extend to one crore rupees."

[178] As per the Chartered Accountants Act ,1949 where there is any misconduct in respect of which the Council has found member of the Institute guilty it shall forward the case to the High Court with its recommendations thereon. On receipt of such a case the High Court shall cause a notice of the date so fixed to be given to the member of the Institute concerned, the Council and to the Central Government, and shall afford such member, the Council and the Central Government an opportunity of being heard, and may thereafter make any of the following orders, namely:-

(a) direct that the proceeding be filed, or dismiss the complaint, as the case may be;
(b) reprimand the member;
(c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;
(d) refer the case to the Council for further inquiry and report.

Fine or imprisonment may be imposed on any person who knowingly or recklessly makes an statement that is false, deceptive or misleading or conceals material facts inducing another person to acquire or subscribe shares (Section 68, CA). This conduct applies to the issuer, its directors and officers, the distributor, and experts (as the auditors of the issuer's financial information) involved in including false statements or omissions of material information in a prospectus.

When a prospectus includes any untrue statement, every person who authorized the issue of the prospectus shall be punishable with imprisonment or fine, unless she proves that the statement was immaterial or that she had reasonable grounds to believe and did believe that the statement was true (Section 63 of the CA). For purposes of criminal liability under this section, the issuer's directors and officers and the distributor shall be deemed to be a person who has authorized the issue of prospectus, but not any other person for merely giving her consent to be included in the prospectus as an expert or to be named as auditor, legal advisor, attorney, solicitor, banker, or broker of the issuer.

3.3 Stock exchange sanctions

The Stock Exchange does not have the power to impose sanctions for a defective prospectus, but in such case it can only delist the securities of the issuer, according to the last paragraph of the Listing Agreement between the issuer and the Stock Exchange. SEBI has recently notified the Securities Exchange Board of India (Delisting of Securities) Guidelines 2003. These empower stock exchanges to compulsorily delist the shares of companies listed on that stock exchange in accordance with prescribed norms. Some of these norms concern the track record of the company in complying with the Listing Agreement as well as the conduct of its directors.

Part 4. Investor's right of restitution for losses

Investors can obtain restitution for losses caused by false or omitted material information in a prospectus through a judicial proceeding before a civil court. A class action suit is also available to this effect, but can only go forward if the leave to sue as a class is given by the appropriate court under the applicable provisions of the Civil Procedure Code[179].

Investors may also obtain restitution through an administrative procedure. Specifically, Paragraph 17.1 of the D&IP Guidelines states that in case of violation of those guidelines, the Board may, in the interest of the market and of investors, pass directions instructing the refund to investors of any money collected through an offering. Also see new Section 11(4) and 12A of the SEBI Act. [180]

A civil proceeding for compensation of losses can be instituted under the Companies Act. According to Section 62 of the CA, every director of the company, every promoter[181], and every person who has

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[179] Order I Rule 8 of the Civil Code of Procedure

[180] Under a new section 15C in the SEBI Act, an investor may possibly claim restitution from the issuer as a redress of grievances it is possible that SEBI may impose sanction .

[181] As per the SEBI Act promoter means

(1) (i) the person or persons who are in control of the company, or
(ii) person or persons named in any offer document as promoters;

(2) a relative of the promoter within the meaning of section 6 of the Companies Act 1956 (1 of 1956);and

(3) in case of corporate body,
(i) a subsidiary or holding company of that body, or
(ii) any company in which the 'promoter' holds 10 percent or more of the equity capital or which holds 10% or more of the equity capital of the promoter; and

authorized the issue of the prospectus (including officers who sign the prospectus, and any person who has given a consent required under Section 58 of the CA with respect to an statement made by her as an expert), shall be liable to pay compensation to every person, who subscribed shares based on the prospectus, for any loss or damage she may have sustained because of any untrue statement included therein. Section 65 of the CA establishes that a statement in the prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included. And when an omission from a prospectus of any matter is calculated to mislead, the prospectus shall be deemed, with respect to such omission, to include an untrue statement also. The phrase "calculated to mislead" in Section 65 of the CA does not impose an obligation to prove that the person had an intention to deceive, but rather that the omission renders the statement misleading.

In case of losses due to a defective prospectus, the minimum that an investor would have to prove in a lawsuit under Section 62 of the CA would be that: (i) she had relied upon the prospectus, (ii) that the information therein provided was material and was false; and (iii) she sustained losses caused by the untrue statement.

However, no person shall be liable for a statement not made under the authority of an expert, if the person proves that she had reasonable ground to believe, and did believe at the time of allotment of the shares, that the statement was true. For any person who authorized the issue of a prospectus which included an untrue statement purporting to be made by her as an expert, she shall escape liability if she proves that she was competent to make the statement, and that she had reasonable ground to believe and did believe that the statement was true[182].

The issuing company is responsible for the contents of the prospectus[183] and liable to pay compensation for loss or damage sustained by reason of untrue statements therein under section 62 of the CA. Compensation for damages from the issuer may also be obtained under common law, in which case an investor must establish that she suffered losses caused by her reliance on a material misstatement or omission of fact in the prospectus, and that the persons who authorized the prospectus on behalf of the company were authorized to that effect and acted with fraud. Under the general law of Contract, an incorrect statement in the prospectus would amount to a misrepresentation which would enable the investor to avoid her obligation to subscribe or to sue for a refund. This is on the basis that the investors consent is obtained by misrepresentation, and so the contract is voidable at her instance.

(iii) any corporate body in which a group of individuals or corporate bodies or combinations thereof who hold 20% or more of the equity capital in that company also hold 90% or more of the equity capital of the 'promoter' and

(4) in case of an individual

(i) any company in which 10% or more of the share capital is held by the 'promoter' or a relative of the promoter' or a firm or Hindu Undivided Family in which the 'promoter' or his relative is a partner or co-parcener or a combination thereof,

(ii) any company in which a company specified in (i) above, holds 10% or more of the share capital; or

(iii) any HUF or firm in which the aggregate share of the promoter and his relatives equal to or more than 10% of the total.

[182] Section 62 (3) (c) of the CA.

[183] Paragraph 6.2.1 of the SEBI D&IP Guidelines requires that the front cover page of the prospectus shall contain, among other details, the following "Issuer's Absolute Responsibility" clause: "The issuer, having made all reasonable inquiries, accepts responsibility for and confirms that this offer document contains all information with regard to the issuer and the issue, which is material in the context of the issue, that the information contained in the offer document is true and correct in all material aspects and is not misleading in any material respect, that the opinions and intentions expressed herein are honestly held and that there are no other facts, the omission of which make this document as a whole or any of such information or the expression of any such opinions or intentions misleading in any material respect".

Liabilities imposed under the CA on directors and officers, and on experts who are associated with a prospectus, do not apply to distributors, who are separately regulated under the SEBI D&IP Guidelines and the SEBI Act. As mentioned in Section 2 above, the Lead Merchant Banker is required to sign a Due Diligence Certificate[184] stating that on the basis of the examination of various documents and an independent verification of various statements, the distributor confirms that the disclosures made in the prospectus are true, fair and adequate, and that all legal requirements connected with the issue have been complied with. The D&IP Guidelines do not create a strict liability standard for the distributor. Absence of fault or negligence could, under general law, be pleaded by a distributor to escape liability. However, it is the distributor's burden to show that she was not negligent.

The issuer's controlling shareholder is not liable for the content of the prospectus. Investors cannot "pierce the corporate veil" to go after the shareholders' assets when the corporation is unable to satisfy investor's claims in a case of an untrue statement or omitted information from a prospectus. Shareholders cannot be held civilly liable either for the acts or omissions of directors or officers.

A case for restitution for losses due to a defective prospectus can take up to 15 years in Mumbai and about 5 years in other courts in India. An appeal is available as a matter of law, even if the defendant does not have a valid defence. If both the suit at first instance and the appeal are filed in the Bombay High Court, the total duration of the litigation might be approximately 20 years.

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[184] According to Section 6.3.3.1 the prospectus shall contain a disclaimer clause including the following: "It should also be clearly understood that while the Issuer Company is primarily responsible for the correctness, adequacy and disclosure of all relevant information in the offer document, the Lead Merchant Banker is expected to exercise Due Diligence to ensure that the Company discharges its responsibility adequately in this behalf and towards this purpose, the Lead Merchant Banker … has furnished to SEBI a Due Diligence Certificate dated … in accordance with SEBI (Merchant Bankers) Regulations 1992 which reads as follows: …"

SECURITIES LAW OF INDONESIA

Part 1. The regulator and its supervisory and regulatory powers

The Capital Markets Supervisory Agency, hereinafter referred to as Bapepam, regulates and supervises capital markets. The main regulator for banks is the Bank Indonesia, and the main regulator for insurance companies is the Minister of Finance.

The President of the Republic of Indonesia appoints the chairman of Bapepam. Prior to the Presidential appointment, two procedures must be performed: (i) the Minister of Finance submits three nominees for the post of Chairman of Bapepam to the President and to the National State Officials Deliberation Board (Badan Pertimbangan Jabatan Tingkat Nasional), and (ii) the Head of the National State Officials Deliberation Board conveys her written recommendation to the President.[185] The chairman of Bapepam does not have a fixed term of service and may be dismissed at will by the President of the Republic (Art 9 of Government Regulation 96/2000).

Bapepam is the only institution that provides guidance, regulation, and day-to-day supervision of the capital market activities. Although the regulations issued by Bapepam are generally not subject to the approval of any other governmental authority, Bapepam reports to the Minister of Finance. General provisions on public offerings are contained in the Capital Markets Law (Law 8/1995, henceforth CML). Bapepam as the supervisory body further regulates the requirements and procedures for registration statements, prospectuses, and announcements related to public offerings. In addition, stock exchanges may also issue regulations to regulate their activities.

When investigating a violation of the law, Bapepam can inspect records and documents, and summon, inspect, and request information and evidence from any party.

Part 2. The duty to disclose material information

Under the CML, public offers of shares may only take place after a registration statement has been declared effective by Bapepam. Registration statements shall be effective on the 45th day after receipt of a complete registration statement or on an earlier date if declared effective by Bapepam. During that period, the issuer may only promote the securities to be offered. Actual sales cannot be concluded before the registration statement is effective and investors have obtained or read the prospectus. Under the CML, buyers of securities in a public offering must state in the securities' order form that they have received or read the prospectus before sales may be made.

The content of the prospectus is described in Regulation No. IX.C.2 as attached to Chairman of Bapepam Decree No. 51/PM/1996 (hereinafter referred to as "IX.C.2"). The prospectus must generally include all details and material facts that may influence the investment decision. Among other items, the prospectus must disclose:

1. Details of shares owned by shareholders holding 5% or more, the board of executive directors, and the board of directors[186] (the number of shares, the nominal value of shares and percentage; IX.C.2--

[185] Articles 4 and 6 of Presidential Decree No. 47 of 1994.

[186] In Indonesia, the directors of a limited liability company are responsible for its day-to-day management and therefore are equivalent to officers of companies incorporated in some other jurisdictions. There may be management personnel within an Indonesian limited liability company that are not on the Board of Directors.

6.b). This disclosure requirement only applies to the legal ownership of shares and not to beneficial ownership[187]. Note that there is no requirement to disclose the salaries or remuneration of directors.

2. Descriptions of material assets bought outside the issuer's ordinary course of business and important agreements on licenses, main buyers, appointment of exclusive agents or distributors, technical agreements, and others need to be included in the prospectus.
3. Transactions "with affiliated parties" covering the type of transactions, the volume, period and prices. The term "affiliated party" includes (Art 1 of the CML): (1) companies directly or indirectly controlled by the issuer; (2) the issuer's majority shareholder (i.e., a party which, directly or indirectly, holds at least 20% of the issuer's voting rights); (3) employees, directors, and commissioners of the issuer and their family and relatives; and (4) companies that share with the issuer one or more members of the board of directors or commissioners or that are controlled by the issuer's controlling shareholder.

Regulation No. IX.C.1 as attached to Chairman of Bapepam Decree No. 42/PM/2000 (hereinafter referred to as "IX.C.1") requires that a statement regarding the completeness of the public offering documents be signed by the directors, the commissioners[188], the underwriter, and the capital markets supporting professionals (e.g., accountants and attorneys) involved in the preparation of the prospectus. Since the underwriter must perform a due diligence review to be able to provide such a statement (Attachment 3 of Regulation IX.C.1), she is fully responsible for the correctness of all information and the honesty of the opinion disclosed in the prospectus (Regulation IX.C.2, Article 1 point (m)). On the other hand, the supporting professionals are only liable for opinions and information rendered by them based on Attachment 4 of Regulation IX.C.1 "Statement of Capital Markets Supporting Professionals". Note that parties who, knowingly or negligently, make false or misleading representations in connection with the sale of securities are civilly liable for losses even if those representations are not included in the prospectus (Article 81 of the CML).

Bapepam may decide to suspend the public offering if the relevant party fails to provide additional material information as required. However, Bapepam cannot oppose a prospectus based solely on its own evaluation of the advantages or weaknesses of the securities.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

Bapepam may impose administrative sanctions on parties in possession of Bapepam licenses, approvals or registrations for violations of securities regulations (Art 102 of the CML). These sanctions may be in

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[187] In addition, directors, commissioners, and 5% shareholders of Issuers and Public Companies must report to BAPEPAM, their ownership of shares of such companies and each change of such ownership no later than ten days after the acquisition or sale of the shares (CML, Article 87).

[188] The Company Law (Law 1/1995) requires the Board of Commissioners (BOC) to supervise the management of the company by the Board of Directors (BOD). As part of its supervisory duties, the BOC has the right to enter the premises of the company to inspect its books, documents and assets. However, the BOC may not participate in the management of the company. Within its supervisory role the BOC may temporarily suspend members of the BOD who fail to properly perform their duties or who take any action contrary to the Company Law or the company's Articles of Association. After suspending a BOD member, the BOC must notify Shareholders of this fact at a General Meeting of Shareholders ("GMS") within one month of the suspension. Further, the Company Law allows the GMS (either by resolution or pursuant to a provision in the company's Articles of Association) to temporarily cede certain management authority from the BOD to the BOC. Should the Shareholders grant the BOC such management authority, all provisions concerning rights, authorities and obligations of the BOD to the Company and to third parties under the Company Law as mentioned above shall apply to the BOC, until such time as the Shareholders remove the BOC's management authority.

the form of written warnings, penalties or fines, restrictions on business activities, freezing of business activities, revocation of business licenses, cancellation of approvals, and cancellation of registration. The parties that may be sanctioned by Bapepam include, among others, stock exchanges, mutual funds, securities companies, manager funds, representatives of securities trading brokers, custodians, trust agents, and capital markets supporting professionals (e.g., accountants and attorneys), each of the directors and commissioners of an issuer, and any investors holding at least 5% of the shares of an issuer.

The underwriter and the issuer are responsible for the truthfulness and completeness of registration statements submitted to Bapepam, including the preparation of the prospectus (Art 72 of the CML). The prospectus itself should contain a statement that the issuer and underwriter are responsible for the truthfulness and completeness of any information or material facts contained in the prospectus. Failure in this regard could lead to imposition of the above sanctions.

3.2 Judicial sanctions

Criminal imprisonment and fines apply to persons who deliberately deceive or inflict losses on other parties, who deliberately mislead Bapepam, or who lose, destroy, eliminate, change, obscure, hide, or falsify records of licenses, approvals or registrations (Art 107 of the CML). Violations of this provision may lead to imprisonment for up to 3 years and a fine of up to Rp. 5 billion (approximately US$500,000 at 6/2002 exchange rate). Therefore, the issuer's directors, the distributor, and the accountants can be held criminally liable for intentionally deceiving investors through a prospectus that includes false statements or omits material information.

3.3 Stock Exchange sanctions

The Jakarta Stock Exchange may delist securities in case of a violation of the CML and its regulations (e.g., false statements or omissions of material information in the prospectus).[189]

Part 4. Investor's right of restitution for losses

Investors who suffered losses as a consequence of violations of securities laws and its regulations may request, either severally or jointly[190] with other parties having similar claims, restitution to a party or parties that are liable for such violations (Article 111 of the CML).[191]

Both the issuer and the underwriter are responsible for the truthfulness and completeness of the registration statements submitted to Bapepam (Article 72 of the CML). Furthermore, all parties signing the registration statement, the issuer's directors and commissioners, the underwriters, and the capital markets supporting professionals who consented to the publication of information provided by them in the registration statement (which includes the auditors and attorneys involved) are jointly and severally liable if a registration statement includes false material information, or fails to state material information rendering the information therein misleading (Article 80 of the CML).

In order to obtain restitution for losses due to a defective prospectus, an investor must prove, by a preponderance of the evidence, that: (1) she suffered losses due to misleading information in the prospectus; and (2) she was not aware that such information was false or misleading prior to the purchase

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189 Under Jakarta Stock Exchange Directors Regulation No. I-B of June 30, 2000.

190 A "class action" mechanism is not available under Indonesian securities regulations. However, class actions are available for certain other areas (e.g., consumer protection and environmental matters).

191 Claims regarding defective registration statements must be filed no later than 5 years after the issuance of such statements (Article 80(4)).

of the securities (Article 81 (2) of the CML). There are no specific provisions under the CML as to what evidence should be presented to prove that the investor was not aware that the prospectus was defective. We believe that the investor should at least declare that she has already read and understood the prospectus prior to purchasing the securities and she relied on the information contained therein.

The CML does not provide specific defenses for the issuer and its directors and commissioners. In contrast, distributors and capital markets supporting professionals (including accountants and lawyers), would not be liable for losses suffered by investors if they can prove that they acted professionally and took sufficient steps to ensure that the statements and information published in the registration statement were true, in accordance with the inspection norms, principles and ethical codes of each respective profession, and that to their knowledge, there were no omitted material facts in the registration statement to make such registration statement misleading (Article 80 of the CML). Furthermore, capital markets supporting professionals are only liable for opinions or information that they render in the context of a registration statement. Therefore, investors can only claim compensation for losses incurred as a consequence of the opinion or evaluation provided by the capital markets supporting professional concerned.

The CML does not contain specific provisions on piercing the corporate veil for a controlling shareholder. Article 3 of the Company Law however, imposes personal liability on shareholders. Claimants in a prospectus liability case may only pursue the assets of a shareholder if they prove that she is involved in unlawful acts conducted by the company or its directors and commissioners.

In addition to the above rights, the Civil Code provides for general principles that govern civil liabilities. In particular, Article 1365 of the Civil Code which can be analogous to the common law "negligence" regime regulates the general tort liability. A claim is established pursuant to Article 1365 of the Civil Code if it can be shown that (a) a person acted contrary to his obligation pursuant to the law; (b) violated another person's statutory rights; (c) acted contrary to morality; or (d) did not act prudently in the community towards persons or property. As to the burden of proof, Article 1865 of the Civil Code provides that anyone who claims to have any right or refers to a fact to solidify such right, or objects to another party's right, must prove the existence of such right, or such fact.

A prospectus liability case may take one to two years until first instance judgment. Appeal is available first to the High Court and subsequently to the Supreme Court. These appeals would be granted as a matter of law even if the defendant does not have a valid defense. Appeal to the High Court may take one to two years and appeal to the Supreme Court may take an additional one year. Thus, including both appeals, it may take the judiciary between three and five years to reach a firm and final resolution in a prospectus liability case.

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SECURITIES LAW OF IRELAND

Part 1. The regulator and its supervisory and regulatory powers

The official regulator of Irish securities markets is the Central Bank of Ireland ("CBOI"). The Central Bank also regulates banks and is likely to undertake an increasing role with regard to insurance companies, which are currently regulated by the Department of Enterprise, Trade and Employment. It is intended that the role of the Central Bank of Ireland in this regard will be transferred to a new authority to be called the Irish Financial Services Regulatory Authority. At the time of writing it is not known when this proposed change will take effect.

The Governor of the CBOI is appointed by the President on the advice of the Government. The other directors of the CBOI are appointed by the Minister of Finance. Members of the CBOI may be discharged at the will of the appointing authority before the expiration of their term.

The CBOI administers the system of regulation and supervision of approved stock exchanges and their member firms[192] (Stock Exchange Act 1995, Section 28). The Central Bank of Ireland has extensive regulatory powers under the SEA1995. Section 29 of the Act, for example, empowers the Central Bank to make a direction to any stock exchange, member firm of a stock exchange, director or those responsible for the management of approved stock exchanges and authorized member firms, in relation to any matter related to the operation of a stock exchange or any matter related to its member firms or any matter related to an acquiring transaction as defined therein. Directions are not subject to the approval of other governmental authorities. Although the CBOI regulates the Stock Exchange, the Exchange acts autonomously in supervising the securities market as the Irish "listing authority", i.e. in regulating the admission of securities to listing on its official list.

When investigating a stock exchange, the CBOI may appoint an Inspector or the Court may appoint one at its request[193]. All supervised entities and persons must help the inspector obtain all books, accounts, deeds, records or other documents of, or relating to, the business of the approved stock exchange or authorised member firm. The inspector may examine on oath or by written interrogatories on oath the officers, employees, shareholders and agents of the approved stock exchange or authorised member firm being investigated[194]. Please note that under Section 57(1) of the SEA the CBOI may apply to the Court to appoint an inspector to investigate the affairs of the stock exchange or a member firm where the CBOI is of the opinion "that it is in the interest of the proper and orderly regulation of approved stock exchanges or their member firms or the protection of investors that an investigation shold be held". This Section grants a broad discretionary power to the CBOI, which may be used in the event that a prospectus contains false information or omits material facts. Should the Court order that an inspector be appointed, the inspector would have all powers of inspection set out under the act, as summarised above.

Part 2. The duty to disclose material information

It is unlawful to issue any form of application for shares unless the form is issued with a prospectus which complies with the requirements established in the law[195]. It is therefore prohibited to offer shares to the public for subscription or purchase without a prospectus, but if shares are offered by way of non-public

[192] Stock Exchange Act 1995, SEA 1995. Act Number 9 of 1995.
[193] Stock Exchange Act 1995. Sections 57 and 64.
[194] Stock Exchange Act 1995, Section 60.
[195] Companies Act 1963, Section 44. Act Number 33 of 1963.

offer the requirement for a prospectus would not apply. There is no satisfactory definition of a non-public offer in Irish law and legal opinion is developing on this point. Factors to be considered include the scope of circulation of the offer, the method of selecting recipients of the offer, whether the recipients are currently shareholders in the offering company and the number of persons to whom the offer is made or by whom it is capable of acceptance. Therefore specific advice should always be sought as to the current view of whether particular circumstances require the issuing of a prospectus if there is any doubt that one is required. A prospectus issued under the Companies Acts must be lodged with the Companies Registration Office in accordance with Section 47 CA 1963 on or before the date of publication. The CRO is obliged to refuse to register a prospectus unless it is dated, correctly signed, and has endorsed thereon or attached thereto the documents required.

Paragraph 5.12 of the Listings Rules provides that Listing Particulars must be approved by the Stock Exchange before publication. Draft Listing Particulars are therefore generally submitted to the Stock Exchange at least ten clear business days in advance of publication.

A prospectus issued under the Prospectus Directive must be registered with the CRO on or before publication and must be submitted to the Stock Exchange for consent where any omission of information otherwise required is sought to be made.

The law does not require a "waiting period" between the time that the information in the prospectus has been published and filed in the CRO and the offer of shares described in the prospectus is made and can be accepted – the requirement is simply to file the prospectus either before or on the same day as it is issued. Therefore, once issued the offer of shares recorded in it is made and may be capable of acceptance.

The requirements for the content of a prospectus depend on whether the public offer will also involve a contemporaneous application for admission to listing for the shares concerned or not. Where application to listing is not sought, Article 11 of the Prospectus Directive applies. If listing is contemplated, the Listing Particulars Directive applies as well as the Listing Rules. According to the Schedule A, "Layout for Listing Particulars for the Admission of Shares to Official Sock Exchange Listing", (hereinafter referred to as the "Schedule A LPD") which is annexed to the Listing Particulars Directive, the following information must be included in the prospectus:

1. Salaries and compensations of the members of the administrative, management and supervisory bodies as an aggregate total for each body (6.2.0 Schedule A LPD). Similarly, an aggregate of the stock ownership for each category of directors and officers must be included (6.2.1 Schedule A LPD).
2. The name and stock ownership of shareholders who directly or indirectly hold shares above a percentage of the issuer's capital which has been fixed in 3% by the ISE (3.2.7 Schedule A LPD and Notes on the Listing Rules Paragraph 9.11). The Listing Rules also require disclosure of interests of persons connected to the directors. The Irish amendment to this rule of the Listing Rules acknowledges that there is no legal requirement in Ireland for the notification of interests of less than 5% but states that if such a notification is made to the company concerned then it must be disclosed.
   If known to the issuer, disclosure of the persons who, directly or indirectly, severally or jointly, control the issuer, is required (3.2.6. Schedule A LPD).
3. Some material contracts made out of the ordinary course of business must be disclosed in the prospectus, as well as information of the issuer's dependency on patents or licenses, and industrial, commercial or financial contracts (4.2. Schedule A LPD).
4. Information on the nature and extent of the interests of members of the administrative, management and supervisory bodies in unusual transactions, as well as loans granted to them and guarantees issued for their benefit. (6.2.2 and 6.2.3 Schedule A LPD)

Please note that the information requirements of the LPD and the Listing Rules are onerous. The information requirements set out at 1 to 4 above are examples only of the information required. The information requirements set out in the Listing Rules are substantially the same as those set out in the LPD, and Irish amendments to this section of the Listing Rules are minimal.

The Companies Act 1963 requires that the prospectus be signed by every director, and a signed consent regarding any statement made by an expert be included for registration. The listing particulars must include a declaration from the parties responsible for the listing particulars that, to the best of their knowledge, the information for which they are responsible is true and complete (1.2. Schedule A LPD). There is no requirement that listing particulars be signed. However they must contain a statement whereby the directors of the issuer take responsibility for their contents, and an application for their approval to the Stock Exchange must include a letter from each director to the sponsor confirming his responsibility for the listing particulars and letters from the sponsoring member firm of the exchange setting out any Listing Rules considered in-applicable, seeking consent to omit any information required to be included that the issuer declines to publish (this is generally on commercial grounds), and seeking exemption from the requirement to publish information concerning material contracts that are commercially sensitive.

The distributor is not required to sign a prospectus but assumes liability for the content of the prospectus. The distributor is not required by law to perform a due diligence review, but should do so out of commercial practice in an attempt to minimize the risk of potential criminal or civil liability arising in respect of the issue of a prospectus or listing particulars.

The distributor will be liable also for representations made outside of the prospectus under the common law, if the court finds that the misrepresentation was deceitful, that it was in the form of an "active misrepresentation," and that it affected the judgment of the unsuspecting investor.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The CBOI does not have an explicit power to de-list an issuer where a prospectus includes false statements or material omissions; this power rests with the Stock Exchange. The CBOI does, however, have a broad power to give directions to the Stock Exchange, as set out above.

A distributor is a "member firm" under the SEA if it provides investment services beyond underwriting and placing securities. The CBOI can apply to Court for an order revoking the authorization of a member firm if, *inter alia*, it is necessary to protect investors, or if the member firm has materially failed to comply the requirements of the SEA or the code of conduct, or if any of its directors or manager or partner is no longer deemed to fulfill the conditions of competence and probity[196]. The code of conduct is required to be drawn up by the CBOI to ensure that a member firm, *inter alia*, acts with due skill, care and diligence, in the best interests of its clients and the integrity of the market, makes adequate disclosure of relevant material information in its dealings with its clients, and complies with all regulatory requirements.

The auditors are not subject to administrative sanctions under the CBOI in case of false or misleading information in the prospectus. The auditors are governed by the relevant regulatory body, depending on what professional accountancy body the firm is a member of. The most prominent accountancy body is

[196] Stock Exchange Act 1995, Section 24.

the Institute of Chartered Accountants in Ireland. Its principal powers of sanction against a defaulting member are: (i) that he be excluded from membership; (ii) that he be suspended from membership for a period; (iii) that any practising certificate held by him be withdrawn; (iv) that he be ineligible for a practising certificate; (v) that any insolvency licence held by him be withdrawn; (vi) that he be ineligible for an insolvency licence; (vii) that any authorisation or licence or permit held by him be withdrawn; (viii) that he be severely reprimanded; (ix) that he be reprimanded; and (x) that he be fined a sum not exceeding €30,000.

3.2 Judicial sanctions

If a prospectus includes an untrue statement, any person who authorised the prospectus shall be liable upon conviction to a prison term or fine, unless she can prove that either: (a) the statement was immaterial, or (b) that she reasonably believed up to the date the prospectus was issued that the statement was true[197].

This provision applies to a director if she authorized the issuing of the prospectus containing an untrue statement but not to the distributor (who does not authorise the prospectus), or to auditors and other experts unless the untrue statement is made or approved by them.[198] Recent UK case law has extended the potential exposure of the auditor to recipients of an offer for shares. This may have persuasive authority over Irish Courts although they are not bound to accept UK case law.

Similarly, Section 242 of the Companies Acts 1990 provides that a person shall be guilty of an offence if she knowingly or recklessly makes a statement or delivers a document required by the Companies Act that is false in some material respect. Section 242 would apply to the auditor's or accountant's report included in the prospectus. The section does not refer to omissions but it may be assumed that an omission so serious as to constitute a false or reckless answer would be considered an offence under the section.

The Listing Particulars Regulations[199] and Prospectus Regulations[200] also provide for similar offences. Both Regulation 6(2) of the Listing Regulations and Regulation 20(2) of the Prospectus Regulations provide that any person (and if a corporate body, the responsible directors or officers) who knowingly publishes any information required which is false or misleading in a material respect shall be guilty of an offence and liable on summary conviction to imprisonment or to a fine. As stated above the provisions in question apply to information which is false or misleading. If an omission of information is so material that the omission in itself amounts to the information that is included being false or misleading information, the provisions apply. Where a director knowingly publishes false or misleading information he shall be guilty of an offence.

When a person is convicted of an offence "in relation to a company, or involving fraud or dishonesty", she shall not be appointed as director, officer or auditor of any company for five years or the time that the court orders. The court may also, if it considers that the conduct of a person makes her unfit to be involved in a company's management, issue a disqualification order against that person for the time that it considers appropriate[201].

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[197] Companies Act 1963, Section 50.
[198] For purposes of Section 50, experts are not considered to have authorized the prospectus by reason only of having given the consent required to include a statement in the prospectus.
[199] European Communities (Stock Exchange) Regulations, 1984, S.I. 282/1984.
[200] European Communities (Transferable Securities and Stock Exchange) Regulations, 1992, S.I. No. 202/1992,
[201] Companies Act 1990, Section 160. Act Number 33 of 1990.

The courts have broad powers to order the measures they see most fit in the particular instance. These measures may be statutory or non-statutory and include the award of damages and the granting of injunctions.

3.3 Stock Exchange sanctions

The Listing Rules are made by the Irish Stock Exchange as competent authority under the Listing Particulars Directive. In practice the Listing Rules applicable in Ireland comprise the listing rules as issued by the Listing Authority in the UK as amended by the "Notes on the Listing Rules" issued by the authority of the board of the Irish Stock Exchange.

Under the Listing Rules as amended by the Notes on the Listing Rules (as at 7 August 2001), if the Irish Stock Exchange considers that an issuer has violated the Listing Rules, it will refer the matter to its Quotation Committee, which can in turn censure the issuer and publish the censure, or suspend or cancel the listing. In case the violation is attributable to the conduct of an issuer's director, the Quotation Committee may also censure the director, publish that censure, and request the issuer to dismiss the director under penalty of suspension or cancellation of the listing.

The Exchange cannot sanction the distributor or the auditor in case of false statements or omissions of material information in a prospectus although in the case of a distributor who is the sponsor sanction can be imposed if the application letters (see supra) were incorrect. In the case of an auditor, the Exchange can bring the matter to the attention of the relevant body of accountants.

Part 4. Investor's right of restitution for losses

Investors who suffered loss or damage by reason of an untrue statement or material omission in a prospectus may obtain restitution in a civil action, both under common law, and under the remedies provided by the Companies Act 1963 and the Statutory Instruments implementing the EC Listing Particulars and Prospectus Directives. A class action is not available in Ireland for a case of prospectus liability.

It is not possible for an investor to obtain restitution for damages through a criminal action.

4.1 Remedies Under the Companies Act

Restitution for investor's losses under the Companies Act is expressly provided in Section 49 of the Companies Act 1963. Under Section 49(1), the directors of the company, promoters[202], and every person who authorised the issue of the prospectus (including experts, such as the auditors, who have granted consent for the issue of the prospectus containing a statement made under their authority, and only to the extent of that statement), shall be liable to pay a compensation, to any person who subscribed shares based on the prospectus, for damages sustained by reason of any untrue statement included therein. According to Section 52 of the same Act, a statement included in a prospectus can be deemed to be untrue if it is misleading in the form and context in which it is included. Therefore, it is possible that a statement containing a material omission could be an "untrue statement" within the meaning of the statute, and an omission of material information may give rise to a Section 49 remedy where the omission changes the true meaning of the disclosed information.

[202] For the purposes of Section 49, "promoter" means " a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company."

It is worth noting that the company itself is not named as a liable party under Section 49, which is considered by some as a lacuna in the legislation which should be remedied[203]. Furthermore, it is not clear whether restitution from the company would be available under common law, as discussed below.

The distributor does not seem to fall under Section 49 either, because she does not authorize the prospectus, and is not a consenting expert. The distributor is generally the person who acts as the registered sponsor required by the Stock Exchange for listed issuers, who manages the application process and advises the company on its ongoing compliance with the Listing Rules, but does not have a direct responsibility to investors (although it would be regulated by the stock exchange, and is liable before the regulator). Therefore, she cannot be held liable for investor's losses under the Companies Act.

The issuer's controlling shareholders are not liable for untrue statements in a prospectus, unless it can be established under common law that they have misled the directors. However, Section 27 of the Companies Act 1990, referring to "shadow directors," provides that a person in accordance with whose directions or instructions the directors of a company are accustomed to act shall be treated as a director under certain circumstances. Therefore, where a shareholder is also a person with whose instructions the directors of a company are accustomed to act, he may be seen as a shadow director, and may therefore be treated by the courts as a director, with all the attendant duties and liabilities, including prospectus liability where appropriate. Finally, there is no legal precedent for corporate veil piercing when the shareholders are individuals, or in cases of liabilities arising from a prospectus.

4.2 Burden of Proof

In order to obtain restitution under Section 49 Companies Act 1963, an investor needs to prove that; (i) an untrue statement was included in the prospectus (or that there was an omission that turned a statement therein untrue); (ii), the investor subscribed shares on the faith of the prospectus; and (iii) she suffered losses by reason of the untrue statement.

4.3 Defenses

Any party, who is liable under Section 49, shall be released from civil liability if she can show any of the defences provided for in the same section. The burden of proof is thus reversed: once it is established that an untrue statement was included in the prospectus, the onus is on the defendants to prove that one of the statutory defenses apply. Among others, it will be a defense to show that the otherwise liable party had reasonable ground to believe, and did believe at the time of the allotment of the shares, that the statement was true (or that there was no material omission that would make a statement in the prospectus to be deemed as an untrue statement). In case of an statement made under the authority of an expert, the person making the statement would need to prove that she was competent to make the statement, in addition to showing that she had reasonable ground to believe, and did believe, that the statement was true. Other defenses, such as proving lack of consent to the issue of the prospectus, or that the statement fairly reflects an expert statement or an official statement, may also be invoked by directors, promoters, or those authorizing the issue of the prospectus.

It is unclear whether there is a remedy also available for investors under Section 44 of the Companies Act 1963; considered opinion indicates that there is not. "…to read a right to compensation into Section 44(5) would do some violence to the legislative intent,…"[204] Section 44 provides that a prospectus must contain certain information and must attach certain reports. It also establishes that a director or "other person responsible" for the issue of the prospectus shall not incur any liability by reason of non-compliance or contravention if she proves any of the defenses under Section 44(5): that she did not know of the undisclosed matter, that the contravention arose from an honest mistake on his part or it was in

[203] See Dermot Cahill, Corporate Finance Law, Round Hall Ltd, 2000, p 156.
[204] See Dermot Cahill Corporate Finance Law Round Hall Ltd 2000 at para 3-40.

respect of matters which, in the opinion of the court, were immaterial or reasonably excusable considering the circumstance of the case. However, while the defenses above are provided, no sanction is specified other than a fine of £500 for breach of Section 44. Therefore, the question of whether breach of Section 44 could give rise to some form of action for damages remains open. It should be noted that Section 44 expressly indicates that it does not limit or diminish any liability that may be incurred under other provisions of the Companies Act. Therefore, unawareness as described in Subsection 44 (5) cannot be used as a defense against liability under Section 49. Should Section 44 be applicable as a remedy for damages caused by omissions of material information in a prospectus, it would be an alternative cause of action to that provided for under Section 49. However, contrary to Section 49, Section 44 would apply also to mere omissions from the information required to be submitted that is even when the omission may not be understood as turning a statement in the prospectus into an "untrue statement".

4.4 Remedies under the EC Listing Particulars Directive

Remedies in case of investor's losses caused by a defective prospectus are also provided under the Statutory Instruments implementing the EC Listing Particulars Directive (which apply to listed securities) and the Prospectus Directive (which applies to any prospectus in respect of shares for which admission to official stock exchange listing is not sought).

Article 4(1) of the Listing Particulars Directive requires that listing particulars contain all necessary information to enable a potential investor to make an informed decision of the financial position and prospects of the issuer. An omission could constitute a breach of such duty, and defenses almost identical to those listed under Section 44(5) of the Companies Act are set out by Article 4(2). Contrary to Section 49, which explicitly grants a right of action for compensation to persons who suffer financially as a result of untrue statements in a prospectus), the Listing Particulars do not explicitly grant a right of action. Instead, it is submitted that a civil action for damages is the most appropriate means to seek a remedy and while the issue remains undecided it seems reasonable to suggest that the Courts would construe the regulations made under the directive as allowing a claim for damages against those responsible for the listing particulars.[205]

Although the Directive continuously refers to "persons responsible" for the prospectus in the context of liability, unfortunately, this phrase is not clearly defined in the legislation. It has been interpreted[206] that this could refer to directors, promoters, experts (in regards to their expert report), and may include the issuer in the context of the Listing Particulars Directive and Regulations only. A responsibility statement is required to be included in the prospectus by the Listing Rules and Article 4.2 and Schedule A & B of the Listings Particulars Directive, and this may clarify the situation as to liability.

4.5 Remedies under Common Law

Parties who play a part in the drafting of a prospectus, including the directors and experts, may also be found liable under common law. Common law actions may consist of fraudulent misrepresentation (actionable in the tort of deceit) and negligent misrepresentation.

In order to establish the tort of deceit, the plaintiff must prove the following:

1. The making of a representation as to a past or existing fact by the defendant;
2. That the representation was made knowingly or without belief in its truth, or recklessly, careless whether it is true or false;
3. That it was intended by the defendant that the representation should be acted upon by the plaintiff; and

[205] See also Dermot Cahill, Corporate Finance Law , Round Hall Ltd 2000 at para 3-36
[206] See Dermot Cahill, Corporate Finance Law, Round Hall Ltd, 2000, p 161.

4. That the plaintiff did act on the representation and suffered damage as a result."[207]

As to negligent misrepresentation, an action may be taken in contract or in tort, there being two main differences between the causes of action; that in the contractual action the parties must have entered into a contract after the misrepresentation was made (not required in tortious action), and that in order to bring an action in tort you must prove that the party making the representation owed a duty of care to the plaintiff (not required for action in contract).

Remedies for both fraudulent and negligent misrepresentation are rescission and damages.

Where an omission has the effect of making what has been disclosed absolutely false, an action lies under common law for damages for misrepresentation. The mere omission of material information in itself cannot give rise to an action for misrepresentation, although it may provide grounds for rescission of the contract.

Although under common law an investor can recover damages against the persons responsible for issuing the prospectus, a right of action in damages does not appear to be possible against the company itself[208].

Please note that the burden of proof under common law for each potential action as set out above will not change where the action is taken against the distributor.

4.6 Rescission

The prospectus forms the basis of contract between the investor and the issuing company, and accordingly a contractual liability may arise which may enable the investor to rescind the contract, i.e., the company would be obliged to return the money paid by the investor. In order to obtain an order for rescission the plaintiff must establish that a misrepresentation has occurred. Rescission post completion of a subscription is notoriously difficult to obtain as the Courts will generally require a plaintiff to demonstrate that all innocent parties will be returned to the status quo ante and this is impossible to achieve in most cases.

4.7 Duration

An action before a civil court for restitution for losses in a prospectus liability case may take between two and four years, including all applicable appeals. A first instance judgement may be obtained in approximately half of that time. Whether or not a defendant can appeal depends on which court the defendant intends to appeal from. If the original suit is filed in the Circuit Court (jurisdiction currently up to £30,000) an appeal can be filed as a matter of course to the High Court. An appeal from the High Court, however, may only be made on a point of law and is much more difficult to obtain. If the defendant has no defence, she will not be able to make a spurious appeal to the Supreme Court.

This chapter was prepared with the help of:

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[207] Stanley J Forshall v. Walsh (18 June 1997, unreported), High Court.
[208] Houldsworth v. City of Glasgow Bank [1880]5 AC.

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SECURITIES LAW OF ISRAEL

Part 1. The regulator and its supervisory and regulatory powers

The Israel Securities Authority ("ISA") is the primary regulator of the Israeli securities market. Banks and insurance companies in Israel are regulated by the Examiner of the Banks and the Superintendent of Insurance, respectively.

The ISA consists of at most 13 members, all of whom appointed by the Israeli Minister of Finance. The Minister of Finance appoints one ISA members as Chairman of the ISA and another as its Deputy-Chairman. The term of office of an ISA member is three years from the day of her appointment and the term of office of the ISA's chairman is five years from the day of her appointment as chairman. The Minister of Finance, however, may cancel the appointment of any member who, in the Minister's opinion, has without reasonable cause been absent from four consecutive meetings of the ISA or absent from six meetings during a fiscal year, provided that the said member has been granted due opportunity to be heard.

Generally, the supervision of the securities market is assigned to the ISA. However, in certain cases the Minister of Finance or the Attorney General have special powers to intervene, and in certain cases there is the right to appeal to an Israeli District Court. In addition, the ISA is involved in and supports the process of enacting regulations promulgated under the Securities Law (the "SL") by the Minister of Finance, who is charged with the implementation of the SL. The Minister of Finance may, in consultation with the ISA, and with the approval of the Finance Committee of the Knesset make regulations as to any matter relating to such implementation, unless otherwise provided in the SL.

In addition, the ISA supervises the orderly and fair operation of the Tel Aviv Stock Exchange Ltd. (hereinafter the "TASE") in accordance to its Articles of Association and has the power to direct it as to the proper manner of operation. The ISA has the power to demand information and documents in order to implement the SL (and the Joint Investments Trust Law) or in the event where a suspicion of a violation thereof has arisen. In these cases, the ISA may demand from any person any information or document pertaining to a corporation which is subject to one of the above laws, including any report, books, account certificate or any other document pertaining to their business. In addition, in the event that a suspicion has arisen as to a violation of the SL (or the Joint Investments Trust law), the ISA may apply to a Magistrate Court judge for a warrant to enter any premises, search the same and seize any document. It may also interrogate any person who, in its opinion, is connected to the issue, and to order any such person to appear before it, submit to it any item and information relating to the said violation, and testify.

Part 2. The duty to disclose material information

A person cannot offer securities to the public without a prospectus approved by the ISA (Section 15, SL). The ISA shall grant a permit for the publication of a prospectus if it is satisfied that the draft prospectus has complied with the provisions of the SL and with the demands of the ISA under it, and that all other permits as required by law have been obtained (Section 21(a), SL). The ISA may order the offerer to circulate copies of the prospectus during a period of which, in places of which and a quantity of which as shall be ordered (Section 23(d), SL).

The prospectus shall prescribe the period for the placing of orders for the securities offered and the said period shall commence no earlier than seven days from and terminate no later than one month after the

date of publication of the prospectus (Section 24(a), SL). However, the ISA is authorized to adjust this period on conditions as it may see fit (Section 24(b), SL). The offerer shall not accept orders before the commencement of the period for placing them nor after the termination of the same (Section 24(c), SL).

The Particulars Regulations[209] lay out the disclosure requirements for prospectuses.

1. Salaries, pay and fringe benefits of the directors and of the general manager, which do not exceed what is customary, are required to be stated in a prospectus as one total amount for all the said directors together.
2. The shares held by every Interested Party[210] in the issuer on the date of the prospectus, or on a date as near to it as possible, need to be stated to the best knowledge of the issuer and of its directors, with the name of every Interested Party, whether the interest be direct or indirect, the proportion of the issuer's share capital which she held on the said date at full dilution, and the nominal value of shares in the issuer, which she undertook to acquire or which the issuer undertook to sell her.
3. The number of shares and options held by every Interested Party and Senior Officers[211] of the issuer, in the issuer and in its subsidiaries or associated companies shall also be disclosed.
4. Under the general obligations set forth in Section 16 of the SL and Section 6, 44, 47 and 67 of the Particulars Regulations, a description of all and every type of material contract in the ordinary course of business must be included in the prospectus.
5. A description of material contracts not made in the ordinary course of business must be included in the prospectus (Section 66 and 67a, Particulars Regulations).
6. The nature of the interest, which any Interested Party in the issuer has or had during the two years that preceded the prospectus, in any transaction to which the issuer, its subsidiary or its associated company is a party, except for transactions carried out in the ordinary course of business of the aforesaid bodies corporate (Section 54, Particulars Regulations).

The issuer, its directors, its underwriter and the offerer have to sign the prospectus (Section 22(b), 22(c) and 22(d), SL). An opinion by the issuer's auditor on the issuer's audited financial reports and on its audited consolidated financial reports in the prospectus, as well as an opinion by an attorney-at-law has to be included in the prospectus. Any person who has signed a prospectus is liable to a person who has acquired securities from the offerer, and to any person who has sold or acquired securities on or outside the stock exchange, for any damage caused by the fact that the prospectus contained a misleading item (Section 31(a), SL). However, the liability of an underwriter or an offerer, shall not be incurred by a person who proves that she took all appropriate measures to ensure that the prospectus, opinion, report or certificate, as the case may be, did not contain any misleading item, and that she honestly believed that it did not so contain (Section 33(1), SL). For this reason, the distributor normally performs a due diligence review as a matter of commercial practice although she is not required by law to perform one.

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[209] The Securities Regulations (Particulars of Prospectus, its Structure and Form) 5729-1969, hereinafter the "Particulars Regulations".

[210] "An Interested Party" in a corporation is defined in section 1 of the SL as: (1) Any person holding five percent or more of the issued share capital of the corporation or of the voting power, or who is entitled to appoint one or more of its directors or the managing director, any person serving as a director of the corporation or its general manager, or any corporation in which any of the above persons holds twenty- five percent or more of the issued share capital or of the voting rights or in regard of which he is entitled to appoint twenty- five percent of the directors; (2) a subsidiary of the corporation, excluding a registration company.

[211] "A Senior Officer" in a corporation is defined in section 1 of the Particulars Regulations as "director, general manager, deputy to the general manager, vice general manager, accountant, internal auditor, and every person who holds a said position, even if his title is different, and also an individual who is employed by the issuer in another position and holds five percent or more of the par value of the issued share capital or of the voting power".

Part 3. Sanctions for the failure to disclose

3.1Administrative sanctions

If after granting a permit to publish a prospectus (but before the termination of the period for the placing the orders) the ISA becomes aware of information which would have prevented it from authorizing the publication of the prospectus, it may direct the offerer to publish an amendment to the prospectus (Section 25(a) of the SL). Once shares have been offered to the public, the ISA may demand a corporation, to submit an immediate report on any event or matter that, in its opinion, is of importance to a reasonable investor considering the purchase or sale of securities of the company (Section 36(e), SL). For example, the ISA may demand the submission of an immediate report that reveals a false or misleading item in the prospectus to the public. If the issuer does not comply with the request, the ISA may order the stock exchange to suspend trade of its securities (Section 38A, SL). Moreover, if the Chairman of the Authority has reasonable grounds to assume that a violation of this Law or the Joint Investments Trust Law, or any regulations thereunder, is being committed, or that an offense is about to be committed, he may apply to the District Court for an order enjoining the committing of the said offense or the continuation of the acts which are the subject of the said application (Section 56D, SL).

An underwriter has to report to the ISA on anything that might have prevented the ISA from authorizing the publication of the prospectus immediately after the underwriter knew about it (Section 23, Underwriting Regulations). Failure to do is punishable with fines (Section 27(b), Underwriting Regulations). Finally, disciplinary sanctions (e.g., suspension of license by the Israeli Audit Council) can be taken against an accountant (Sections 11 and 12, Auditors Law 5715-1955 and the regulations promulgated there under) and against a lawyer (Sections 61 and 68, Bar Association Law 5721-1961 and the regulations promulgated there under).

3.2Judicial sanctions

Section 16(a) of the SL sets forth the general rule, under which "a prospectus shall contain any every detail of importance to a reasonable investor[212] considering the acquisition of securities offered therein, and every detail determined by the Minister of Finance in regulations by virtue of section 17". Section 16(b) of the SL determines that "a prospectus shall not contain any misleading item[213]". A person who fails to comply with the provisions of Section 16(a) of the SL shall be liable to imprisonment or to a fine (Section 53(b)(2), SL). In addition, anyone who contravenes the provisions of Section 16(b) of the SL, and does not prove that she did so without intent to mislead a reasonable investor, shall be liable to imprisonment or to a fine (Section 53(a)(2), SL). Finally, anyone who gives an opinion, report or certificate that she knows contains a misleading item, and which is included or referred to in a prospectus with her prior consent shall also be liable to imprisonment or to a fine (Section 53(a)(3), SL). Where a corporation is responsible for omitting material information or including misleading statements in the prospectus, the directors and the general manager of that corporation shall likewise be criminally liable, unless they can prove (1) that they did not know nor were under any obligation to know of the offense or that they had no way of knowing of the same, or (2) that they took all reasonable measures to prevent the offense (Section 53(e), SL).

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[212] The Israeli Supreme Court held that a reasonable investor is neither an especially sophisticated investor nor a misunderstanding investor. It also held that there is a duty to disclose any fact that, if known, may change the decision of a reasonable investor (See Civil Appeal 5320/90 *Baranovitch v. The Israel Securities Authority*, P"D 46(2) 818, 837.)

[213] The term "Misleading Item" is defined in Section 1 of the SL, as "including anything that is apt to deceive a reasonable investor, **and anything the omission of which is likely to deceive a reasonable investor**". [Emphasis added]. Please note that the Israeli Supreme Court determined that it is sufficient that the representation or the omission were potentially deceiving to conclude that it was misleading. (See the *Barazani* case, pp. 600-601)

In addition, a person who induces or attempts to induce a person to acquire or sell securities, and does so by way of statement, promise or forecast - written, oral or otherwise - which she knows or ought to have known to be false or misleading, or by concealing material facts, or fraudulently influences the fluctuation of the price of securities shall be liable to imprisonment or to a fine (Sections 54(a)(1) and 54(a)(2), SL). Therefore, the issuer's directors, and the distributor shall be criminally liable in case of a false statement or omissions of material information in a prospectus, and the accountant or the lawyer shall be criminally liable in case of a false statement or omissions of material information in an opinion, report or certificate that she knows contains a misleading item, and which is included or referred to in a prospectus with her prior consent. The mental component of the offences of a misleading item in a prospectus or deceit in connection with securities under Section 53(a)(2) or Section 54(a) of the SL requires the awareness of the defendant towards the factual components of the offence (the behavioral and circumstantial components). In addition, under Section 53(a)(2) a special criminal intent to mislead a reasonable investor is also required unless the defenses described above apply. Under the Companies Law, a person cannot be appointed as a director in a public company, if he was convicted of a prospectus offense (under Sections 53(a) or 54, SL), unless five years have passed since the judgement that convicted him was handed down. Anyone who was convicted with an offence specified in the SL cannot serve as an officer in an underwriter.

3.3Stock exchange sanctions

The general manager of the TASE or anyone authorized by her is allowed to suspend the trading in a security, inter alia, if (1) an ambiguity regarding the company, including its controlling ownership or its securities, may substantially affect the value of the security, and (2) the SA announced that the financial reports of the company were not appropriately submitted, or the company did not submit financial reports on time.

In addition, the General Manager of the TASE or a person authorized by him may temporarily halt trading in a security or in a group of securities where, among other things, (1) material information with regards to the company, including its control holders or its securities, was published in any way, and it is doubtful whether such information can become known to the public; and (2) incorrect information relating to the security rate was published, or in any derivative – in the event of halt in trading of its base asset or if incorrect information relating to its base asset was published.

Part 4. Investor's right of restitution for losses

REMEDIES AVAILABLE

In case of misleading information in a prospectus, investors have several courses of action under the Securities Law. According to Section 31, they may have an action for damages against any person who signed the prospectus, and under Section 52K against the issuer (and its directors, general manager and controlling shareholder). Under Section 35, investor may also pursue the cancellation of the acquisition[214] of the shares and refund of money paid.

In addition, investors may get restitution for damages under other causes of action including but not limited to, misrepresentation, negligence, breach of statutory duty, deceit under the Torts Ordinance [New Version], action without good faith, breach of loyalty duty, misrepresentation and misleading under the

[214] Israeli laws distinguishes restitution from damages as restitution of the price paid may not be enough to cover investors' losses.

Contracts Law (General Part), 5733-1973[215] and the Contracts Law (Remedies), 5730-1970, and unjust enrichment.

A class action suit is available to investors as provided for in Sections 207-218 of the Companies Law.

SECTIONS 31 AND 32 OF THE SL

Under Section 31(a) of the SL, "any person who has signed a prospectus under Section 22 is liable to a person who has acquired securities from the offerer, and to any person who has sold or acquired securities on or off the stock exchange, **for any damage caused by the fact that the prospectus contained a misleading item**". [Emphasis added]. Therefore, the signatories of a prospectus (whether or not involved in the preparation of the prospectus, such as the distributors who are not required by law to participate in the preparation of the prospectus) are liable for its contents, including for the inclusion of a misleading item in the prospectus.

The accountants and the attorneys are liable as experts. According to Section 32 of the SL, any person who has provided an opinion, report, review or certificate included or mentioned in the prospectus with her prior consent, shall be liable as provided in Section 31(a) of the SL (to a person who has acquired securities from the offerer, and to any person who has sold or acquired securities on or off the stock exchange) for any injury caused by virtue of a misleading item contained therein.

Section 34 of the SL establishes that, in the event that two or more persons are liable under Section 31 and 32 of the SL, their liability shall be **jointly and severally** towards the injured party (while their liability *inter se* shall be governed by the rules applicable to liability in tort).

In order to establish liability under these sections, the plaintiff has to prove that (1) there is a misleading item in a prospectus or in the opinion, report, review or certificate included or mentioned in the prospectus, (2) she suffered harm, and (3) there is a causal relationship between the misleading item or the breach of the provisions of the SL. The plaintiff is not required to prove her direct reliance on the misleading item, as required, for example, under Section 35 (a) of the SL[216].

Under Section 33 of the SL, the defendant can escape liability if she can prove that (1) she took all appropriate measures to ensure that the prospectus, opinion, report or certificate, as the case may be, did not contain any misleading item, and that she honestly believed that it did not so contain, and has fulfilled her obligation under Section 25(d); or (2) the plaintiff, at the time she purchased the securities, knew or ought to have known that the prospectus, opinion report or certificate, as the case may be, contained a misleading item; or (3) in regard to an issuer, she submitted an immediate report correcting the misleading item and published the said correction in the manner prescribed for the publication of a notice on a prospectus under Section 23(c)(2), and the plaintiff has acquired the securities after the publication of the said correction; or (4) she submitted written notice to the issuer in regard to a correction of a misleading item, and the plaintiff has acquired the securities after the lapse of 24 hours from the time of the submission of the said notice.

SECTION 52K OF THE SL

Under Section 52K of the SL, an issuer is liable towards a holder of securities for any harm caused to her by the issuer's violation of the provisions of the SL or the regulations promulgated under it. To this effect, a false or misleading statement in the prospectus would clearly be considered a violation of the SL. Such

[215] This section provides that where a contract has been rescinded, each party shall restore to the other party what she has received under the contract or, if restitution is impossible or unreasonable, pay her the value of what she has received.

[216] See: The *Shemesh* case, p. 311-312.

liability shall also apply to the directors of the issuer, its general manager, and the person holding a controlling interest in the issuer. And under Section 52N of the SL, where two or more persons are liable under Section 52K of the SL, they shall be jointly and severally liable towards the holder, while their liability *inter se* shall be governed by the rules applicable to liability in tort.

The plaintiff under Section 52K is required to prove that the damage was caused to him by the fact that the issuer violated the SL or the regulations. The burden of proof under Sections 31 and 52K from a civil perspective is the same – by way of a balance of probabilities (51%).

Section 52M of the SL provides certain cases in which the liability under Section 52K shall not apply: "(1) to any person who has proven that she has taken all appropriate measures to prevent the violation; (2) to a person who has proven that she had no knowledge of the violation, nor was she under an obligation to know nor had she any way of knowing of the same; (3) to a person in regard to whom it was proven that the said person acquired the securities of the issuer at a time when she knew or ought to have known of the violation."

Under Section 52K(b) of the SL, the controlling shareholder shall be liable towards investors for any harm by reason of a violation of the SL. Although according to the Companies Law, a company is perceived as a separate legal entity from its shareholders, directors, or officers, Section 52K(b) allows the plaintiff to pierce the corporate veil and hold the controlling shareholder liable.

Apart from Section 52K(b), the controlling shareholder of a corporation will not be held directly civilly liable for the acts or omissions of the directors and officers of a corporation, unless such acts or omissions are attributed to the company itself. Alternatively, if it can be claimed that a controlling shareholder takes an active part in the managerial decision making process in the company and influenced the acts or omissions of the directors and officers, she might also be liable to their actions, jointly or severally[217].

SECTION 35 OF THE SL

Finally, the SL also provides for the cancellation of the acquisition of shares as a specific remedy. Under Section 35(a) of the SL, any person who has acquired securities from the offerer in accordance with a prospectus may cancel the acquisition and demand the refund of money paid by her, provided that: (1) she purchased the securities in reliance on a misleading item in a prospectus, and (2) she canceled the acquisition and demanded so within a reasonable time after becoming aware of the fact that the item was deceptive, or after the publication of an immediate report (as provided in Section 36(c) of the SL) in which the misleading item was amended, and not later than two years after the acquisition. In this case, the reliance on the misleading item is an element of the cause of action that needs to be proved by the plaintiff[218].

Section 35(a) refers to an acquisition of the securities from the offerer in accordance with a prospectus, therefore someone other than the issuer (e.g., the distributor) may refund investors.

When comparing Section 35(a) of the SL and Section 52K of the SL, the following differences must be noted: (1) The two legal provisions refer to different losses that the plaintiff suffered and can claim: Section 35(a) refers to the money paid for the securities, while Section 52K refers to any harm (damage) caused to the holder of the securities by virtue of a violation by the issuer of the provisions of the SL; (2) Section 35(a) refers to the offerer as the liable party, while Section 52K refers to the issuer, its directors,

[217] In Civil File (Tel Aviv) 54154/98 *The municipality of Herzelia v. Hason David*, Takdin-Magistrate Court 2002(1) 104, 109, a similar argument was raised by the judge, in connection with the liability of the directors in the case of a deceitful management of the business, and the possibility to levy such liability on the company's shareholders.
[218] See: The *Shemesh* case, p.308-309.

general manager and the holder of control as the liable parties; and (3) the SL does not specifically set forth a defense for the offerer with regards to a claim under Section 35 of the SL, while Section 52M of the SL does set forth the defenses described above.

DURATION

The District Court is authorized to hear first instance certain cases specifically provided for by the SL as well as civil claims that exceed 2,500,000 New Israeli Shekels (equivalent to approximately $520,000 US dollars[219]) at the date of submitting the claim.[220] The Magistrates' Court is authorized to hear first instance criminal cases under Sections 53 and 54 of the SL.

In a prospectus civil liability case, first-instance judgment at the District Court could take approximately between 3 to 4 years, depending on the court hearing the case and its location in the country.

A first-instance judgment of a District Court can be appealed to the Supreme Court as a matter of law (Section 41(a), Courts Law). It may take approximately 3 to 7 years from the moment of filing the initial complaint until the moment of a firm and final resolution by the judiciary, including the appeal to the Supreme Court. If the defendant does not have a valid defense under the law, but opposes the lawsuit and resorts to the defenses and recourses generally available, reaching a first-instance decision could still take 3 to 4 years and a final decision 3 to 7 years. However, in such case, the following may happen:

(1) The judge presiding in the first-instance may examine the pleadings and may permit or order to correct them, or eliminate from them anything unnecessary to the case, and may make judgment in the action, to the extent it became clear that the defendant has no defense against the claim;
(2) If a judgment was given in the first-instance, the defendant may appeal to a higher court applicable. However, the judge at the appeal court might order to amend the statement of appeal, or order to delete or amend any reason of the appeal that the court deems unnecessary to the case, or that might interfere with fair hearing or delay or complicate the case; and
(3) If a court finds that a party unnecessarily prolonged hearings in any proceeding, by means of baseless arguments or in any other manner, then it may, in that proceeding or in the judgment, and irrespective of the outcome of the trial, obligate her to pay the costs of the proceeding or of the trail, at a rate found appropriate under the circumstances, in favor of the opposing party, or of the State Treasury, or both.

In addition, note that the submission of an appeal shall not stay the execution of the decision against which an appeal has been lodged[221]. The execution of a judgment, and especially of a monetary judgment, will be stayed only in exceptional cases, such as where the petitioner will prove that she will not be able to get paid by the respondent if she wins the appeal, or where the situation will not be restored unless the judgment is stayed.

This chapter was prepared with the help of:

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[219] Based on the exchange rate of 4.75 New Israeli Shekels per US dollar, as of October, 2002. The Minister of Justice may, in consultation with the President of the Supreme Court and with the approval of the Constitution, Legislation and Judicial Committee of the Knesset, by order, increase this amount, from time to time.

[220] The District Court is authorized to hear any civil or criminal matter not within the jurisdiction of the Magistrates' Court. A Magistrates' Court shall hear, inter alia, (1) civil claims – other than claims relating to immovable property – where the amount of the claim, or the value of the subject matter, does not exceed NIS 2,500,000 at the date of submission of the claim (Section 51(a)(2), Courts Law); and (2) criminal cases: offences that are punishable by fine only or by imprisonment for a period not greater than seven years (Section 51(a)(1), Courts Law). A judgment of a Magistrates' Court shall be appealable to a District Court (as a matter of law). Any other decision of a Magistrates' Court in a civil matter shall be appealable to a District Court if leave so to appeal has been given by a Judge of the District Court.

[221] Regulation 466 of the Civil Procedure Regulations.

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SECURITIES LAW OF ITALY

Part 1. The regulator and its supervisory and regulatory powers

The Italian official authority in charge of the supervision and regulation of securities markets is the National Commission for Companies and Stock Exchange (*Commissione nazionale per le società e la borsa* or "CONSOB"). The main regulators in charge of banks and insurance companies are the Banca d'Italia and the Institute for the Supervision on Private and Public Interest Insurance (*Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Colletivo*), respectively.

The five members of CONSOB are appointed through a Decree of the President of the Republic, issued upon proposal by the President of the Council of Ministers. The government is required to seek the prior non-binding opinion of the competent Parliamentary Commission with regard to the appointment of the members of CONSOB. Upon completion of the above procedure– which contemplates the intervention of the Parliament, of the Government and of the President of the Republic - the appointment of members of CONSOB is not subject to approval or confirmation by other authorities.

Individual members of CONSOB can be removed from their office as a result of incompatibility of positions. In particular, the members of CONSOB cannot: (i) carry out any professional activity, (ii) be members, partners with unlimited liability, directors, auditors, employees of partnerships or corporations, as the case may be, or (iii) cover other positions or offices within the public administration or public entities. In addition, CONSOB in its entirety can be dissolved in case of impossibility to function or continued inactivity. Dissolution of CONSOB is disposed through a Decree of the President of the Republic, issued after completion of a procedure equivalent to the one provided for the appointment of CONSOB.

In general, CONSOB is the main regulator and supervisor of the Italian securities market, though it does share some of this responsibility with the Bank of Italy, the Ministry of the Treasury and others. The supervision of the securities markets (except wholesale markets of State bonds which are assigned to the Ministry and the Bank) and the approval of their regulations are assigned to CONSOB. The securities markets are organized and operated by special purpose joint stock companies ("Operating Companies") are also under the supervision of CONSOB. In addition, CONSOB regulates and determines the capital requirements for the Operating Companies and the related, instrumental activities that the Operating Companies are allowed to carry out. The Ministry of Treasury determines the requirements in terms of professional skillfulness and absence of criminal records to be complied with by the directors, officers and auditors of the Operating Companies.

The Operating Companies regulate the relevant securities market in compliance with general requirements set out by CONSOB. The establishment of new securities markets must be approved by CONSOB. CONSOB keeps a register of the recognized Italian, EU and non-EU regulated markets. Unregulated markets (Organized Exchanges of Financial Instruments) are also under the supervision of CONSOB, except for the interbank exchanges of funds, which are under the supervision of the Bank of Italy.

In general, the regulations issued by CONSOB are not subject to the approval of governmental authorities. Legislative Decree No. 58 of February 24, 1998 ("TU") entitles CONSOB to establish terms and procedures for the adoption of the regulations falling within the scope of its competence. Some regulations of CONSOB, however, require prior consultation with the Bank of Italy. While the consultation is compulsory, the opinion of the Bank is not binding. Examples of such cases include regulations on the activity and rules on behavior of investment firms, or regulations on the internal

organization of investment firms and recording of their transactions and orders. In some limited cases, regulations are issued by CONSOB in agreement with the Bank of Italy, including regulations on the centralized administration of securities. The regulations of CONSOB being administrative acts and, therefore, subject to the law which gave CONSOB its relevant powers, can be opposed for violation of the law before the Regional Administrative Tribunals by persons qualified to act for being damaged by such violation of law.

Where there is a well-founded suspicion of violation of the laws and regulations regarding public offerings, CONSOB may, within one year of the purchase or subscription, require purchasers or subscribers of the financial products to communicate data and information and transmit records and documents. Such power may also be exercised with respect to persons suspected of making public offerings in violation of disclosure requirements.[222] Moreover, CONSOB investigates violations of insider trading laws. To that end, CONSOB may: (a) request information, data or documents of anyone who appears to be acquainted with the facts; and (b) hear anyone who appears to be acquainted with the facts and shall prepare procès-verbaux of such hearings.[223]

Part 2. The duty to disclose material information

In order to conduct a public offer of securities, issuers must file with CONSOB a prospectus. When filed with CONSOB for approval, the prospectus should be accompanied by a notice stating the intention to offer the securities, and such declaration should be signed by the issuer, the offeror and the distributor. The prospectus and the supplementary note must be made public by filing with CONSOB, making copies available, and publishing a notice in newspapers, at least five days before the start of the acceptance period (Article 8 of Regulation 11971 of 1999, hereinafter "Reg 11971"). Copies of the prospectus should be delivered to potential investors upon request.

When examining the prospectus in order to authorize the offer, CONSOB may request additional documents or information, in which case the term for the approval of the prospectus is suspended. In case of violations of rules on prospectuses or offer of securities, CONSOB is entitled to prohibit the offer.

Regulation 11522 of 1998 implements the rules of the TU on the rendering of investment services (as defined in the EU Investment Services Directives of 1993). According to Regulation 11522, distributors should contact potential investors for "door-to-door"[224] sale through agents called "financial promoters", enrolled in a special register after having passed an exam administered by CONSOB. A "financial promoter" can act for one distributor only, and should carry out his activity in compliance with TU and Regulation 11522. These rules provide, *inter alia*, that the distributor – "financial promoter" has to provide potential investor with adequate information on the investments to be made. In case of violation of securities rules, the "financial promoters" shall be liable jointly with the principal distributor. The entering into force of the agreements for the placing of securities stipulated on a door-to-door basis or "at distance" (e.g., via the web), is suspended for a period of seven days from the subscription by the investor[225]. Within such term the investor can communicate his/her withdrawal to the "financial promoter" or the distributor at no charge.

[222] TU, Article 97.
[223] TU, Article 185.
[224] "Door-to-door" placement means the promotion and the placing of securities among the public carried out in places other than the registered office or the branches of the issuer, the offeror or the distributor.
[225] TU, Article 30.6.

The prospectus must include all the information necessary for investors to make an informed assessment of the issuer's assets and liabilities, profits and losses, and its financial position and projections[226]. The prospectus must meet the requirements set forth in Schedule 1 to CONSOB Reg 11971, which implements the rules of the TU on issue and offer of securities. These disclosure requirements entail including in the prospectus, among other items, the following information:

1. Salary and compensation for each and every director, statutory auditor (in-house auditors to be appointed by the general shareholders' meeting of the company) and general manager (2.7 F.II, Temp 1).
2. The name, number and type of shares with voting rights held directly or indirectly by each shareholder holding more than 2% of the issuer's share capital, and an indication of the issuer's controlling shareholder (D.2 and G.III, Temp 1). Also shares that are beneficially owned should be considered. Irrespective of the issuance of a prospectus, holdings in listed companies of voting shares exceeding the 2% threshold or multiples thereof should also be disclosed to CONSOB and to the issuer[227]. Information on these holdings are made public by CONSOB through its website.
3. The name and number of shares held directly or indirectly by each and every director, statutory auditor (as above described), general manager and their spouses and children under eighteen (2.8 F.II, Temp 1).
4. Specific information on contracts related to intellectual and industrial property should be inserted to the extent they are significant for the activity and the profitability of the issuer. Also information on some contracts outside of the ordinary course of business should be included (e.g., significant purchases or sales of assets. (1.2 E.I Temp 1).
5. With regard to contracts and transactions with "related parties", the issuer should specify the "nature, main characteristics and amount of the commercial or financial transactions having material effects on the issuer". Homogeneous transactions can be aggregated on the basis of their "significance" for the issuer. Disclosure of contracts with related parties should be made according to the International Accounting Standard no. 24, "Related Party Disclosure", issued by the International Accounting Standards Committee (1.2.18 E.I Temp 1), and Article 2359 of the Civil Code: in furtherance to the cases of "related parties" described by the International Accounting Standard no. 24, Article 2359 of the Civil Code also contemplates companies having a dominant influence over the issuer by reason of their holding or particular agreements with the issuer.
6. Specific information on the interest of each and every director, statutory auditor (as above described) and general manager in extraordinary transactions (2.9 FII, Temp 1).

The prospectus must indicate the individuals and/or companies responsible for its compilation or, if applicable, for each part of the prospectus[228]. In addition, the relevant parties should sign an engagement of responsibility for the completeness and accuracy of the Prospectus or parts thereof (where applicable). The distributor, as a placer of the securities (or lead manager of the placement syndicate), is required to attest, by a statement attached to the notice of the public offering, that the prospectus contains the information necessary to make an informed investment decision that came into her knowledge[229].

[226] TU, Article 94.
[227] TU, Article 120.2.
[228] Temp 1, Section T.XIV.
[229] Regulation 11971, Article 5

Part 3. Sanctions for the failure to disclose

False information or material omission from the prospectus may give rise to either administrative or criminal liabilities. It should be noted that these rules of the TU do not refer to a specific perpetrator of the violation, but use general expressions such as "persons who"[230] or "any person who"[231]. Therefore, sanctions shall be applicable to the issuer, the offeror, the accountant and the distributor, according to the evidence that shall be given with respect to their responsibility. Facts ascertained in a criminal proceeding must be mandatorily kept into consideration in an administrative proceeding, but not vice-versa. This means that if in a criminal proceeding it is established that the issuer omitted material information from the prospectus, it will not be possible to conclude otherwise in the administrative proceeding.

3.1 Administrative sanctions

CONSOB may order the suspension of the issue of shares if it is in the public interest[232], or suspend or prohibit a public offering in case of a violation of the provisions in the TU related to public offerings or the applicable regulations[233], which also include the norms on the content of the prospectus. In addition, any person who makes a public offering in violation of prospectus disclosure requirements shall be punished by a pecuniary administrative sanction[234].

CONSOB may suspend the licences of the distributor's financial salesmen who violate the TU or any of the regulations[235]). A distributor not involved in the preparation of the prospectus selling shares as underwriter can be subject to a pecuniary administrative sanctions for violations to the norms on financial salesmen[236].

The pecuniary administrative sanctions for false information or omission of material information in a prospectus are enforced by means of a decree of the Ministry of the Treasury following a proposal for sanction submitted by CONSOB[237]. CONSOB will draft the proposal for sanction on the basis of the information gathered from the concerned parties; in particular, CONSOB is required to hear the alleged responsible of the violation[238] and shall evaluate the procedures for preparing the prospectus.

CONSOB may convene the directors, members of the board of auditors, and manager, and order the convening, or directly convene, the meeting of the governing bodies of an authorized person such as investment firm, asset management companies and financial intermediaries[239].

In order to supervise the activities of auditing firms, CONSOB may require an auditing firm to provide information and documents, carry out inspections and obtain information from directors and officers, and recommend auditing principles and methods. In case CONSOB finds serious irregularities in the performance of auditing activity, CONSOB may order an auditing firm not to employ the person involved for a period not exceeding two years, prohibit the firm from accepting new engagements for a period not exceeding one year, or delete the auditing firm from the special registry[240]. A pecuniary sanction may also

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[230] Article 174 TU
[231] Article 191 TU
[232] Article 7 TU.
[233] Article 99 TU.
[234] Article 191 TU.
[235] Article 196 TU.
[236] Article 190.1 TU by reference to Article 31 TU.
[237] Article 195.1 TU.
[238] Article 195.2 TU.
[239] Article 7 TU.
[240] Article 163 TU.

be imposed on an accounting firm by the Ministry of Treasury upon proposal by CONSOB in case of false information or omissions of material information from a prospectus[241].

3.2 Judicial sanctions

Persons who render false notifications or obstruct CONSOB's functions may be punished with imprisonment and a fine[242]. False statements in notifications to CONSOB, include *inter alia*, the notice of a public offering attached to the prospectus[243]. On the other hand, omissions of material information from the offering documents are likely to obstruct the exercise of CONSOB's review of the prospectus, or to induce CONSOB to issue a decision on the prospectus that it wouldn't have issued should the material information have been disclosed. Negligence is sufficient to create the violation. The sanction shall apply to the issuing company, and its directors and officers, but not to the distributor.

The directors and partners of auditing firms who make false statements or conceal facts regarding an audited company's economic situation shall be punished with imprisonment and a fine[244]. The sanction applies if in the judgement of a court, the perpetrator acted with willfulness and intention to obtain a given result with almost certain knowledge of the consequences of her actions. In particular, lack of an independent investigation by the accountant could amount to a very serious violation of the accountant's diligence and a public prosecutor could see a collusion with the issuer in order to deceive investors or hide from them material information. In addition to imprisonment and a fine, condemnations for the above crimes will also involve the temporary suspension from the position of director, statutory auditor (as above described) or general manager in any company[245].

3.3 Stock Exchange sanctions

The Italian Exchange may suspend the listing of specific securities, or even revoke the listing where it deems that it is not possible to maintain a regular market for such instrument, considering, among other elements, the lack of diffusion of information that may affect the operation of the market[246]. The Italian Exchange may also impose a private or public censure, or a fine, to issuers who fail to provide the exchange with all the information it deems necessary[247].

Finally, the Italian Exchange may also require the appointment of a sponsor to assist the issuer in case or serious violations to the exchange rules or other applicable regulations or provisions, as those regarding the content of the prospectus[248]. The other case in which appointment of a sponsor is required is to assist an issuer which has no other financial instruments already admitted to listing on the Italian Exchange. In case of admission to listing following a public offering and/or a private placement carried out through a consortium of managers/underwriters, the sponsor, if appointed under the above described Italian Exchange regulations, will also be the lead manager/underwriter of such public offering/private placement. The foregoing is the only case in which a sponsor has also to be the distributor. Violation of the duties of the sponsor as described in the regulations of the Italian Exchange[249] do not involve, *per se*, the enforcement of the administrative and judicial sanctions described in Parts 3 and 4. Therefore, a

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[241] Article 193 TU.
[242] Article 174 TU.
[243] Article 94 TU.
[244] Article 175 TU
[245] Additional sanction provided for by Articles 32bis and 35bis of the Criminal Code. Article 2382 expressly prohibit the appointment as director of a company, or, if it is the case, the immediate termination of his/her office as director, of a person condemned to the additional sanction provided for by the above mentioned articles of the Criminal Code.
[246] Article 2.5.1 REGBIT. Rules of the Markets Organized and Managed by the Italian Exchange.
[247] Article 2.6.7 and 2.6.1 REGBIT
[248] Article 2.3.1 REGBIT
[249] Article 2.3.4 – 2. REGBIT

sponsor shall be liable to enforcement of the sanctions described in Parts 3 and 4 to the extent it is also a distributor and was in breach of the duties on the distributors acting as such.

Part 4. Investor's right of restitution for losses

Investors may obtain restitution for losses caused by a prospectus containing untruthful or incomplete information through either a civil or criminal proceeding. A class action suit is not available under Italian law.

Restitution in a prospectus liability case is governed by the general rules of civil law. The basic principle regarding restitution for losses under the Civil Code is that a person is obliged to repair the unjust damage caused by her intentional or negligent action (Article 2043). The term "action" includes omissions when the law establishes a positive duty to act in a specific way, as in the case of the duty to provide complete information in a prospectus.

As a general rule, a party seeking restitution before an Italian court bears the burden of the proof (Article 2697 Civil Code). The typical structure of a "damage" in Italian law consists of three elements: (i) intentional or negligent ("doloso o colposo") behaviour of the agent; (ii) unjust damage (i.e., in violation of the law and of a right protected by the Italian legal order); and (iii) causal relationship between (i) and (ii).

The liable parties include the issuer, its directors and officers, the auditor and its employees, the distributor, and CONSOB. The issuer is liable as responsible for the prospectus and the public offer. Directors and officers are also liable since Article 2395 of the Civil Code gives shareholders the right to be indemnified for the damages caused by their negligent or intentional actions. In addition, the accounting firm that audited the issuer's financial statements is liable for the damages resulting from incomplete or inaccurate financial information attributable to non-compliance of its duties or illicit actions (TU Article 164). Furthermore, the accountants who audited the issuer's financial statements are jointly and severally liable with the audit firm.

The distributor may be held civilly liable on three different grounds. First, Article 5 of Reg 11971 requires that the distributor *attest* that the prospectus contains all the relevant information known to her. However**,** the distributor is not required to perform a due-diligence review of the information contained in the prospectus. Thus, in practice, the distributor is responsible for damages to investors if she knew that the prospectus was inaccurate and did not disclose it. Second, if the distributor has helped in the preparation of the prospectus, she is civilly liable for the part of the prospectus that she has helped prepare (rather than for the prospectus as a whole). Note however that the distributor is not obliged by law to be involved in the preparation of the prospectus. Third, in the performance of financial services[250], the distributor is legally required to act diligently in the interest of investors and acquire the necessary information on the financial instruments offered to potential investors and to illustrate to the latter the risk profile of the investment: this duty of diligence, accompanied under Article 21.1 a) of the TU by duties of correctness and transparency[251], constitute a specific expression of the duty to behave according to good faith provided for by the Italian general rules on obligations. Thus, violation of these duties shall give investors an action for damages not arising from a contract[252] but directly from the law and in particular

[250] TU refers to "investment services" under EC Council directives 93/22/EEC and 93/6/EEC, which include the distributor's activity, defined as the "placing of securities".
[251] In the Italian market practice, "transparency" means, *inter alia*, to provide information on the investment to the client independently from a request by the latter.
[252] Also because according to the TU a written agreement is not required between the distributor and the investor.

from the TU and CONSOB regulations (respectively, Article 21 of the TU and Article 26 of Regulation 11522). Note that in a judgement for damages arising from *investment services*[253], the distributor must prove that she acted with due diligence in informing the investor about all the circumstances related to the investment (Article 23.6 TU), with therefore an inversion of the burden of the proof.

Finally, under a recent court ruling (Decision No. 3132, March 3, 2001, Civil Court of Cassation), investors have a legal action for damages against CONSOB for lack of diligence in examining the offering documents if they suffered losses by relying on a defective offering documents approved by CONSOB .

The controlling shareholder is not civilly liable for the content of the prospectus unless she offers shares in the public offering or is involved in the preparation of the prospectus. Investors may not pierce the corporate veil or hold her civilly liable for the acts or omissions of the directors or officers of the company.

The securities laws do not provide for specific defenses in case of prospectus liability, except for the due diligence defense that can be exercised by the distributor regarding her investment services. Nonetheless, the most successful defense for the issuer, the accounting firm, or the distributor, in a prospectus liability case, is to give evidence that they fully complied with all the statutes and regulations governing their activity. The issuer (and the other parties to the extent they participated in the preparation of the prospectus) should also demonstrate that they acted with due diligence in preparing the prospectus.

A prospectus liability case may take between 3 and 5 years to be resolved in first instance. The first-instance decision is immediately enforceable. However, even without a valid defense, the defendant may first appeal the sentence to the Appeal Court and, subsequently, to the Cassation Court (i.e., a judgement limited to the application of the law by lower courts). Each of the two appeal proceedings may require approximately two to three years. Therefore, reaching a final judicial resolution may take roughly 10 years if the defendant resorts to all the recourses generally available.

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[253] For the relevant definition see the footnote 30.

SECURITIES LAW OF JAPAN

Part 1. The regulator and its supervisory and regulatory powers

The official regulator of securities law in Japan is the Financial Services Agency (*kin-yu-chou*) ("FSA"). The FSA is also the main regulator of banks and insurance companies. The FSA was originally spun off from the Ministry of Finance ("MOF") and, thus, the current officials of the FSA are mainly the former officials of the MOF. The FSA is the extra-ministerial bureau (*gaikyoku*) of the Cabinet Office (*naikakuhu*), but it has its own Minister[254], who is appointed by and reports to the Prime Minister. The Prime Minister delegates its powers and authorities relating to securities law to the FSA while retaining the authority to discharge the FSA Minister pursuant to the procedure set forth in the National Public Official Law and the Regulations of the National Personnel Agency.

The principal sources of securities law in Japan are the Securities and Exchange Law of Japan ("SEL") , the enforcement order, and the Cabinet Office's regulations. The FSA drafts the amendment to the Securities and Exchange Law, the enforcement order, and the Cabinet Office's regulations. However, the amendments to the SEL are always subject to the approval of the Diet, the legislator. In addition, the stock exchange (e.g., Tokyo Stock Exchange) and the Japan Securities Dealers Association ("JSDA") have acted as self-regulating entities and issued numerous internal regulations.

In terms of market surveillance, the Securities and Exchange Surveillance Commission, which is the subordinate body of the FSA, has the primary responsibility to investigate fraudulent activities conducted in the market. In addition, the stock exchanges and the JSDA have powers to regulate trading in the market.[255] According to the Securities and Exchange Law ("SEL"), if the FSA thinks it necessary or appropriate, it may command the delivery of documents from securities companies (including their affiliates) and their counter-parties in transactions.[256] If the FSA intends to sanction the securities companies, it needs to give the securities companies opportunity of notice and hearing procedure. And if the FSA thinks it necessary or appropriate, it may command the testimony of witnesses from the securities companies (including their affiliates) and the related party.[257]

Part 2. The duty to disclose material information

For a public offering of shares, the issuer must prepare the securities registration statement ("SRS") to be filed with the local finance bureau and a prospectus to be delivered in advance to the prospective purchasers of the securities offered. The local finance bureau has the authority to order the issuer to amend the filed SRS if it considers that the securities registration statement fails to provide material information.[258] If the issuer fails to amend the statement accordingly, the local finance bureau may not effect the registration. The local finance bureau may also order to amend the filed SRS if it considers that the risk factors included in the SRS are insufficient to protect investors. Normally, the SRS becomes effective the 15th day after the date of its filing.[259]

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[254] See Art. 55 and 61of National Public Official Law, Art. 6 of the Law concerning Establishment of the Cabinet Office and Art. 2 of the Law concerning Establishment of the Financial Services Agency.
[255] Art. 4 of the Law concerning Establishment of the Financial Services Agency.
[256] Art. 59 of the SEL.
[257] Art. 187 of the SEL.
[258] Art. 10 of the SEL.
[259] Art. 8 of the SEL.

According to Art. 8 of Cabinet Office Order on the Disclosure of the Contents of the Company, the prospectus must include the following information:

1. The name and ownership of the top 10 major shareholders of the company. Under the SEL, the prospectus must provide information on shares beneficially owned by large shareholders; for this purpose, a "beneficial owner" is generally considered to be any person who, even if not the record owner of the securities, has the controlling power to direct the voting and/or the disposition of the securities. Note that persons who beneficially own more than 5% of the total amount of issued and outstanding shares in a publicly-traded company, must file a report with the MOF stating the percentage of shares owned within five days after the beneficial ownership exceeds 5%. They must also notify the MOF if their ownership changes by 1% or more.
2. The number of the shares held by directors and statutory auditors, including the number of shares held in the name of such directors and statutory auditors, and in the name of a third party but beneficially owned by such directors and statutory auditors[260].
3. The description of material contracts entered by the issuer, irrespective of whether those contracts are made in the ordinary course of business.
4. The description of all material transactions between the issuer and its "affiliates". These include: (i) a parent company of the issuer; (ii) a subsidiary of the issuer; (iii) a company whose parent company is the same as that of the issuer; (iv) a company over which the issuer has material influential power, or over its parent company and subsidiaries; (v) a company which has material influential power on the issuer and its subsidiaries; (vi) a shareholder who has 10% or more of the shares of the issuer and his family members; (vii) directors and statutory auditors and their family members; and (viii) a company whose majority ownership (including beneficial ownership) is owned by the persons listed in (vi) and (vii) above and its subsidiaries.[261]

There is no express requirement to disclose the remuneration or compensation of the issuer's directors or main officers. In addition, there is no specific requirement in the SEL or regulations thereunder for inclusion of any information that a reasonable investor would likely consider important to make an investment decision. However, if the securities registration statement or the prospectus fails to include such information, the issuer might be liable for the losses incurred by the investors (Articles 17 and 18 of the SEL).

The person who has the official authority to represent the issuer (normally, the representative director) must sign the SRS. The directors, the statutory auditors, and the officers who have authority similar to that of the directors and the statutory auditors can be held liable for the truthfulness and completeness of the prospectus. The underwriter is not expressly required by law to perform a due diligence review of the information included in the prospectus. However, the underwriter of the securities bears certain statutory obligation to compensate the damages if the prospectus has material incorrect information or omits material information. The accountant also bears similar statutory obligation regarding the financial information in the prospectus. As a result, the underwriter of the securities and the accountant monitor the contents and quality of the prospectus as a matter of practice.

The SEL (Art. 13) prohibits the use of representations which were not included in the prospectus. If the distributor made representations in connection with the sale of shares that were not included in the offering document and subsequently those representations turned out to be incorrect, then the distributor

[260] Beneficial ownership does not necessarily include indirect ownership. If Director A owns her corporation ("Xco") and Xco holds shares of the issuer, the number of shares held by Xco will not be treated as the number of shares held by Director A unless Director A assumes the economic risk of the shares.

[261] Art. 193 of the SEL and Article 8, Item 16 of the Regulations on the Terms, Forms and Methods for Preparation of the Financial Statements.

would be liable for the losses incurred by the investors who have relied on such representation (Art. 17 of the SEL).

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

If a securities registration statement contains an untrue statement or fails to disclose material information, the FSA on behalf of the Prime Minister may order the issuer to file an amendment statement, or if necessary, issue a stop order suspending the effectiveness of the registration and therefore the public offer (Article 10, SEL). The SEL does not provide for any other administrative sanction that may be imposed by the regulator on the issuer, the underwriter, the accounting firm, or its directors and officers, in case of false statements or omissions of material information in a prospectus or a registration statement; provided, however, that (i) the FSA may impose an order of cancellation of the registration as a securities company or other sanctions on the underwriter if it she solicited prospective investors to buy or sell such securities although she knew that the prospectus or registration statement contained false statements or omissions of material information;[262] and (ii) the FSA may impose an order of suspension or cancellation of the license for accountants if they issued an unqualified opinion as to audited financial statements although they knew that such audited financial statements contained false statements or omissions of material information.[263]

3.2 Judicial sanctions

A director or officer who filed a securities registration statement with any false statement on a material matter shall be subject to a penalty of imprisonment or a fine or both (Article 197, SEL). However, this sanction does not apply to omissions of material information.

The issuer of which a director or officer who filed a securities registration statement with any false statement on a material matter shall be subject to a penalty of a fine (Article 207, SEL)

Finally, a person convicted of a crime and sentenced with imprisonment for a defective prospectus shall be restricted from becoming a director of a corporation and government employee (Article 254-2 of the Commercial Code and Article 38 of the National Public Official Law).

3.3 Stock Exchange sanctions

An issuer may be de-listed if the exchange establishes that the prospectus does not meet the applicable listing requirements due to false statements or omissions of material information in the audited financial statements in the prospectus (Article 2 (10) of the Delisting Standards of the Tokyo Stock Exchange).

Part 4. Investor's right of restitution for losses

In case a prospectus includes an untrue statement or material omission, investors may initiate a civil lawsuit for damages against the issuer, its directors and statutory auditors, securities company, or accountant. A class action lawsuit is not available for this purpose.

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[262] Art. 42, Para.1,Item 9 of the SEL, Art. 56 of the SEL, Art. 4, Item 1 of Cabinet Office's Regulations for Restrictions of Actions of Securities Companies

[263] Art. 30 of the Certifies Public Accountants Law

Pursuant to Article 18 of the SEL, the issuer is liable to compensate losses caused to any purchaser of the securities if the registration statement or prospectus contains an untrue statement or fails to disclose a required material information. Therefore, in order to obtain restitution from the issuer, the investor is only required to establish that the untrue statement or omission was material, and that she suffered losses for this reason. The only defense available to the issuer is to prove that the investor knew of the false statement or material omission.

The distributor is liable under Article 17 of the SEL, which provides that any person who sells securities to another or makes another acquire them by use of a prospectus or any other representation, which contains an untrue statement or omits to state material information, is liable to compensate for any losses suffered by an investor who acquired the securities not knowing of the untrue statement or of the omission, unless the person who may be liable can prove that she did not know of the untrue statement or of the omission, and could not have known despite her exercise of due diligence. So investors may recover from the distributor, but distributor has a due diligence defense available.

According to Article 21 of the SEL, the issuer's officers, the distributor, and the accountants of the accounting firm (regarding their audit report) are jointly liable to compensate investors who suffer losses due to an untrue statement or material omission in the registration statement or prospectus unless investors knew of such untruth or omission. The issuer's officers and the distributor may escape liability if they did not know of the untruth or omission or could not have known despite their exercise of due diligence. The accountants are only required to prepare their audit report without malicious intent or negligence.

In order to obtain restitution under the provisions of the SEL, the investor would need to prove in court that: (1) there was an untrue statement or an omission of material information in the prospectus, and (2) that she incurred damages due to such untruth or omission. The amount of compensation for the damages would normally be the price paid by the plaintiff; however, the amount of the damages may be reduced, at the discretion of the courts, by the market value of the securities at the time of claiming the compensation. The defendant may not be liable for the whole or part of the damages if she proves that the damages cannot be attributed to the untrue statement. Note that if the investor establishes that the purchase of the securities was made due to error or fraud under the Civil Code, then, the investor may void or claim rescission of the purchase of the securities and the reimbursement of the price paid.

The controlling shareholder cannot be held civilly liable for the acts or omissions of the corporation (or of its directors and officers) solely because she owns a controlling stake in the firm. However, the principle of "joint torts" under the Civil Code gives investors a direct claim against the controlling shareholder if she acts jointly with the corporation and certain requirements are met. Furthermore, when the corporation is unable to satisfy creditors' claims, case law gives creditors the right to "pierce the corporate veil" if the corporation is a shell company and the shareholder arbitrarily uses such corporation for the avoidance of its own liability. However, there is no case law in relation to the securities regulation permitting investors to "pierce the corporate veil" to go after the assets of the shareholder when the corporation is unable to satisfy investors' claims.

The first-instance judgment in a prospectus liability case may be made within 1 year. Japan has a three-instance court system and appeals are automatically granted as a matter of law upon request of the losing party. If either the plaintiff or the defendant appeals to the Supreme Court, the case will normally take 3 years from the moment of filing the complaint until final resolution.

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SECURITIES LAW OF JORDAN

Part 1. The regulator and its supervisory and regulatory powers

The Securities Commission was established by the Securities Law (hereinafter referred to as "SL"[264]) as the main regulator for the securities market in Jordan. Banks are regulated by the Central Bank of Jordan and insurance companies by the Insurance Sector Regulatory Commission.

The Commissioners of the Securities Commission are appointed by the Prime Ministry and this appointment has to be approved by his Majesty the King. According to general rules of law, the appointing authority can discharge all or any of the members of the Commission before the expiration of their term since they are considered civil servants and are appointed under a contract basis. There is no rule in the SL providing for a mandatory tenure or minimum term for the Commissioners.

Both the regulation and supervision of the securities market are assigned to the Commission. The Commission prepares drafts of laws and Regulations regarding securities markets. Regulations prepared by the Commission should be approved by the Prime Ministry before they come into force. However, the Commission may issue Instructions to give effect to its provisions without need to get the approval of the Prime Ministry.[265] For example, the Commission issues instructions regarding disclosure requirements for entities it monitors.[266] However, the rules and procedures pertaining to the Commission's financial, administrative and personnel affairs are stipulated in Regulations[267]

The Commission has the power to request the testimony of witnesses when investigating a violation of securities laws (Article 17/c/2 of New SL and Article 21 of SL). Although Article 21 of the SL expressly gave the Commission power to request from any person or government institution any documents and information necessary when investigating a violation of securities laws, the New SL does not contain a similar provision. However, Article 18/b of the New SL provides that any person who does not cooperate with the Commission when exercising its powers shall be deemed in violation of the SL

Part 2. The duty to disclose material information

According to the SL, the issuer cannot sell shares without first submitting the prospectus to the Commission and obtaining its approval. Copies of the prospectus should be made available to investors who are willing to subscribe for shares in a public offering. Investors should fill in the subscription form attached to the prospectus. An issuer shall not sell shares to investors before first delivering the prospectus to them (Article 55, SL). However, in case of a private placement, the issuer usually discusses with the investors the terms and conditions of the prospectus before delivering it to the Commission. The law does not require a "waiting" period, when issuer's shares may be offered but actual sales may not be committed.

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[264] Jordanian Securities Law No. 23 of 1997. The SL was abolished by the Jordanian Securities Law No. 76 of 2002 (New SL). In the text, we note where the provisions of the two laws differ.
[265] Article 9 of SL and Article 12 of New SL.
[266] Article 53of SL and Article 12/Q of New SL.
[267] Article 22 of SL and Article 123/a of New SL.

The Commission may reject a prospectus only if it violates the disclosure requirements or if the issuer fails to submit the annual and quarterly reports or to pay the prospectus fee.[268] However, the Commission cannot oppose an offering document based solely on its own determination regarding the quality of the investment or any other reason.

The prospectus must contain a sufficient description of the issuer and the securities, a clear financial statement and any other information required by the Commission according to Instructions issued to that effect, which may assist the investors in making their investment decision (Article 56, SL). To this effect, Appendix 2 to the Issuing and Registration of Securities Instructions No. 2/1997 ("IRSI") provides the Requirements for the Registration of Securities Shares Prospectus, which include the following:

1 Salaries and compensation of each Board member and high ranking officer (e.g. the director general).
2 Names of shareholders each of whom directly own 5% or more of the company's shares, and the number of shares owned by each of them (Article 3/a/7 of the Disclosure Instruction No 1/98). In addition, an issuer must deliver to the Commission an annual report showing, amongst other matters, the name of each shareholder who owns more than 5% of the Issuer's share capital (Article 6/b/17 of the Disclosure Instruction No. 1/98). Shareholder is not required to disclose his share ownership but the issuer keeps a file containing the name and holdings of each of its shareholders.
3 Shareholding of the members of the Board of Directors, their spouses and children, and the higher management, and any company controlled by them.
4 A description of the company and its operations, including a brief historical overview of changes or events that affected the company in terms of its nature, or the sale or repurchase of important assets. Disclosure of every material contract made outside the ordinary course of business, or of every outstanding material contract, however, is not required under Jordan law.
5 Significant contracts with members of the Board or with companies owned by any of them.

The prospectus must be signed by the directors authorized by the Board to that effect. A certificate from the legal consultant and auditors must also be attached. The prospectus must include a conspicuous note declaring that the company bears full responsibility for the information contained therein and affirm that no information has been omitted that would make the prospectus misleading.

The underwriter is not required to be involved in the preparation of the prospectus, unless the underwriter expressly undertook that responsibility to be the "issue manager". The issue manager is the company vested with the power, according to an agreement with the issuer, to conduct the study needed and to take the measures necessary for the issuance of the securities including, but not limited to, the registration of the securities with the Commission (Article 4/f of the Instructions on licensing of Activities of Financial Services Companies No. 1/99). If that were the case, Article 31 of the Instructions on Licensing of Activities of Financial Companies No. 1/99 provides that the issue manager shall be responsible for the authenticity, accuracy and completion of what is stated in the prospectus. Moreover, Article 37/a of the New SL provides that the Prospectus must be signed by the issuer's chairman, the CEO or the DG as the case may be, the CFO, the majority of the promoters in case Company is in the formation stage, the majority of the BOD members, the majority of the Shareholders in case where the issuer is a private shareholding Company, the issue manager, and the issuer's auditor.

[268]Article 58 of SL and Article 41/6 of New SL. Article 41/6 of the New SL gives the Commission the power to reject an offering document if, in its discretion, the offering document does not comply with the requirements of the public interest or the interests of potential investor.

The distributor may be held liable for misleading or false representations she makes that affect the stock price.[269] As to representations not included in a prospectus that, without being fraudulent or false, turned out to be incorrect due to the distributor's negligence in conducting a professional evaluation, she will be held liable based on Article 256 of the Civil Code. However, in order to establish liability under Article 256 of the Civil Code, the injured party should prove that she sustained loss and that the loss is a result of the defendant's deeds.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

If it is proven that the defendant has violated the SL, the Regulations or the Instructions issued thereunder (for example if the prospectus included a false statement or omitted material, relevant or essential information), the Commission may order the defendant to rectify the breach and its consequences or to desist from committing the violation or from taking to steps leading thereto (Article 69/a, SL). This sanction may apply to directors, officers, accountants, issuers, and distributors if they are involved in the preparation of the prospectus. In case the defendant fails to respond positively, the Commission may take any of the following measures: (1) suspend any prospectus submitted to the Commission or cease issuance of the securities concerned or dealings therein; or (2) suspend all activities related to securities, or to a particular security, for a period of time the Board of Commissioners deems appropriate; or (3) revoke or suspend the license for a period of time the Board of Commissioners deems appropriate. In case the defendant did not comply with any of the measures taken by the Commission the defendant shall be referred to the competent court (Article 69/b, SL). The court shall look into the case expeditiously, and may issue a temporary injunction for taking any of three preceding sanctions until the trial is concluded.

Article 21 of the New SL provides that if it is proven that the defendant has violated the SL, the Regulation or instructions issued thereunder, the Commission may take any of the following measures: (1) publish the results of the investigation conducted by the Commission; (2) order the defendant to rectify the breach or to desist from committing the violation; (3) impose fines on the defendant in accordance with Article 22; (4) suspending the issuance of any securities or trading therein if those securities are linked with the violation; or (5) revoke or suspend the License issued to the defendant.

In addition, Article 22/a of the New SL provides that the fines which may be imposed by the Commission shall not exceed (50,000) Jordanian Dinars. Article 22/c gives the defendant the right to appeal to the Commission itself against the decision that imposes the fine. The Commission shall, within 2 weeks of receiving the appeal, issue a decision relating thereto. Thereafter, the defendant may appeal the Commission's decision to the High Court of Justice. Finally, Article 22/d of the New SL gives the Commission the right, at any time, to refer the defendant to the Competent Court.

Under the Laws of Jordan, distributors are not required by Law to participate in the preparation of the prospectus. Thus, a distributor who has not participated in the preparation of the prospectus will not be held liable for any omissions or misleading statements in a prospectus.

Although not applied by the Commission, Article 24 of the Law of Accounting Profession and Article 63 of the Jordan Bar Association Law provide that an accountant or a lawyer who fails to perform his duties up to the professional standard shall be subject to administrative sanctions such as written warning, suspension of the license for a limited period, or cancellation of the license.

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[269] Article 68 of the SL and Article 107 of the New SL.

3.2 Judicial sanctions

If it is proven that the defendant has violated the SL the Regulations and Instructions issued thereunder, the court may impose on the defendant a fine up to 20,000 Jordanian Dinars in addition to a fine up to 5 times of the profit realized or the loss avoided by the defendant (Article 70, SL).[270] In addition to the fine, the injured party shall have the right to seek compensation from the wrongdoer for the loss of profit or the loss sustained (see Part 4 below). The court may seize the assets of the wrongdoer to secure the payment of the fine imposed or the compensation awarded to the injured party (Article 71, SL). Violations of disclosure requirements may not be sanctioned with imprisonment.

If the violator is a legal entity, its directors, officers, and concerned employees shall be held liable, but may escape liability if they prove lack of knowledge of the violation. Therefore, the issuer's directors or officers, as well as the accountants, who are aware of an untrue statement or omissions of material information in the prospectus, can be sanctioned with a fine. The distributor would not be subject to the sanction if not involved in the preparation of the prospectus.

3.3 *Stock Exchange sanctions*

The Amman Stock Exchange cannot impose sanctions on the issuer, the distributor, or the accounting firm involved in the preparation of a prospectus for false statements or omissions of material information in the prospectus.

Part 4. Investor's right of restitution for losses

Compensation is the only available remedy to an investor who has suffered losses as a result of a defective prospectus. Investors can pursue restitution for losses due to a defective prospectus through a civil lawsuit or a criminal proceeding. An offender may be exempted from imprisonment if she provides enough funds to pay the fines and compensation of losses ordered by the court.[271] After obtaining a Court verdict dictating that the offender shall pay compensation, the Investor may apply to the Execution Department in the Court of First Instance to implement the verdict by way of seizing the offender's assets and auctioning them.

Article 70 (f) of the Securities Law establishes that a person who violates the provisions of the SL intentionally, or as a result of gross negligence, or of failure to exercise due care, is liable for the damages incurred by other persons. Therefore, in case of false statements or omissions of material information in the prospectus, an investor may obtain restitution for the loss suffered and the loss of profit from the violator who negligently or intentionally omitted to state some essential or relevant information in the prospectus. The liable parties in a prospectus liability case include the issuing company, the issuer's directors or officers involved in the preparation of the prospectus, the distributor acting as an issue manager, and the auditors and the lawyers for the information in the prospectus that they have certified. According to the New SL any person who signed the prospectus my be held liable (Articles37 and 111/a and b). The distributor is only liable under securities laws if involved in the preparation of the prospectus. When she is not involved in the preparation of the prospectus, the distributor can still be held liable under general laws if she committed a crime or acted with knowledge and intent to deceive.

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[270] Article 70/c of SL. The ceiling for the monetary fine has been increased to100,000 Jordanian Dinars under the New SL (Article 110/a).

[271] Article 110/c of the New SL provides that an offender may be exempted from imprisonment if he/she provides enough funds to pay the fines which may be ordered by the Court. In other words providing funds to pay the "compensation" is no longer a condition .

The rules relating to tort liability, set forth in the Civil Code, apply to prospectus liability. Article 256 of the Civil Code provides for an injured party the right to seek adequate compensation for any act which causes losses or damages to her from the injuring party. In order to obtain restitution for damages caused by a defective prospectus, the plaintiff must prove: (1) the prospectus contained misleading information or a material omission; (2) the defendant acted with negligence;[272] and (3) she suffered losses as a result (i.e., her losses were caused by the defective prospectus).

Article 70 (e) of the SL provides that a director or officer of the legal entity that violates the provisions of the SL may escape liability if she proves that she was not aware of the violation. This defense is not available to the legal entity (i.e., the issuer, the distributor acting as an issue manager, and the auditors) who have no defenses under the Securities Law. However, under the general rules set forth in the Civil Code, defendants may escape liability if they prove that the plaintiff's loss was not a result of the false or misleading statement or of the omitted information.

The New Securities Law requires a lower burden of the proof for investors seeking restitution than the old one. Specifically, Article 111/a of the New SL provides that an Investor who suffered loss as a result of purchasing securities shall have the right to seek compensation from the seller or the Issuer, as the case may be, provided that the Investor proves that: (1) the sale of securities was conducted in a way that violated the Law, the Regulations or the Instructions issued thereunder; and (2) he suffered a loss as a result of the sale of the securities. Moreover, Article 111/b provides that an investor who suffered loss as a result of the inaccuracy or the insufficiency of the information contained in the prospectus or the documents attached to it, shall have the right to seek compensation from any signatory on the said prospectus provided that the Investor proves that: (1) that the prospects and/or the documents attached to it do not include material information necessary for him to make proper decision to sell or to buy or to keep the securities; and (2) that the prospectus and/or the documents attached thereto contains inaccurate or misleading information which have an impact on his decision to sell, buy or keep those securities

No provision in the Companies Law or the Securities Law gives the investor the right to pierce the corporate veil. Article 91 of the Companies Law No. 22 of 1997 establishes that: "The financial obligation of the Public Shareholding Company (Public Joint Stock Company[273]) shall be considered as independent of the financial obligations of every shareholder therein. The company with its assets and properties, shall be responsible for the debts and obligations consequent thereon and the shareholder shall not be liable towards the company for such debts and obligations except to the extent of shares owned by him in the company". As a result, no shareholder is liable for the debts of the company or for the actions or omissions of the directors or officers of the company.

A civil lawsuit for restitution for damages caused by material omissions in a prospectus takes approximately 2 years to be resolved by the judiciary, from the moment of filing the complaint until first-instance judgment. An appeal against the first-instance judgment may be filed to the competent court of appeal, and then to the Supreme Court as court of cassation. The right to appeal to both the court of

[272] The standard of care required for the issuer's directors and officers, its auditors and of the lawyer of the issue is provided under the general rules of the contract of agency. Article 841 of the Civil Code establishes that: "If the agency is without remuneration, in carrying out what has been delegated to him, the agent shall exercise the care he exercises for his own work, and if it is for remuneration, he shall exercise in its respect the care of an ordinary man." Accordingly, the issuer's directors and officers, the auditors or the lawyer of the issue should perform their duties with the care of an ordinary man.

[273] In Jordan, three types of companies may issue shares to the public: (1) Public Joint Stock Companies; (2) Limited Partnerships; and, subject to instructions to be enacted by the Commission, (3) "Private Shareholding Company". Note that, to date, only public joint stock companies have actually offered shares to the public.

appeal and to the court of cassation would be granted even if the defendant does not have a valid defense, but opposes the lawsuit and resorts to the defenses and recourses generally available. If both appeals are pursued, it may take an additional 1-2 years to reach a final and firm judgement.

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SECURITIES LAW OF KENYA

Part 1. The regulator and its supervisory and regulatory powers

The primary regulator of securities markets is the Capital Markets Authority ("the Authority"), which was established by the Capital Markets Act (Chapter 485A, Laws of Kenya) (the "CMA"). Banking and financial institutions are regulated by the Central Bank of Kenya under the provisions of the Banking Act (Chapter 488, Laws of Kenya) and the Central Bank of Kenya Act (Chapter 491, Laws of Kenya). Insurance companies are regulated by the Commissioner of Insurance pursuant to the Insurance Act (Chapter 487, Laws of Kenya). Any public offer of shares whether by banking institutions, insurance companies or other companies would also have to comply with the provisions of the CMA, the Companies Act (Chapter 486, Laws of Kenya) (the "CA") and the requirements of the Authority.

The Board of the Authority is made up of a Chairman who is appointed by the President of the Republic of Kenya on the recommendation of the Minister of Finance, six other members appointed by the Minister of Finance, the Permanent Secretary to the Treasury (or a person deputed by her), the Governor of the Central Bank of Kenya (or a person deputed by her), the Attorney General (or a person deputed by her) and the Chief Executive of the Authority. The Chief Executive is appointed by the President of the Republic of Kenya on the recommendation of the Minister of Finance. In making a recommendation to the President for the post of Chief Executive, the Minister of Finance is required to consult with the Board of the Authority. The period of appointment of the Chairman and the six other members of the Board of the Authority appointed by the Minister of Finance is three years and they may be re-appointed for another term of three years. The period of appointment of the Chief Executive is four years and the Chief Executive is eligible for reappointment for another term of four years, provided that no person can serve as Chief Executive for more than two terms.

The Minister of Finance may remove any one of the six members of the Board of the Authority appointed by the Minister, on the advice of the Authority, on grounds that a member is, *inter alia*, unable or unfit to discharge the functions of a member or is unable to continue as a member. It is not clear whether a determination by the Minister can be made subjectively or whether it must be based on objective criteria. Furthermore, the meaning of the words "is unable to continue as a member" is not apparent.

The Authority is vested with the power to frame rules, regulations and guidelines on all matters within the jurisdiction of the Authority under the CMA (S.11 and S.12 CMA). The Authority can promulgate such rules, regulations and guidelines without the approval of other governmental authorities. However, S.12(2) CMA requires that all rules, regulations and guidelines formulated by the Authority should (a) take into account and be consistent with the objective of promoting and maintaining an effective and efficient securities market; (b) be exposed for comment by stakeholders and the general public for a period of thirty days through notification in at least two daily newspapers of national circulation and the electronic media; and (c) be published in the Kenya Gazette. It is unclear whether the Authority is required to take cognizance of any comments or observations made by stakeholders or other members of the public. The term "stakeholders" is defined in S.12(3) CMA to include listed companies, all persons licensed by the Authority or financial or other institutions whose operations have, in the opinion of the Authority, a bearing on the development and regulation of capital markets in Kenya.

The secondary regulator of the Kenyan securities market is the Nairobi Stock Exchange Limited (the "NSE"), which is a company incorporated under the CA. The NSE (being a "securities exchange"[274]) is licensed and supervised by the Authority. S.19 CMA provides that no person shall carry on business as a securities exchange or hold himself out as providing or maintaining a stock market unless approved as a securities exchange by the Authority. A "securities exchange" is required to make rules governing certain aspects of the regulation and supervision of the securities market as provided in the Capital Markets Authority Rules, 1992 (the "CMA Rules") and the rules promulgated by the NSE (including any variations to these rules) must be approved by the Authority. The rules of the NSE, in so far as they have been approved by the Authority, cannot be amended, varied or rescinded without the prior approval of the Authority.

The CMA is granted authority to command documents generally from any person when investigating a violation of the CMA. S.13 CMA sets out the general power to the Authority to require any person to furnish "all such returns or information" as specified in a notice issued by the Authority. The NSE has promulgated rules and regulations which are binding on all its members known as The Nairobi Stock Exchange Limited, Rules and Regulations of 21st March, 1997 (the "NSE Rules and Regulations"). Rule 2.4(7) of the NSE Rules and Regulations empowers the Board of the NSE to order an investigation into the affairs of any broker, dealer, authorized representative and executive director suspected of having violated any of the provisions of the articles of association of the NSE or the NSE Rules and Regulations and for this purpose to inspect and demand the production of all books, accounts, records and any other documents which it may deem necessary and to engage an auditor or any other person or persons to assist in the investigation.

The CMA may not, however, command the testimony of witnesses. A body known as The Capital Markets Tribunal (the "Tribunal") has been established under S.35(A) CMA. The function of the Tribunal is to hear appeals by any person who is aggrieved by any direction or decision made by the Authority concerning, *inter alia*, a refusal to grant a license, suspending or revoking a license or refusing to admit a security to the NSE. S.35(A)(1)(5) CMA provides that for the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

Part 2. The duty to disclose material information

It is unlawful to issue any form of application for shares or debentures being offered to the public unless the application form is issued with a prospectus (CA, S.40 (3)). The prospectus must be filed with the Registrar of Companies (CA, S.43(1)) and delivered to the Authority for approval. The Authority does not have an express obligation to determine that a prospectus has met the disclosure requirements. The allotment of shares may begin three days after the prospectus is issued, or later if so specified in the prospectus (CA, S.52(1)(a)).

The CMA Rules and the Third Schedule to the CA (the "CA Third Schedule") set out the matters to be specified in a prospectus and, in addition, the reports to be set out in the prospectus, including, *inter alia*, the following information:

1. A statement in a prospectus providing "details of any existing contracts between the directors and the issuer" (CMA Rules, Rule 34(g)). This would cover directors' (not officers') service contracts, but the

[274] A "securities exchange" is defined in the CMA to mean "a market, exchange, securities organization or other place at which securities are offered for sale, purchase or exchange including any clearing, settlement or transfer services connected therewith.

nature of the details required to be furnished is not specified. It should be noted that the definition of a "director" in the CA "includes any person occupying the position of director by whatever name called". Paragraph 2 of the CA Third Schedule requires disclosure of any provision in the articles of association of the issuer as to the remuneration of directors (no reference is made to the need to specify the amount of the remuneration). Finally, paragraph 16 of the CA Third Schedule requires the inclusion of a statement setting out full particulars of all sums paid or agreed to be paid to a director or to the firm of a director either to induce her to become, or to qualify her, as a director, or otherwise for services rendered by her or by her firm in connection with the promotion or formation of the issuer. In practice, prospectuses' do not normally quantify salaries and compensation.

2. All "substantial shareholders" together with particulars of their respective holdings of share capital (CMA Rules, Rule 35(e)). The CMA defines a "substantial shareholder" to be any person who is the beneficial owner of, or is in a position to extend control over, not less than 15% of the shares of a body corporate. Under the NSE Listing Manual of 21st March, 1997 (the "NSE Listing Manual") a listed company is required to notify the NSE within 24 hours of a decision being made of (inter alia) any "change of substantial shareholding or changes received by the company and details thereof".

   The NSE Listing Manual requires a listed company to furnish an annual report to its shareholders and the NSE. The annual report must set out, inter alia, the names of the twenty largest shareholders and the number of equity securities held. Pursuant to Rule 35(f) CMA Rules every prospectus must contain a statement with regard to the capital of the issuer to show, inter alia, the number of shares to be listed upon the first listing date (if applicable) following the public distribution indicating whether the issuer or any substantial shareholders has the intention to cause additional shares to be listed and whether any substantial shareholders has the intention to sell shares in addition to those sold in the public distribution (if applicable) within one year of the close of the distribution period.

   Rule 22(7)(h), CMA Rules requires every listed company to "disclose promptly" to the NSE any material information that may affect the price of its securities including on the occasion of "the public or private sale of a significant amount of additional securities." Moreover, a listed company is required to maintain a register of shareholders ordinary shares showing at all times the holding thereof by (a) foreign investors (b) residents of Kenya and (c) institutional investors.

3. Number of shares of each class of the issuer held by each director (CMA Rules, Rule 34(c)). This disclosure obligation does not extend to the issuer's officers. There is no obligation on a director to disclose any indirect ownership of shares in the issuer under the CMA or the CA. However, there is a general duty under common law to disclose all material facts and contracts and this duty may extend to the disclosure of indirect ownership. This would be particularly relevant if the indirect ownership is substantial. Also relevant are first, the provisions of S.34(1)(b) CMA to the extent that a director or an officer "furnishes" information which is to his knowledge untrue or incorrect or misleading because of material omissions and secondly, S.31(7)(d) CMA which requires that no person (this would include a director or an officer) shall, directly or indirectly, in connection with the purchase or sale of any security omit to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading.

4. There is no express obligation to disclose all material contracts made in the ordinary course of business[275]. Nonetheless, there is a general common law principle requiring the persons issuing a

[275] Some contracts that may be entered into in the ordinary course of business must be disclosed under a specific disclosure requirement. For example, Rule 36 CMA Rules requires disclosure of particulars of any material outstanding indebtedness of the issuer (this would include indebtedness incurred in the ordinary course of business); CA Third Schedule contains certain disclosure requirements relating to the contracts for the acquisition of property

prospectus to display with the utmost candor when making a decision whether or not a material contract (including a material contract made in the ordinary course of business) should be disclosed.

5. The dates and parties to and general nature and principal contents of all material contracts not being contracts entered in the ordinary course of business must be included in the prospectus (Rule 38 CMA Rules and paragraph 14 of the CA Third Schedule).

6. Full particulars of the nature and extent of the interest, if any, of every director in the promotion of the issuer or the property proposed to be acquired by the issuer (paragraph 16 of the CA Third Schedule) must also be stated in the prospectus. Where the interest of the director consists of being a partner in a firm, the nature and extent of the interest of the firm must be specified with a statement of all sums paid or agreed to be paid to her or to the firm by any person whether to include her to become, or to qualify her as, a director, or otherwise for services rendered by her or by the firm in connection with the promotion or formation of the issuer. Rule 34(g) CMA Rules requires the disclosure of details of any existing contracts between a director and the issuer.

There is no general "catch all" provision in the CMA or the CA requiring an issuer to provide all information that a reasonable investor would likely consider important to make an investment decision.[276]

The prospectus must be signed by every person who is named therein as a director or proposed director of the issuer, or by her agent authorized in writing (CA , S.43(1)).

The distributor, unless acting as an underwriter, is not legally required to perform a due diligence review of the information contained in a prospectus. However, every prospectus involving underwriting shall contain a statement by the managing underwriters that, to the best of their knowledge and belief, the material submitted to the Authority complies with the disclosure requirements, and that they have satisfied themselves after due and careful inquiry that any profit or cash flow forecasts or projections stated by the issuer are reasonable (CMA Rules, Rule 31 (3)). A well-advised distributor is likely to perform a due diligence review of the contents of a prospectus as a matter of commercial practice. As explained in Part 4, managing underwriters who omit to state a material fact necessary to make the statements made in the prospectus not misleading may be committing an offence under S. 34(1) CMA and S. 31(7)(d) CMA although there is no judicial authority or other official guidance on this issue of which the authors are aware.

A distributor could also be held liable for representations made in connection with the sale of shares that were not included in the prospectus. S.31(7)(c) CMA provides that "no person shall directly or indirectly, in connection with the purchase or sale of any security … make any untrue statement of a material fact". This provision extends to untrue representations made outside the prospectus with knowledge that they were untrue. Furthermore, pursuant to Rule 22, CMA Rules, all public communications with investors by persons licensed under the CMA must be factual and no material fact or qualification may be omitted if such omission would cause the communication to be misleading in the light of the context of the information presented. Rule 22 effectively places an obligation on the licenced person to verify the

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the payment of which will be effected wholly or partially from the proceeds of the issue including contracts for the purchase of property entered into in the ordinary course of business if the contract was entered into in contemplation of the issue; and Rules 5.2(2)(k) and (l) of the NSE Listing Manual requires an issuer to attach to its application for approval for listing duly certified copies of, respectively, any management contracts and copies of any material contracts for the supply and/or provision of goods and services.

[276] Note, however, the general requirement to include any material fact necessary in order to make statements made in light of the circumstances under which they were made, not misleading (S.31(7) CMA) and the general common law principles requiring those issuing a prospectus to give a full, accurate and fair picture of the issuer.

information referred to in Rule 22 before its publication. Accordingly, a distributor would be in breach of Rule 22, CMA Rules and, hence, commit an offence (CMA, S.34 (1)) if, because of negligence, she made untrue or misleading representations to the public. Finally, the Authority may disqualify a "professional" [4] from giving professional opinions on matters related to listed companies or otherwise penalize any professional who, in the opinion of the Authority, has given a professional opinion that is false or misleading or has omitted to give an opinion where such omission is likely to be misleading in the circumstances in which the professional opinion is given or omitted as the case may be (Regulation, 33 of the Capital Markets Authority, Regulations 1992 (the "CMA Regulations")).

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The administrative sanctions under the CMA are provided for in Regulation 33 CMA Regulations and S.11 CMA.

Regulation 33 is targeted at "professionals"[277] and empowers the Authority to disqualify a professional from giving any professional opinion on matters related to listed companies or otherwise penalize any professional, who in the opinion of the Authority has given a professional opinion that is false or misleading or has omitted to give an opinion where such omission is likely to be misleading in the circumstances in which the professional opinion is given or omitted as the case may be. Regulation 33 is wide in its application. In addition, Regulation 33 does not require the professional to have knowledge of the material omission (what is or is not a material omission would appear to be a subjective matter for the Authority). Furthermore, the term "otherwise penalize" has not been defined. In the circumstances, the extent of the powers of the Authority to penalize a professional are not clear, although it is arguable that the powers of the Authority to "penalize" cannot extend beyond the sanctions expressly vested in the Authority under the CMA.

S.11 CMA gives the Authority the right to exercise various administrative sanctions set out in that provision. Pursuant to S.11(3)(d)(i) CMA, the Authority has the power to frame rules and guidelines, *inter alia*, prescribing financial penalties or sanctions for breach of the Authority's rules or non-compliance with the Authority's requirements. However, it should be noted that the Authority has not to date issued any rules and guidelines concerning financial penalties or sanctions for breach of the Authority's rules pursuant to S.11 CMA. S.11(3)(w) CMA gives power to the Authority for the purpose of carrying out the Authority's objectives to do all such other acts (other than those expressly provided for in S.11(3)) as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of the Authority's powers under the CMA. Theoretically, this provision could give the Authority the right to order the issuer to stop or refrain from a specific action, and could arguably permit the Authority to place employment restrictions.

In addition to the above, when the Authority considers that a licensed person[278] has, *inter alia*, acted in contravention of any provision of the CMA or any rules or regulations made thereunder, the Authority may direct that person to take whatever action the Authority deems necessary to correct the conditions resulting from any contravention, and to come into compliance or suspend or impose restrictions on the license granted (S.25(4) CMA). In this regard, if the distributor also acts as the underwriter, then it is

[277] Regulation 34 CMA Regulations provides that the reference to a "professional" in Regulation 33 includes persons giving opinions in respect of listed companies or in relation to a primary issue of securities and shall include (inter alia) accountants, underwriters, lawyers, valuers and other experts.

[278] A distributor would need to obtain a licence from the Authority to operate its business.

required to give a compliance statement in the prospectus pursuant to Rule 31(3) CMA Rules. If this is the case, false statements or omissions of material information would breach the compliance statement and Rule 31(3) CMA Rules, resulting in the right of the Authority to impose sanctions on the distributor.

The Authority also has the right to revoke a license if it is satisfied that the licensed person has contravened or failed to comply with any provision of the CMA or any rules or regulations made under the CMA (S. 26(1) CMA). The Authority is required to give the licensed person an opportunity to be heard before revoking the license and before revocation the Authority is required to first exercise its powers under S.33A CMA (power of the Authority to intervene in the management of a licensee by the appointment of a statutory manager).

3.2 Judicial sanctions

In case of false information in a prospectus, criminal liability is provided for under the CMA and under the CA, in addition to the general criminal law that may apply as well under certain circumstances.

CRIMINAL LIABILITIES UNDER THE CAPITAL MARKETS AUTHORITY ACT

Section 31 (7)(d) CMA prohibits a person directly or indirectly making any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading, in connection with the purchase or sale of any security. Although this Section does not itself create an offence, S.34 (1) (a) CMA provides that any person who contravenes any provision of the CMA or any requirement imposed under the provisions of the CMA or any rule or regulations made under the CMA shall be guilty of an offence. Moreover, S.34 (1)(b) CMA specifically establishes that any person who furnishes <u>or publishes</u> any information or return regarding the issue of securities, which are to her knowledge untrue or incorrect or misleading because of material omissions, shall be guilty of an offence. Finally, S.34 (2) CMA provides that a person who is guilty of an offence under the CMA for which no penalty is expressly provided (as it is the case under Sections 31 and 34(1) CMA) shall be liable to imprisonment for a term not exceeding five years, or to a fine not exceeding Kenya Shillings one million five hundred thousand, or to both. In summary, it is clear that a breach of either of S.31 (7)(d) or S.34 (1)(b) CMA will result in an offence. Therefore, if the issuer's directors or officers intentionally include a false statement or omit material information in a prospectus, they commit an offence under S.34 (1)(b) CMA and, if the nature of the false statement or omission is caught by the provisions of S.31 (7)(d) CMA, a further offence will also have been committed under S. 34(1)(a) CMA. Both S.31 (7)(d) and S.34 (1)(b) CMA extend to material omissions, but it is necessary in both cases that the accused has knowledge of the untrue statement or material omission.
If the distributor was a managing underwriter it would have made a statement in the prospectus as required by Rule 31(3) CMA Rules explained above. Therefore, criminal liability under S.31 (7)(d) CMA would arise in the case of untrue statements or omissions of material information in the prospectus. It would be necessary for the purposes of S.31(7)(d) CMA that the distributor knew about the false information or that it was misleading because of material omissions.

Also, if the accountant includes false information in the accountant's report (which is required to be included in the prospectus) or omits material and necessary statements, then criminal liability could arise pursuant to S.31 (7)(d) CMA as long as the accountant knows about the omission or false statement.

CRIMINAL LIABILITIES UNDER THE COMPANIES ACT

On the other hand, S.46 (1) CA provides that where a prospectus includes any untrue statement (including a material omission[279]), any person who authorised the issue of the prospectus shall be guilty of an offence and liable to imprisonment, or to a fine, or to both unless she proves either that:

[279] Section 48(a) CA provides that a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included.

(i) the statement was immaterial; or
(ii) that she had reasonable grounds to believe and did up to the time of the issue of the prospectus, believe that the statement was true.[280]

Therefore, the issuer, its directors and the officers involved (in the case of officers, however, only to the extent that the officers "authorized" the issue of the prospectus) can be held criminally liable for a defective prospectus under this provision, even in case of negligence.

Section 40 CA provides that it is unlawful for a person to issue any form of application for shares unless the form is issued with a prospectus which states the matters referred to in the CA Third Schedule. If any person acts in contravention of this provision, she shall be liable to a fine, but she can establish pursuant to S.40 (5) CA as a defence to a claim under S.40 (4) CA that she had no knowledge of the omission or that it arose from an honest mistake of fact or that contravention was immaterial or that having regard to the circumstances of the case the contravention ought reasonably to be excused by the Court.

Section 393 CA is a "catch all" provision and provides that if any person in any report, return or other document (which would include matters to be set out in a prospectus pursuant to the Third Schedule CA) willfully makes a statement false in any material particular, knowing it to be false, she shall be liable to imprisonment or to a fine or both. Omissions per se are not caught by S.393 CA unless they render false a statement made in the prospectus.

Section 189 CA entitles the Courts to disqualify a director or officer from being able to participate in the management of a company for up to five years, inter alia, if she has been convicted of an offence in connection with the "promotion, formation or management of a company".

CRIMINAL LIABILITIES UNDER THE GENERAL CRIMINAL LAW

Finally, false or misleading information, or omission of material information, in a prospectus, may be considered a fraudulent device to illegitimately obtain payment from others, which is sanctioned as a misdemeanor with imprisonment, under Chapter XXX of the Penal Code or conspiracy to defraud under Chapter XLI of the Penal Code.

3.3 Stock Exchange sanctions

Subject to the Authority's power to suspend and cancel the listing of any securities, the Board of the NSE may suspend any listing at any time and in such circumstances as it may see fit. The NSE also has the power to lift a suspension and may impose such conditions for lifting the suspension as it "considers appropriate" (NSE Listing Manual Rule 4.3(8)). These conditions could theoretically include the payment of a fine.

The Board of the NSE is entitled to order an investigation into the affairs of any broker, dealer or their representatives, suspected of having violated any of the provisions of the articles of association of the NSE or NSE Rules and Regulations, and for this purpose to inspect books, accounts, records and such other documents which it may deem necessary and to engage an auditor or any other person to assist in the investigation (NSE Rules and Regulations, Rule 2.4(7)). In addition, the NSE may suspend or revoke the trading floor rights of any broker or dealer, and reprimand, fine, suspend or expel any broker, dealer, their representatives, and to exercise other disciplinary measures provided thereat (NSE Rules and Regulations, Rules 2.4 (9), (10) and (11)).

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[280] In the case of this defence, an objective test is to be applied. It is not sufficient that the accused believed at all times the statement to be true. The accused has to establish on evidence that she had "reasonable grounds" to believe it to be true. Consequently, the accused is liable under S.46 CA for an untrue statement if she negligently failed to ascertain that it was not correct.

Part 4. Investor's right of restitution for losses

Investors can obtain restitution for losses caused by a defective prospectus through a judicial proceeding before a criminal judge, or before a civil judge (individually or in a class-action suit[281]).

Restitution before a criminal judge derives from the application of S. 34(1) and S. 34(3) CMA. Section 34(1) CMA provides that any person who contravenes any requirement imposed under the CMA or any rule or regulation made thereunder (thus including the rules on the matters to be included in a prospectus), shall be guilty of an offence. Section 34(3) CMA establishes that any person guilty of an offence under the CMA shall be liable to pay compensation to any person who suffers losses caused by the offence. In order to obtain restitution through a criminal proceeding, an individual investor would have to lodge a formal complaint with the police. The Director of Public Prosecutions would, after appropriate investigations, decide on whether or not there is sufficient evidence to prosecute. On the issue of the burden of proof, the prosecution must prove beyond any reasonable doubt that the offence was committed once guilt has been established under S.34 (1) CMA, there are no defences available under the CMA in favor of an issuer, distributor or accountant, and compensation is *prima facie* payable provided that the investor can show that she suffered loss as envisaged in S.34 (3) CMA.

The prosecution would in the case of an infringement of S.31(7)(c) CMA need to establish beyond a reasonable doubt that a statement in a prospectus was untrue, that the issuer knew it was untrue and that the investor suffered loss as a result of the untrue statement.

Restitution through a civil proceeding may be achieved either under the CA or through common law proceedings for damages under the torts of misrepresentation or deceit.

Under S.45 CA, investors may seek to recover damages suffered as a result of untrue statements in the prospectus. Note that omissions do not lead to liability unless they render untrue a statement in the prospectus. The liable parties are the issuer's directors, promoters[282] and persons who authorized the offering. In this regard, the officers who were involved in the preparation of the prospectus, the accountants and other experts (only to the extent of their expert report), and the issuing company itself, are generally considered as having authorised the prospectus.

According to S.45 CA, in order to obtain compensation, an investor is required to prove that a statement in a prospectus is untrue, that the investor bought the shares on the faith of the prospectus, and the investor sustained damage by reason of the untrue statement.

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[281] The Civil Procedure Act (Chapter 21, Laws of Kenya) sets out the procedures to be followed in pursuing a class action.

[9]A "promoter" is defined in S.45(5)(a) CA as a "party to the preparation of a prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company". There is no general definition of the word "promoter" under Kenyan law of which we are aware. Under English Law (the CA is taken from the 1948 Companies Act of England) a promoter is "one who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose"(Turycrose v Grant (1877) 2CPD 46.) It is not possible to lay down any general rule but a person who takes an active part in suggesting the formation of a company, in preparing a prospectus and memorandum and articles of association or in appointing the directors may be a promoter, particularly, if she receives a benefit.

The main defence available to the directors, officers who authorised the prospectus, and issuer, is that she had reasonable ground to believe, and believed up to the time of the allotment of the shares, that the statement (being a statement not purportedly made by an expert) was true[283]. Similarly, the main defence available to the accounting firm is showing that it was competent to make the statement and had reasonable ground to believe, and did believe up to the time of the allotment of the shares, that the statement was true[284].

In practice, it is unlikely that a distributor would be liable under S.45 CA as it would typically not be a promoter or person who authorized the issue of a prospectus. However, in the event that a distributor is required to provide a Rule 31(3) CMA Rules compliance statement (see Part 2 above) there may be grounds for arguing that the distributor has authorized the prospectus in respect of an untrue statement purporting to be made by him as an expert [285]and the distributor could face liability under the CA for omissions related to statements which the distributor is required to verify or comment on However, there is no judicial authority or statement from the Authority to support this argument.

The issuer, its directors, and any other party involved in the preparation of the prospectus or the sale of the securities (e.g., managing underwriter) may also be liable under the CA if an omission renders statements in the prospectus to be untrue.[286] Material omissions from the prospectus may lead to restitution pursuant to S.34 (3) CMA as explained above.

The controlling shareholder may be held liable under the CA if she is a promoter[14] or authorizes the issue of the prospectus. In addition, the controlling shareholder may be liable under S.34 (1)(b) CMA if she knowingly furnishes untrue or misleading information in connection with the offering of listed securities.
Under common law, the issuer, its directors, and any other party responsible for the preparation of the prospectus may be liable for damages under the tort of misrepresentation, in case of an untrue statement or an omission that falsifies statements made in the prospectus or in the case of a fraudulent misrepresentation under the tort of deceit. The burden of proof for an investor under common law is more onerous than under the CA. To this effect, an investor must establish that she relied on a material misrepresentation of fact and that the investor suffered loss or damage caused by the misrepresentation. If the defendant has been negligent the investor would be better off in claiming compensation under S.45CA as if she can establish that a statement is untrue the director (or other person) is *prima facie* liable. To escape liability, the director (or other person) would have to prove that she had reasonable grounds to believe the statement to be true and that she did in fact believe it to be true. Accordingly, if the director (or other person) had been negligent she would still be liable under S.45 CA if she cannot prove that she had reasonable grounds to believe the statement to be true.

In order to obtain any restitution under the tort of deceit against directors (or other persons) who have issued a prospectus containing untrue statements it is necessary for the investor to prove affirmatively that the statements were made fraudulently, that is to say, either with knowledge that they were false or recklessly, not caring whether they were true or false or not believing them to be true. The standard of proof is, therefore, much higher than under S.45 CA.

There are very limited circumstances in which a shareholder of a company would be exposed to civil liability due to the acts or omissions of the company in which she holds shares. Kenyan company law

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[284] S.45(3)(c)CA.
[285] "An expert" is defined in S.42(3) CA as "including an engineer valuer, accountant and any other person whose profession gives authority to a statement made by him."
[286] S.45 CA refers to "untrue statements" not omissions. However, S.48(a)CA states that a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included.

recognizes the independent corporate existence of a company from its shareholders. Courts may pierce the corporate veil when necessary to prevent fraud or some improper conduct. However, there is no legal precedent in Kenya of which we are aware for corporate veil piercing based on allegations of omitted material information from a prospectus.

The Magistrates Court has jurisdiction to hear civil suits for any claims up to 500,000 Kenya Shillings (or approximately U.S. $6,250 at the current exchange rate). For larger claims the civil suit should be filed in the High Court. Judgements issued by the Magistrates Court may be appealed on points of law and fact to the High Court[287]. Judgements issued by the High Court, including appeals from original decrees of the Magistrates Court, may be appealed substantially on points of law only[288] to the Court of Appeal.

A claim for restitution commenced in the Magistrates Court and appealed to the High Court and then to the Court of Appeal is likely to be concluded in three to four years. A claim for restitution commenced in the High Court and appealed to the Court of Appeal, is likely to be concluded in two to three years. However, civil litigation could be concluded in eight to eighteen months if the defendant does not have a valid defence in law and the Court grants, on affidavit evidence, an order for summary judgement. The defendant has the right to appeal against an order made for summary judgement, which can be finally resolved in six to nine months.

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[287] Section 65(1)(b) Civil Procedure Act (Chapter 21, Laws of Kenya).
[288] Section 72(1)Civil Procedure Act (Chapter 21, Laws of Kenya).

SECURITIES LAW OF KOREA

Part 1. The regulator and its supervisory and regulatory powers

The Financial Supervisory Commission ("FSC") supervises securities markets, as well as banks and insurance companies. The FSC is composed of nine commissioners, six of whom are appointed by the President of the Republic of Korea under the Act on the Establishment of Financial Supervisory Organization ("AEFSO"). The other three FSC members are the vice-Minister of Finance and Economy, the president of the Korea Deposit Insurance Corporation ("KDIC"), and the Deputy Governor of the Bank of Korea ("BOK"). The first two of these ex-officio members are directly appointed by the President of the Republic while the third one is appointed by the Governor of the BOK (who, in turn, is appointed by the President of the Republic). Among the nine FSC members, the six appointed-members may not be involuntarily discharged during her three-year term unless she falls under some exceptions under AEFSO. Similarly, neither the Deputy Governor of the BOK nor the president of KDIC may be involuntarily discharged during their three-year terms unless they fall under some exceptions. In contrast, the vice-Minister of Finance and Economy may be discharged at any time by the President of the Republic of Korea.

In principle, the FSC is responsible for both the regulation and supervision of the securities markets. However, matters to be entered in the registration statement or for the necessary matters accompanying documents shall be prescribed by Presidential Decree (Art 8 of SEA). Moreover, the contents of the prospectus are regulated by Ordinance of the Ministry of Finance and Economy (Art 12 of SEA). The FSC, in consultation with the Minister of Finance and Economy, approves regulations issued by Stock exchanges (e.g., business regulations, listing regulations, and disclosure regulations) (Art 115 of SEA). In addition, there are specific areas of market regulation and supervision which may be shared with other regulators, as set forth below:

(1) The Securities Futures Commission ("SFC") has the authority to conduct investigation in respect of unfair transactions in the securities and futures markets under AEFSO and the Securities and Exchange Act ("SEA"). However, the FSC may revoke or suspend the execution of all or part of any unlawful or unjust measures taken by the SFC.
(2) The Financial Supervisory Service ("FSS") carries out the activities for the regulation and supervision of securities markets under the direction of the FSC.

The Governor representing the FSS may demand reports, documents, and the appearance and testimony of persons involved, from the institutions subject to the examination of the FSS under the law (Section 40 of the AEFSO). When it is necessary for the public interest or the protection of investors, the FSC may order an issuer, an underwriter, and any other related person to file a report or materials for reference, or have the Governor of the FSS investigate accounting books, documents and any other related materials thereof (Article 19 (1) of the SEA).[289] Moreover, in case of a violation of the SEA, the FSC may order the concerned person to submit a report or materials for reference, and demand her appearance for testimony on the matters being investigated (Article 206-3 of the SEA).

Part 2. The duty to disclose material information

[289] The powers of the FSC under Article 19 (1) of the SEA are delegated to the FSS (Article 90-2 (3) of the Enforcement Decree of the SEA). Accordingly, the FSS may investigate accounting books and other documents if such parties involve an issuer, an underwriter and/or any other related persons.

In order to make a public offering of securities, the issuer is required by Section 8 (1) of the SEA to file a registration statement with the FSC and obtain its approval. The issuer shall prepare an offering document or prospectus for review by potential investors, as stipulated in the applicable laws and regulations. Although a prospectus must be made available for public inspection and delivered upon request, it is not necessary to deliver the prospectus to all investors before sales may be made.

The offering document shall become effective only after a specified number of days (which is 15 days in the case of shares) subsequent to its submission. During this 15-day period shares may not be offered or sold. If the FSC considers that a registration statement is incomplete, it can issue an order to file an amendment. If it determines that the prospectus contains false information or omits material information, the FSC may take certain measures such as suspending the issuance of securities. Note that the FSC cannot oppose an offering document based solely on its own determination on the quality of the investment.

The prospectus shall contain essentially the particulars included in the registration statement (Section 12 of the SEA). According to the Enforcement Decree of the SEA, Sections 5-4 and 8(1), and Regulation on Securities Issuance and Disclosure (FSC Regulation based on SEA), Section 17(2) the prospectus is expressly required to include the following information:

(1) The name and the number of shares held by shareholders who own 5% or more of the issuers' capital. To the extent that it is known to the issuer, the prospectus must also provide information on the largest shareholder nominally and/or beneficially holding shares of the issuer. In case of large shareholders other than the largest shareholder, the prospectus should provide the information thereof based on the registry of shareholders. If the shares are (or are scheduled to be) listed on or registered with KSE or KOSDAQ, shareholders holding 5% or more of such shares are required to file a report with the FSC and KSE (or KOSDAQ) with respect to their ownership (SEA, Section 200-2). Such report will be subject to public disclosure. Thereafter, large shareholders should report to FSC and KSE (or KOSDAQ) any change involving 1% or more of the total issued and outstanding shares of issuer, shall be reported to the.
(2) The number of shares held by each director and officer separately. This requirement applies to indirect ownership through corporate entities.
(3) The total (as well as average) compensation of directors and officers for a fiscal year must be disclosed in the prospectus. On the other hand, the specific compensation for each director and officer is not required to be included in the prospectus.
(4) Description of each outstanding material contract.
(5) Description of each material contract not made in the ordinary course of business.
(6) Description of transactions in which directors, officers, and controlling shareholders have any direct or indirect interest (e.g., transactions with legal entities controlled by the issuer's directors, officers or controlling shareholder, or with their relatives or employees).

The offering document must be signed by the director or directors representing the company (Art 389 of the Korean Commercial Code). If the prospectus includes false statements or fails to state important matters, the directors of the corporation, the underwriter, and the accountants who certified or signed on the validity, truthfulness and accuracy of the information included in the offering document, shall be held liable. In addition, the controlling shareholder is liable for the contents of the prospectus when she sells some of her own shares at the public offering. Note that the distributor is not legally required to perform a due-diligence review of the information in the prospectus but is likely to carry one out since she is civilly liable for the accuracy and completeness of the information in the prospectus. In fact, a distributor may be held liable for incorrect representations even when those representations were not included in a prospectus (except in the case where the acquirer of securities was aware of the incorrect nature of such representations at the time of offering).

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

If the issuer fails to include material information in any registration statement, prospectus, or other documents for public offering, the FSC may impose penalties of up to 3% of the subscription or sales value of securities (with a cap of two billion Korean Won) on the issuer, the issuer's directors and officers involved in such failure, the underwriter, and the accounting firm (Article 206-11(1) of the SEA). These sanctions do not apply to the distributor who is not involved in the preparation of the prospectus. The FSC is required to give a concerned party an opportunity to present her case prior to the imposition of penalties.

In case any registration statement, prospectus, or other documents for public offering omits material information, the FSC may, after showing reasons therefor and making a public notice thereof, order the issuer to make an amendment, and if necessary, the FSC may suspend or prohibit the issuance of such securities, public offering of new or outstanding securities or other transactions with respect thereto or may take measures including, but not limited to, i) recommendation seeking removal of officers, ii) restriction on the issuance of securities for a specified period, iii) demand for announcement of unlawful contents, and iv) demand for submission of a commitment letter[290] (According to Article 20 of the SEA).

3.2 Judicial sanctions

The directors and officers of the issuer, who include false material information in the registration statement to be submitted with the FSC for public offering, shall be punishable by imprisonment of not more than 1 year or by a fine not exceeding five million Korean Won. Such fines may be imposed also on the issuer itself (Art 210(6) of the SEA). As of April 1, 2001 these sanctions are no longer in effect. Instead, an issuer who includes false material information in the registration statement to be submitted with the FSC for public offering shall be punishable by a fine not exceeding thirty million Korean Won, while the issuer's directors or officers shall be punishable by imprisonment of not more than 5 years or by the above fine (Art 207-3(2) of the SEA).

A distributor who willfully includes false material information in the registration statement to be submitted with the FSC for a public offering shall be punished with imprisonment of not more than 1 year or with a fine not exceeding five million Korean Won (Art 210(6) of the SEA, which became Art 207-3(2) after the amendment). However, distributors are generally not–involved in the preparation of the prospectus, and thus, criminal sanctions ordinarily do not apply to them. Moreover, criminal sanctions do not apply to a distributor who, although involved in the preparation of the prospectus, is negligently unaware that it is defective.

Criminal sanctions of up to three years of imprisonment or a fine not exceeding thirty million Korean Won also apply to accountants and auditors if they fail to register a matter that ought to be registered or make a false statement in an audit report (Act on External Audit of Stock Companies, Article 20 (1) 2).

3.3 Stock Exchange sanctions

The Stock Exchange cannot impose sanctions on the issuer or its directors, officers, distributor, or accounting firm, in case of false statements or omissions of material information in the prospectus.

Part 4. Investor's right of restitution for losses

[290] In a commitment letter prepared by the issuer to be submitted to the FSC, the issuer admits its mistakes (including, but not limited, negligence and/or misconduct) and makes a definite promise not to repeat such mistakes.

In case of losses due to false information or material omissions in a prospectus, an investor can obtain restitution through a judicial proceeding before a civil judge[1] under Article 14(1) of the SEA, or through a criminal proceeding under Article 210(6) of the SEA.

Investors are legally entitled to obtain restitution from the issuer, the issuer's directors, the issuer's officers if involved in the preparation or distribution of the prospectus, the underwriter, and the accounting firm, distributor, and controlling shareholders (when they sell some of their own shares at the public offering). The compensation amount for damages pursuant to Article 14(1) of the SEA shall be the difference between the amount actually paid by the claimant for the acquisition of securities and their current market price or, if appropriate, the price at which the securities were disposed of. To obtain restitution under Article 14(1) of the SEA[2], an investor must prove that: (1) the false statement or the information omitted from the offering document is material; (2) the investor suffered losses; and (3) such losses were caused by the omitted information.

The defendant may avoid liability by proving that she did not know about the false statement or omission even after exercising due diligence or that the investor was aware of the fact or omissions at the time of she was offered the relevant securities.

There is no specific provision that allows the investors to rescind the acquisition of shares. The investor must resort to the fraud theory under Article 110 of the Korean Civil Code to rescind such acquisition. However, it will be very difficult for the investor to prove, among others, a fraud committed by any of the defendants. Also, there is no court precedent under which the rescission of the acquisition of shares based upon fraud theory was recognized as valid and enforceable by the court.

Investors must resort to general laws to obtain restitution from parties (e.g., lawyers who advised in the transaction) that are not specifically listed under SEA §14(1). In this regard, Article 750 of the Korean Civil Code states that any person who causes losses to another by an unlawful act, willfully or negligently, is responsible to compensate the damages. This provision would apply to a prospectus liability case if the defendant was directly involved in the preparation of the prospectus or provided information contained therein.

The shareholders of a company are generally not liable for the company's liabilities, and corporate veil piercing is rarely available in Korea. Similarly, the shareholders of a company (including the controlling shareholder) are generally not liable for actions or omissions of the company's directors and officers. Nonetheless, under Article 401-2(1) of the Korean Commercial Code, a person who instructs a director to conduct a business shall be deemed to be a director relating to director's liability to a third party.

A first instance court (i.e., district court) may render judgment on a prospectus liability case one year after the case was filed. The Court of Appeals may initially review such judgement, and thereafter the Supreme Court may review it. If the defendant does not have a valid defense, the appeal process may require six months to one year before the Appeal Court and one year before the Supreme Court. Thus, including both appeals, it may take the judiciary two to three years to reach a firm and final resolution in a prospectus liability case.

This chapter was prepared with the help of:

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[1] A class action suit is currently not permitted in the Republic of Korea although there are several pending legislative initiatives in this regard.

[2] As of November of 2002, there is no Supreme Court ruling regarding the application of Article 14(1) of SEA.

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SECURITIES LAW OF MALAYSIA

Part 1. The regulator and its supervisory and regulatory powers

The Securities Commission (SC) is established by the Securities Commission Act 1993 (SCA) as the main securities regulator in Malaysia. It is not the main regulator of banks or insurance companies. However, if banks and insurance companies need to make a public offering of their shares, issue private debt securities, or are involved in take-over, mergers or compulsory acquisitions[291], the SC's approval is required.

The members of the SC are appointed by the Minister of Finance, who may revoke the appointment at any time.[292] They are appointed for a term not exceeding 3 years and are eligible for re-appointment[293]. Their office shall become vacant[294] in case of death, conviction of any offense under the law, bankruptcy, incapability of discharging their duties, or absence from 3 consecutive meetings of the SC without leave of the Chairman.

The SC is in charge of both the regulation and supervision of the securities market.[295] The SC may, with the approval of the Minister of Finance, make such regulations as expedient or necessary to assist the execution of the provisions of the SCA.[296] Apart from the SC, the Stock Exchange of Kuala Lumpur, a self-regulatory organization with its own Memorandum and Articles of Association, governs the conduct of its members in securities dealings. It is also responsible for the surveillance of the marketplace and for the enforcement of its Listing Requirements, which spell out the criteria for listing, disclosure requirements and standards to be maintained by listed companies.

An investigating officer of the SC regarding the performance of an investigation can, by notice in writing, require any person to produce any document under the control of that person or to appear to be examined orally.[297]

Part 2. The duty to disclose material information

It is prohibited to issue or distribute any form of application for securities unless it is accompanied by a prospectus registered by the SC, and therefore it is prohibited to place the securities without the delivery of the prospectus (Section 41(2), SCA). The SC shall refuse to register a prospectus if it considers that the prospectus does not comply with the legal requirements, or that it contains false statements or omits material information (Article 42 SCA). Although the SC does not review the merits of investing in the offered securities, it will revert to the applicant for more information The SC will, if necessary, revert to the applicant for more information to be disclosed in the offering document but it does not review the merits of the investment. If the SC refuses to grant its approval, the offering document cannot be registered with the Registry of Companies.

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[291] Division 2 of SCA and also the Malaysian Code of Take-Over and Mergers.
[292] Section 7(1) SCA.
[293] Section 6 SCA.
[294] Section 8 SCA.
[295] Section 15 SCA defines the broad scope of functions of the SC which covers both regulation and supervision of the securities and future industries.
[296] Section 159 SCA.
[297] Sections 128(5) and 134 SCA.

The Prospectus Guidelines issued by the SC on July 2000 describes the information the SC considers necessary for inclusion in a prospectus for a public offer of shares, and which investors and their professional advisers would reasonably require and expect. Among other requirements, the Prospectus Guidelines calls for disclosure of:

1. The aggregate remuneration and benefits of directors and CEO (does not expressly require the disclosure of the salaries and compensation of each of the directors and officers).
2. The direct and indirect shareholding of the CEO and each director.
3. The shareholding of any major shareholder, stating the ultimate beneficial owner of any shares held under a nominee, corporative, or trust arrangement.[298] To this effect, a major shareholder would be considered the owner of more than 5% of the total aggregate voting shares of the corporation . Major shareholders are required to report their status as major shareholders or any changes to their status as major shareholder pursuant to section 69E, 69F & 69G of the Companies Act to the Issuer and the Stock Exchange. The Issuer upon receiving the notice of change of major shareholders is also obliged to post such notice to the public via the Stock Exchange website.
4. Particulars of all material contracts made outside the ordinary course of business, as well as terms of all material agreements.[299]
5. Description of transactions in which any director and major shareholders have a direct or indirect interest.

Directors have to sign a responsibility statement regarding the accuracy of the contents of the offering document. The distributor (although normally her signature does not appear in the offering document) will also be primarily responsible for the accuracy of the contents therein. The distributor is not required by law to perform a due diligence review of the information contained in the prospectus. However, it is a strict liability offense on the distributor if it is proven that there is a false statement or material omission in her submission to the SC. Proof of a due diligence review will afford the distributor a statutory defense to any such prosecution by the regulator. The SC also encourages a due diligence review and has even come up with broad guidelines on the need to conduct such review before any submission to the SC. Therefore, a due diligence is always carried out by the distributor as a matter of commercial practice. The distributor may also be liable to third parties under the common law duty of care in making any representations outside of the prospectus. If it can be proved that the distributor has been negligent in conducting a professional evaluation, she will be civilly liable for representations made outside of the prospectus. The Attorney leads the due diligence team and produces a report. In the event that anything in the prospectus is found to be untrue notwithstanding the due diligence exercise, the distributor has a statutory defense that she has relied on the report of the Attorney (Section 32B of the SCA).

The controlling shareholder is normally requested by the working group established to carry out the due diligence exercise to sign a statutory declaration confirming its shareholding in the company. The controlling shareholder's liability is not dependant on her signing the prospectus. As long as the controlling shareholder submits or causes to be submitted any false statement or material omission, or is engage in, aids or abets a conduct that she knows to be misleading or deceptive, she will be guilty of an offense (Section 32B, SCA). In order to avoid liability, the controlling shareholder must have first made reasonable inquiries that the prospectus does not contain any false statement or material omission (Section 32B(3), SCA). It is very unlikely that a controlling shareholder will not be involved in the preparation of the prospectus because she will have to provide details of her shareholding and other interests in the company which must be declared in the prospectus.

Part 3. Sanctions for the failure to disclose

[298] Securities Commission Prospectus Guidelines, Chapter 9.
[299] Securities Commission Prospectus Guidelines, Chapter 18.

3.1 Administrative sanctions

The SC may issue a stop order if in its opinion determines that the offering document does not meet the requirements of the SCA, contains false or misleading information, omits material information, or when the issuer has contravened any provision of the securities laws or the Companies Act (Section 54(1), SCA). The SC may also prohibit the trading of particular securities if it determines that it is in the public interest to do so (Section 11A, Securities Industries Act). Furthermore, the SC may make an order modifying the requirements relating to the content of a prospectus, and imposing such terms and conditions as it deems fit.[300] Failure to comply with these terms and conditions constitutes an offense.

In the event of any violation on disclosure in a prospectus, Section 32(7) of the SCA empowers the regulator to withdraw the approval for the prospectus, revise the approval or impose further conditions on the approval. The regulator also has the power under chapter 9 of the Policies and Guidelines for the Issue/Offer of Securities to mete out various punishments on the issuer, the advisers, reporting accountants and expert including the issuance of a reprimand, banning the advisers from submitting any proposals to the regulators, prosecution under the SCA.

Although it is not a direct administrative sanction, the Chairman of the SC may, with the consent of the Public Prosecutor, settle any offense under the Act by accepting from the suspect the payment of a determined sum of money for the Federal Consolidated Fund, after which no further proceedings shall be taken against the violator (Section 139, SCA).

3.2 Judicial sanctions

Any applicant, any of its officers or associates, a financial adviser or an expert, or any person who submits false or misleading information or information that contains material omissions is guilty of an offence which on conviction carries a maximum fine of RM3 million or imprisonment of 10 years or both (Section 32B, SCA,). Similar criminal sanctions apply to any person who authorizes or causes the issue of a prospectus which contains information that is false or from which there is a material omission (Section 55, SCA). Therefore, in case of false statements or omission of material information in a prospectus for a public offer of shares, the above criminal sanctions of fine and imprisonment may be imposed against the directors or officers of the issuer, the distributor, the accounting firm, and the lawyers involved in the transaction. These sanctions are applicable to both intentional and negligent conduct.

Directors have primary duty in ensuring that offering documents are accurate. The issuer and the relevant directors and officers will be the first to be charged under the SCA upon investigation by the SC that an offense has been committed. In most cases, it will be the directors who are aware of the omission of material information that are charged. However, a proposed director may withdraw her consent from being named in the offering document upon her becoming aware of the material omission or misstatement. That will accord her a statutory defense in respect of a prosecution of providing false or misleading statements in an offering document (Sections 55, 57, and 63, SCA). Similarly, if the principal officers are aware of the omission of material information, they would be committing an offense under SCA. They will not be liable if they were unaware of the omission although they acted with due diligence.

Technically, controlling shareholders are not involved in the submission of offering documents, but they have a duty to disclose correct information to the issuer. If controlling shareholders do not provide correct information and those omissions or misstatements are reflected in the offering documents, they would be liable under the category of 'any other person' submitting misleading information or omitting to provide material information (Section 32B, SCA). Similarly, the distributor is typically not involved in the preparation of offering documents. If she is aware of the misleading information and actively

[300] Section 44 SCA.

promoted shares, she would be liable for offenses under the SCA. However, as explained above, submitting documents to the SC which include a false statement or a material omission is a strict liability offense, subject to the defense of having reasonable grounds to believe in the truthfulness and completeness of the prospectus after reasonable inquiries. Therefore, the underwriters are criminally responsible for any false statement or a material omission in the prospectus.

The accountant and lawyer, as the issuer's professional advisors, will be responsible for their portion of the work and for any misstatement or omission. Similarly, the accountant is criminally responsible only for the information that she has audited and not for any misstatement.

If on the application of the SC or the Stock Exchange, it appears to the High Court that a person has committed an offence under this Act or contravened the rules or listing requirements of the Stock Exchange, the High Court may make one or more of the following orders: an order restraining a person from carrying on a business of dealing in securities; an order restraining a person from acquiring, disposing of or otherwise dealing with any securities that are specified in the order; an order directing a person to dispose of any securities that are specified in the order; an order restraining the exercise of any voting or other rights attached to any securities that are specified in the order; an order restraining a person from making available, offering for subscription or purchase, or issuing an invitation to subscribe for or purchase, or alloting any securities that are specified in the order; an order vesting securities that are specified in the order in the Commission or a trustee appointed by the High Court; an order declaring the whole or any part of a contract relating to securities, including a contract for the acquisition or disposal of securities, to be void, and if the High Court thinks fit, to have been void *ab initio* or at all times on or after a specified date before the order is made; where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under this Act, an order requiring such person to do such act or thing; in a case of a contravention by a person of the rules or listing requirements of the stock exchange or a rules of a recognized clearing house, an order giving directions concerning compliance with or enforcement of those rules or listing requirements to the person or the directors of the body corporate; in a case where the person is a director, an order removing her from office and that she be barred from becoming a director of any other public company for such period of time as may be determined by the High Court; for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act; and any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions (Section 100, SCA).

While there is no express prohibition of employment, a person convicted of an offense involving dishonesty may be disqualified to act as a director of a company (but can remain as an employee of a company).

3.3 Stock exchange sanctions

The Kuala Lumpur Stock Exchange (KLSE) can suspend the trading of a listed security or de-list it subject to consultation with the SC, and impose penalties such as reprimand, fines, orders to rectify the non-compliance, imposition of one or more condition(s) for compliance, and any other action which the Exchange may deem appropriate on issuers, directors, and advisers (Chapter 16 of the KLSE Listing Requirements). The KLSE can also request the directors, officers, employees or adviser of a listed issuer to attend personally before the exchange and provide any document or information required.

Finally, in addition to any action it may take under its own listing requirements, the KLSE may reprimand the person in default (including an issuer, its directors, officers and advisers), direct that person to comply with listing requirements, and impose a penalty (Section 11, SIA).

Part 4. Investor's right of restitution for losses

Investors may obtain restitution for losses in a prospectus liability case through a civil proceeding. In addition, the Regulator may also take civil action on behalf of the investors pursuant to Section 155 of the SCA.

Investors may seek restitution either under the SCA or under common law. According to Section 153 SCA, a person who suffers losses by reason of relying on the conduct of another person who violates the provisions of the law on prospectus may recover damages by civil proceedings. In addition, Section 153 of the SCA preserves an investor's common law right to make a civil claim against the defendant even if the defendant has been charged with an offense under the SCA. Section 57 SCA explicitly addresses prospectus liability. It establishes that an investor who suffers losses due to misleading information or material omissions from a prospectus may obtain restitution from, among others, the issuer, each of its directors, a promoter[301], a principal adviser, a person named in the prospectus as having made a statement therein (for damages caused by that statement), and any person who has consented to be named as a stockbroker, underwriter, auditor, banker, or lawyer, and who has made a statement included in the prospectus or on which a statement in the prospectus is based. In this regard, the distributor is liable not only for the information that she has certified but also for the contents of the prospectus insofar as she knows that it contains untrue statements or material omissions.

In a civil claim, the claimant has to prove her case on a balance of probability. To obtain restitution, the plaintiff will be required to prove in court the following: (1) that there is false or misleading statement or a material omission in the prospectus, (2) that the investor suffered losses which were caused by the misleading statement or material omission in the prospectus, and (3) that she relied in the prospectus to invest.

Section 59 SCA provides a due diligence defense to the civil liabilities derived from Section 57 SCA. A person is not liable for misleading information or material omissions in a prospectus if she can prove that she made all reasonable enquiries and as a result had reasonable grounds to believe, and in fact believed, that the statement was not misleading and that there was no material omission. Other defenses available under the SCA are having relied on a statement or information provided by an expert or public officer.

Although there are no reported cases, investors may also seek the rescission of the acquisition of shares under English common law principles, which would require that the plaintiff proves her loss and then be restituted as if the true facts were disclosed in the prospectus and she had reacted in a way that would have mitigated her loss.

Normally, a controlling shareholder is not liable for the actions of the corporation. Courts would not pierce the corporate veil in a prospectus liability case (although they have done so when the shareholder was the alter ego of the corporation). Similarly, a controlling shareholder is not normally liable for the actions of the directors or officers of the corporation unless the controlling shareholder is the prime motivator of the actions of directors or officers.

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[301] Section 35 SCA defines a 'promoter' to mean- *(a)* in relation to a prospectus issued by or in connection with a corporation, a promoter of the corporation; *(b)* in relation to a prospectus in respect of a unit trust scheme or prescribed investment scheme, a promoter of the scheme; or*(c)* in relation to a prospectus in any other case, a person, who is a party to the preparation of the prospectus or any relevant portion thereof, but does not include any person by reason only of his acting in a professional capacity.

A first-instance judgement in a prospectus liability case may take approximately 3 to 5 years to be resolved by the judiciary from the moment of filing the complaint. An appeal is almost always granted as a matter of law, and may take between 1 and 2 years to be heard. A defendant without a valid defense may not be able to stay the execution of the first-instance decision unless she can show a strong chance of succeeding in the appeal.

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SECURITIES LAW OF MEXICO

Part 1. The regulator and its supervisory and regulatory powers

The official authority in charge of the supervision and regulation of the securities markets in Mexico is the National Banking and Securities Commission (CNBV). Banks are regulated by CNBV, the Ministry of Finance and Public Credit (SHCP) and the Central Bank (Banxico). Insurance companies are regulated and supervised by SHCP and the National Insurance and Bonding Commission (CNSF).

The Government Board of the CNBV consists of 10 members, one President and two Vice-presidents. Five of its members are appointed by SHCP, 3 by Banxico, one by CNSF, and one by the National Commission for the Savings Retirement System. The President of the CNBV is appointed by the SHCP and, in turn, appoints the two vice-presidents. There is no legal provision with respect to the duration of appointments for the members of the Government Board of the CNBV. Thus, they may be removed at any time.

In general, the CNBV both regulates and supervises the securities market. Thorough regulations, the CNBV establishes the regulatory framework pursuant to which the issuance and transactions on securities are subject to, both in the primary and secondary markets. In connection with public offerings, the CNBV regulates the corporate governance of the issuer as well as the disclosure requirements to be satisfied by the issuer in the prospectus (Art 3 of LMV[302]). However, the LMV has delegated some regulatory authority to certain self-regulatory organizations (i.e. national securities exchanges). These authorities include, among others, the power of national securities exchanges to review the listing requirements of new issuances. In general, the regulations issued by the CNBV are only subject to the approval of the Federal Commission of Regulatory Improvement.

The CNBV may command the delivery of documents only from persons or entities under its regulation and supervision, including, in certain cases, the delivery of documents and information from the issuers of listed shares (Art 4 of LCNBV[303] and Art 41 of LMV). In contrast, CNBV does not have express authority to command the testimony of witnesses.

Part 2. The duty to disclose material information

The public offer of shares requires CNBV's prior approval (Art 2 of the LMV). The offering document must meet the requirements set forth in the LMV and the regulation issued by CNBV. If it does, CNBV must approve the public offering since it may not oppose a prospectus solely on its own determination of the quality of the investment.

Generally the prospectus is publicly available but shares may be sold without delivering the prospectus to investors in advance. In addition to that information specifically required under Schedule H of Circular 11-29 of the CNBV, the prospectus must disclose all information that may be relevant to investors. The list of specific disclosure requirements includes: (1) the aggregate remuneration of directors and

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[302] "*Ley de Mercado de Valores*" - Securities Market Law, which is the main regulatory instrument for the securities market in Mexico. Please note that this Law was substantially modified effective June 2, 2001. The information in this summary refers to the law in force in Mexico as of December 2000.

[303] Law of the National Securities and Banking Commission published in the Federal Official Gazette on April 28, 1995, as amended.

officers;[304] (2) information on the shareholders who, directly or indirectly, own at least 5% of the issuer's capital; (3) the name of the 10 largest shareholders; (4) the number of shares and options held by the issuer's directors and its main officers; (5) a summary of relevant contracts signed in the last two years[305], and some transactions with related parties[306]. Finally, although there is no express requirement to disclose shares indirectly owned by directors and officers, these may need to be disclosed based on the principle that the prospectus must disclose all relevant information. Note that insiders and 10% shareholders must inform CNBV about variations in the percentage of their holdings involving the acquisition or loss of control of shares representing 10% or more of the issuer's capital.

The law does not name the persons that must sign the prospectus. However, directors, officers, distributor, examiner[307], and lawyers, must sign "Letters of Responsibility" certifying that the information filed before the CNBV and included in the prospectus is truthful and complete.[308] Note that the distributor is not only liable for the contents of the prospectus, but also for representations not included in a prospectus that, without being fraudulent or false, turn out to be incorrect due to her negligence in conducting a professional evaluation.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

If the prospectus contains false or misleading statements, CNBV may suspend or even cancel the securities registration of the issuer (Art 16 of the LMV). In addition, the CNBV may sanction false or misleading statements in a prospectus with fines on the issuer and the distributor (Art 51 II of the LMV). Moreover, fines may be imposed on the directors, officers, and employees of the issuer and distributor (Article 51 of the LMV).

The CNBV may suspend a distributor that, in its judgment, has provided false information (Art 20 IX of the LMV). This sanction could also be applicable in case of willful or negligent omissions of material information in a prospectus as a false statement would have been rendered to the CNBV in the distributor's letter of responsibility included in the prospectus.

There are no administrative sanctions applicable to the accounting firm that audited the issuer's financial statements for omissions of material financial information in the prospectus.

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[304] Schedule H, III 3 B

[305] Schedule H, III 2 C.

[306] Schedule H, III 3 C requires a brief disclosure of transactions (involving goods, services or assets) with value of at least 250,000 UDIS that took place since the previous fiscal year between the issuer and related parties. For this purpose, related parties include directors, major shareholders, their close relatives, and in some cases companies in which directors hold more than 10% of the stock.

[307] Or "Comisario". In terms of the General Law of Commercial Entities, the Examiner of a Sociedad Anónima (a limited liability company that may be an Issuer in terms of the LMV) must render a report regarding the financial statements prepared by the administration of such company.

[308] Regulation 11-29, Schedule A-9. The letters signed by the issuer's directors and officers and the examiners, must indicate that they have reviewed the prospectus, that it was prepared based on information provided by the company, that they agree with the information in the prospectus, and that they are not aware of omitted relevant information. The letter signed by the distributor must expressly state that she has performed a due diligence investigation of the issuer, and has reviewed the prospectus, which in her opinion complies with the applicable regulations, and that she is unaware of omitted, false, or misleading information therein. Finally, the letter signed by the external lawyers or law firm advising the transaction must certify that they have reviewed the prospectus and the legal documents and information, the validity of the incorporation of the issuer, the adoption of the public offer resolution, and the issue of the new shares, and that they are not aware of material omissions or false legal information.

Finally, the CNBV does not have the power to issue orders to refrain from, or commanding the performance of, a specific action.

3.2 Judicial sanctions

Persons who knowingly provide false information in a prospectus may be sanctioned with 2 to 10 years of imprisonment and a fine equivalent to twice or three times the amount of the profits derived therefrom (Art 52 Bis 2 of the LMV). These sanctions may be imposed by a criminal judge on the directors and officers of the issuer and apply to omissions of material information considering the Letter of Responsibility included in the prospectus. The distributor and the external lawyers may also be held criminally liable if they were aware of the false statements or omissions and fraudulently signed the Letters of Responsibility. Similarly, the responsible officers of the accounting firm that audited the financial information included in the prospectus may be subject to criminal liabilities if they made false statements or omitted material information in a prospectus (Articles 10, 11, 13 of the Federal Criminal Code).

In addition to the applicable sanctions for crimes perpetrated while in the performance of their profession, professionals may be suspended temporarily (or permanently in case of recurrence) from performing those services (Art 228 of the Federal Criminal Code).

3.3 Stock Exchange sanctions

The Mexican Stock Exchange may suspend trading of a security when it deems it necessary in order to make information available to the public. The Stock Exchange can also suspend the operations of a distributor before the exchange in case of serious or recurring violations to the applicable rules and regulations.

Part 4. Investor's right of restitution for losses

Under securities laws, there is no express right to obtain restitution for investors' losses in a case of false statement or omissions of material information in a prospectus. Therefore, investors must resort to general civil law or tort law to obtain restitution in a prospectus liability case. The general principle (Article 1910 of the Federal Civil Code) is that investors are legally entitled to obtain restitution when they suffer losses due to illegal acts (defined as those acts carried out against the law or that fail to comply with legal requirements).

The parties signing the "Letters of Responsibility" described in Part 2 above are liable towards investors by virtue of those declarations[309]. In case there was a false statement or a material omission in the prospectus, and the signing party was aware of it, the investors have a right to obtain compensation, for the damages incurred by reason of relying in the letters of responsibility, from the issuing company, the signing members of the board, examiners, and officers, the distributor, and the lawyers.

To obtain restitution in a prospectus liability case, the plaintiff must prove that: (1) the prospectus omitted material information or included false or misleading material statements; (2) the defendant knew the false or omitted information; (3) the defendant acted with intent to deceive; (4) the investor relied in the prospectus to invest and suffered losses; (5) the losses were caused by the false or omitted information. In order to escape liability, the defendant must rebut the arguments and proofs presented by the plaintiff.

[309] By signing the letter of responsibility, only the Distributor and Lawyer are obliged to perform a due-diligence review of the information contained in the prospectus.

The accounting firm that audited the financial information included in the prospectus must be licensed and is subject to a more severe degree of liability pursuant to self-regulatory rules applicable to auditors. Specifically, the accounting firm is liable for losses caused by the negligent performance of its professional activities, even if it had no knowledge of the defective financial information, but should have known about it according to the standards applicable to its professional work.

As set forth above, investors only have legal remedies pursuant to tort or civil liability standards in order to collect damages.

Finally, there is no legal provision that would enable investors to hold the controlling shareholder civilly liable for the company's liabilities or for acts or omissions of the company's directors or officers.

A first instance court (i.e., district court) may render judgment on a prospectus liability case in 18 months after the case was filed. Thereinafter, the un-favored party has the right to appeal the judgement and even after the appeal, the defendant may bring an "*amparo*" procedure arguing a violation to the Constitutional right of due process or similar violations. In an appeal process, judgment is usually rendered within 12 months after the case is filed, and in the *"amparo"* procedure, within an additional 12 months after the case is filed. In cases where the defendant does not have a valid defense, but resorts to all defenses available under law, the stated periods may be shortened.

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SECURITIES LAW OF THE NETHERLANDS

Part 1. The regulator and its supervisory and regulatory powers

The main regulator of the Dutch securities market is the Netherlands Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten*), the AFM, (until 1 March 2002 named the Securities Board of the Netherlands (*Stichting Toezicht Effectenverkeer*)). Banks and insurance companies are regulated by the Dutch Central Bank *(De Nederlandsche Bank N.V.)* , the DCB, and the Pension and Insurance Chamber *(Pensioen- en Verzekeringskamer)*, the PIC, respectively. The AFM is, however, the regulator of the securities' businesses of banks. Euronext Amsterdam N.V.is the official Dutch stock exchange (hereinafter defined as "Stock Exchange").

As of September 2002, the supervision on the financial sector is divided into behavioural supervision and prudential supervision. As of that date, the AFM deals with behavioural supervision, by which is meant inter alia advancing an orderly and transparent financial market and the protection of financial consumers, such as promoting proper information to consumers. Prudential supervision, such as capital adequacy is the domain of the DCB (and the PIC).

This means that the AFM is responsible for the market conduct supervision on the Stock Exchange, securities institutions (brokers, asset managers), as well as investment institutions and the securities businesses of banks. DCB remains the principal regulator for credit institutions and is the prudential regulator for securities institutions. In this respect, the AFM has issued the Further Regulations on Market Conduct Supervision of the Securities Trade 2002 (stipulating the obligations of securities institutions, securities businesses of banks and investment institutions, which are subject to prior negotiations with the Minister. For example, the AFM may lay down rules concerning the layout of the prospectus (Bte 2(5)) Policy rules however, issued by the AFM are not subject to further governmental approval. The DCB has, as a result of the aforementioned change in supervision structure, issued the Further Regulations on Prudential Supervision of the Securities Trade 2002.

Members (being the Board of Directors) of the AFM are appointed by the Minister of Finance and are not subject to further approval or confirmation. The Minister of Finance also has the power to discharge members of the AFM before the expiration of their term.

The Securities Markets Supervision Act of 1995 (*Wet toezicht effectenverkeer 1995*, or SMSA) grants the AFM the power to obtain any information that is reasonably necessary for the due fulfillment of its responsibilities and exercise of the powers it has pursuant to the SMSA and in order to ascertain whether statutory provisions are being complied with. This information may be obtained from, among others, securities institutions, holders of a qualified shareholding, operators of a securities exchange, and offerors[310]. Any such person has the obligation to assist the AFM in all manners that it reasonably demands for the exercise of its function. In contrast, the AFM does not have power to subpoena witnesses.

Part 2. The duty to disclose material information

[310] SMSA, Article 29.

Securities shall not be admitted on the Stock Exchange until after a prospectus has been published[311]. When a prospectus is complete, it must be sent to the Stock Exchange for approval and to the AFM, only as notification, since the AFM cannot approve or reject the offering document, which is the task of the Stock Exchange[312]. A prospectus may only be published after approval or recognition thereof by the Stock Exchange. An advertisement must be placed in the Official List in which the full prospectus must be included or a reference to where the prospectus is published or is available for free. At the latest the first day the Stock Exchange is open for business after publication of an advertisement in the Official List (Officiële Prijscourant), the prospectus needs to be made public. At least 3 trading days must pass after the publication or making available of the prospectus before trading may start on the Stock Exchange, although subscribers may place orders[313].

The prospectus must disclose the following material information as required by the LIR, including:

1. Remuneration paid and benefits in kind granted to members of the executive, managerial and supervisory bodies during the last completed financial year, indicating the overall totals for each type of governing body[314].
2. The names of the shareholders, so far as known to the issuer, who, directly or indirectly, hold 5% or more of its capital and the numbers of shares held by them[315]. Also, the prospectus must disclose the names and holdings of the natural or legal persons, so far as known to the issuer, who, directly or indirectly, jointly or severally, exercise or may exercise control over the issuer.
3. Aggregate number of shares in the issuer held, directly or indirectly, by the members of the executive, managerial and supervisory bodies and the options granted to them on the shares of the issuer[316].
4. A description of the main and principal investments of the issuer, as well as some of its major dealings[317]. However, there is no duty to disclose all material contracts..
5. Nature and extent of the (direct or indirect) interests of the members of the executive, managerial and supervisory bodies with regard to transactions effected by the issuer which are unusual as to their nature and their terms and conditions in the course of the last and current financial year[318].
6. A true and fair view of the state of the issuer as of the last fiscal year for which annual accounts have been published as well as information on significant events that have occurred after said date[319].

Note also that certain large shareholders[320] need to disclose their ownership to the AFM under the Disclosure of Major Holdings in Listed Companies Act 1996 (*Wet melding zeggenschap in ter beurze genoteerde vennootschappen 1996).* The AFM will make this information public in a national newspaper, as well as on its website. Further, managing directors and members of the supervisory board of listed public limited companies (*naamloze vennootschappen*) have the obligation to disclose their shareholding to both the company itself and the AFM[321]. This means that they need to disclose the number of shares in the capital of the company that they possess as well as the number of voting rights they can exercise on the capital of the company. This also applies to shares and voting rights that they have in the capital of

[311] LIR, article 8.
[312] LIR, articles 20, 20A.
[313] LIR, Article 5.
[314] LIR, Schedule A - 6.2.0.
[315] LIR, Schedule A - 3.2.7.
[316] LIR, Schedule A – 6.2.1.
[317] LIR, Schedule A - Article 4.7.
[318] LIR, Schedule A - Article 6.2.2.
[319] LIR, Article 8.2.
[320] Starting with 5% of the shares of a public limited company under Dutch law at the moment that the shares are admitted to the stock exchange in a member state of the EU.
[321] Article 2a Disclosure of Major Holdings in Listed Companies Act 1996.

companies that are affiliated with the company[322]. The meaning of "shares" under The Disclosure of Major Holdings in Listed Companies Act 1996 is broad and includes shares, depositary receipts as well as rights (e.g., options and warrants) as a result of an agreement to acquire shares or depositary receipts.

The prospectus must be signed by the issuer and by the sponsor[323]. The prospectus must include a statement of the persons that are responsible for the prospectus, that, so far as known to them, the information in the prospectus (or the part for which they are responsible) is true and accurate and that no information has been omitted which, if disclosed, would change the purport of the prospectus[324]. The prospectus must also include a statement by the auditors regarding the annual accounts included therein[325] as well as with respect to other information in the prospectus if this is audited by an auditor[326].

The sponsor is required by the LIR to perform a minimum due diligence review of the information in the prospectus based on an examination of the items as further set forth in the LIR[327] [but is not bound by mandatory law to do so]. This means an investigation of the status of the issuing company and the accuracy and completeness of the prospectus in view of the requirements for listing[328]. If it is likely that the sponsor has acted contrary to his obligations or has acted unlawfully by either not having included or having omitted important information from the prospectus, the sponsor can be held liable for representations included in the prospectus that, without being fraudulent or false, turned out to be incorrect due to negligence or for information that is not included in the prospectus but should have been included therein as a result of the due diligence review. This is covered in Article 6:162 of the Dutch Civil Code, by both law [and unwritten law of Social Conduct].

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

An administrative sanction may be imposed by the AFM for a violation of certain legal provisions of the SMSA, while a criminal sanction may be imposed by a judge for a violation of the provisions of the Penal Code and for certain violations of the SMSA. Under the so-called 'una via principle,' it is not possible to impose both an administrative sanction and a criminal sanction for the same act committed by the same person or entity. Therefore, the regulators have entered into a covenant[329] with the public prosecutor to determine when an administrative sanction should be sought and when a criminal sanction will be imposed.

If certain obligations under the SMSA regarding the prospectus for securities that will not be listed on the Stock Exchange (including information requirements) are violated, the AFM may impose a penalty order

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[322] An affiliated company is a public limited company under Dutch law of which the shares are listed on a stock exchange which is situated in a member state of the EU with which the company forms a group or has a participation as mentioned in article 2:24c of the Dutch Civil Code, if the most recent fixed turnover of that company is at least 10% of the consolidated turnover of the company, or provides more than 25% of the capital of the company.

[323] LIR, Article 9. A sponsor is a member of the Stock Exchange supervising and signing the application for admission of another company to the Stock Exchange.

[324] LIR, Schedule A -Article 1.1 and 1.2.

[325] LIR, Schedule A - Article 1.3.

[326] Article 1.3 Schedule A LIR.

[327] Article 11 Listing Procedure Rules.

[328] Article 11 Listing Procedure Rules.

[329] *Convenant van 23 december 1999 betreffende de afstemming over de keuze tussen de oplegging van bestuurlijke boeten of strafrechtelijke adoening bij bepaalde overtredingen van de financiele wetgeving.*

(*last onder dwangsom*) or an administrative penalty (*bestuurlijke boete*) on the issuer[330] or the distributor[331]. In case of a prospectus for securities that will be listed on the Stock Exchange, if any obligations under the LIR with respect to the prospectus are violated, the Stock Exchange may ask the Listing and Issuing Rules Advisory Committee to advise them about suspected violations of the LIR. Following this advice, the Stock Exchange may take measures relating to the continuance of the listing, such as suspension or cancellation of the listing, or may require that either the issuer or the Stock Exchange itself makes certain information public.

If the AFM considers that the auditor of a securities institution (securities broker or portfolio manager) cannot guarantee the fulfillment of its responsibilities, the regulator may revoke its authorization to issue statements under the SMSA[332].

3.2 Judicial sanctions

Any person who issues securities, or assists with the issue, and induces the public to subscribe the securities by deliberately concealing or misrepresenting information, or presenting false information, commits an economic crime[333] . Therefore, the issuer as well as its directors and officers, the distributor, and the accountant commit a criminal offense if they deliberately withhold material information in a prospectus.

The director or officer of an issuer who intentionally disseminates untruthful information with the aim to favor himself, or intentionally discloses or permits to be disclosed a false annual report and accounts, or other information, commits a criminal offense and is subject to imprisonment or fine[334].

The directors and officers of the issuer may be dismissed if the intentional omission of information or false statement can be considered contrary to principles of good market practice (*strijd met elementaire beginselen van verantwoord ondernemerschap, of: wanbeleid*)[335]. A judge in the Business Chamber of the Amsterdam Court of Appeal may only perform such action after a request of a party to perform an investigation[336].

Upon the plaintiff's petition in a tort action, the court may order the defendant to refrain from making the information in the prospectus public, and publish a correction of that information as indicated by the court[337].

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[330] But not on the issuers' directors or officers, since\ the regulations regarding the content of the prospectus are directed to the issuer.
[331] Articles 48b and 48c SMSA.
[332] Articles 28b SMSA.
[333] Articles 47 and 48, SMSA.
[334] Penal Code, Articles 334 and 336.
[335] , Article 2:356 Civil Code.
[336] Parties that are entitled to ask the Business Chamber to appoint a person to investigate the course of action and the procedures within a legal entity (to decide if the course of action was contrary to principles of good market practice) are, with respect to a public limited company, shareholders or depository receipts holders who represent, alone or together, at least one tenth of the issued capital or are entitled to an amount of shares or depository receipts thereof up to a nominal value of EUR 225.000, or so much less if such is stated in the articles of association. Also entitled are parties that were given this authority in the articles of association or in an agreement with the public limited company, as well as the advocate-general with the Business Chamber for reasons of public interest. Finally, this request may also be made by an association of employees which has some of its members working within the public limited company and which was incorporated as a legal entity at least two years ago and has written down in its articles of association that its task is to look after the interests of its members as employee.
[337] Articles 6:194/196 Civil Code.

3.3 Stock Exchange sanctions

In the listing agreement between the Stock Exchange and the issuer, the issuer needs to declare that it will act in accordance with the provisions of the LIR. Should the issuer fail to comply with these provisions, including the disclosure requirements for the prospectus, the Stock Exchange is authorized to suspend or cancel the listing[338].

If any obligations under the LIR with respect to the prospectus are violated, the Stock Exchange may ask the Listing and Issuing Rules Advisory Committee to advise it about suspected violations of the LIR. Following this advice, the Stock Exchange may take measures relating to the continuance of the listing, such as suspension or cancellation of the listing, as well as the requirement that the distributor shall make certain information public.

Part 4. Investor's right of restitution for losses

Investors who have suffered damages due to untrue or omitted information in a prospectus will not generally be able to be compensated by means of criminal[339] or administrative sanctions. Instead, compensation is mainly to be pursued through a judicial proceeding before a civil court. Rather than securities law, the legal basis to recover damages as a result of any omitted or false information are Articles 6:162 and 6:194 of the Dutch Civil Code.

According to Article 6:162 of the Civil Code, a person must compensate the damages caused to other parties by unlawful acts attributable to that person's fault or to a cause for which she is legally accountable. To this effect, an unlawful act includes both the violation of a right and any act or omission breaching a duty imposed by law or by a social rule of proper conduct. In addition, Article 6:194 of the Civil Code establishes that a person commits an unlawful act if she makes public, or causes to be made public, misleading information regarding goods or services offered in the conduct of a profession or business. The courts have held that Article 6:194 does apply to the information included in a prospectus for the public offer of shares, and therefore Article 6:162 is also applicable in this regard.

The parties that can be held liable are those involved with the preparation of the prospectus or the information contained therein. Specifically, Article 6:195 of the Civil Code describes a liable party to this effect as any person "who himself, in whole or in part, has determined or has caused to be determined the content and presentation of the information." Therefore, the issuer, its directors and officers, the Sponsor, the underwriter, the lead manager (usually a bank) who, if he supervises the issue, may be held responsible for making public the information in the prospectus, the accounting firm acting as statutory auditor, the attorney who advised in the public offer, and even the controlling shareholder, may under some circumstances all be held liable for the truthfulness and completeness of the material information included in the prospectus, only with respect to the information in the prospectus that they have reviewed

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[338] LIR, Article 65.

[339] In principle, an investor may join as injured party a criminal proceeding against one of the persons mentioned in articles 334 and 336 of the Penal Code. The investor needs to prove that she has suffered damages as a direct result of the criminal offense for which the suspect is being prosecuted. Article 334 PC states that anyone who, with the purpose of favoring himself or another person, unlawfully circulates a false statement with the intention to raise or lower the price of merchandise, funds or money, will be punished with a prison sentence of two years at the most or a fine of the fifth category. Article 336 PC states that the trader, managing director, managing partner or member of the supervisory board of a legal entity or partnership, who intentionally makes public or intentionally allows a publication of an untrue list or untrue balance sheet, profit and loss account, statement of income and expenditure or explanatory notes on one of these documents, will be punished with a prison sentence of a maximum of one year or a fine of the fifth category.

or that they have composed or for which they are responsible. Directors and officers may be held personally liable on the basis of article 6:162 Civil Code by third parties. This is possible only if such person personally can be blamed for having seriously violated the legal requirements of article 6:162 Civil Code (*persoonlijk een ernstig verwijt valt te maken*). This liability is in addition to a possible liability of the issuer and the claim the issuer itself may have against its directors, as follows from article 2:9 of the Civil Code. According to applicable case law (Association of Bondholders Coopag Finance BV v. ABN AMRO Bank NV), the distributor (acting in this case as lead manager and responsible for making the prospectus public) is also liable for the contents of the prospectus and should carry out a due diligence review of the information contained therein to avoid liability. In this court case the prospectus contained a statement from the bank that the information in the prospectus was, as far as the bank knew, in conformity with reality, and that no information was omitted which would change the meaning of this prospectus. Auditors and lawyers may in general only be liable with respect to the information as is reviewed or composed by them or for which they are responsible.

Based on case law, the controlling shareholder may be liable for the truthfulness and completeness of the material information included in the prospectus, if she has exercised decisive influence over the company, and has had an influence on the truthfulness and completeness of the contents of the prospectus, and knew, could have known or should have known that the rights of investors would be harmed. In contrast, investors may not pierce the corporate veil as shareholders may not be generally liable for the liabilities of the corporation.[340]

In order to obtain restitution for losses, investors generally need to prove that: (i) the liable party committed an unlawful act against the investor; (ii) this wrongful act can be attributed to the defendant; and (iii) the investor has suffered damages as a result thereof. Nonetheless, in a tort action for prospectus liability, Article 6:195 of the Civil Code provides that the defendant must prove the rightness or completeness of the information if an action is brought pursuant to Article 6:194 Civil Code against a defendant who herself, in whole or in part, has determined or has caused to be determined the content and presentation of the information. Under this reversal of the burden of the proof[341] (*omkering van bewijslast*), if the plaintiff starts a legal procedure against the defendant under article 6:194 of the Civil Code, stating that the information concerned was misleading, then the defendant bears the onus to show on her defense the accuracy or completeness of the allegedly misleading information. If subsequently according to article 6:194 of the Civil Code it is established that the person/entity that has produced the content and wording of the information or has caused this information to be produced, has acted unlawful, than he is liable for the damages which have risen as a result thereof, unless he proves that this cannot be attributable to his fault nor on any other grounds can come for his account.

The above-mentioned means that when starting a legal procedure it is sufficient for the plaintiff to state that the information from defendant is misleading. It is then up to defendant to make a reasonable case for the correctness or completeness or otherwise the non-misleading character of the communicated information.

The reversal of burden of proof is only applicable if the unlawful deception comes in total or largely from someone who has himself produced the contents and wording of the information or has caused this information to be produced. The normal rules of evidence will again be applicable if the reversal of

[340] However, a parent company as a shareholder may be liable for debts of its subsidiary, if the parent company has interfered intensively with the management of its subsidiary or if the creditors' access to the subsidiary assets is reduced because of acts of the parent. As to our knowledge, no shareholder has been held civilly liable for acts or omissions committed by directors or officers of the company.

[341] The burden of proof may not take place if unreasonable given the circumstances (Article 6:195 Civil Code).

burden of proof would be unreasonable. This may be the case if the plaintiff is only after business secrets of the defendant-competitor or states too lightly an unlawful misleading by defendant.

Under Dutch law, it is possible to nullify an agreement if this is concluded as a result of mistake of fact (*dwaling*) and would not have been concluded if there had been a right representation of the facts and, if amongst others, the mistake of facts is attributable to information of the other party, unless this party could assume that the agreement would also have been concluded without such information (article 6:228 Civil Code). Another possibility is to nullify a legal act if this was performed on the basis of deceit (*bedrog*, article 3:44 section 3 Civil Code). Deceit is present, when someone induces another person to perform a legal act by means of an intentionally wrong announcement, or by means of intentionally concealing any fact that should have been disclosed, or by means of another cunning device. Finally, it is also possible to nullify a legal act based on conflict with mandatory law (article 3:40 Civil Code). A conflict with mandatory law leads to voidness of the legal act, but if the provision is written solely for the protection of one party to a multilateral legal act, then this leads to voidableness of such legal act only if the meaning of the article of law does not imply something else. Under circumstances it is possible that these articles see to a subscription for shares. This means that possibly a share transaction may be nullified or is void.

A civil case for restitution for losses incurred by reason of a defective prospectus could take between two and three years to be resolved in the first instance, and if litigated up to the Supreme Court, it could require a total of seven to ten years. An appeal in the Netherlands entails an integral judicial review on the ground of the same case facts as in the first instance trial, possibly with additional new facts or evidence. Recourse to the Supreme Court is only possible on the basis of non-compliance with procedural requirements and wrong application of the law. The defendant in the first instance trial is generally admitted in appeal, despite the absence of valid grounds, since this will not be verified prior to the start of the appeal procedure.

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SECURITIES LAW OF NEW ZEALAND

Part 1. The regulator and its supervisory and regulatory powers

The main regulator of the securities markets in New Zealand is the Securities Commission (SC). The Reserve Bank of New Zealand regulates and supervises banks.

Members of the SC are appointed by the Governor-General of New Zealand, based on the recommendation of the Minister of Commerce. The Governor-General may remove any member of the SC at any time for disability, bankruptcy, neglect of duty, or misconduct, which has been proved to the Governor-General's satisfaction.

The Ministry of Economic Development, through the Business and Registries Branch (including the Companies Office) pre-vets and registers prospectuses under the Securities Act 1978 and registers documents required to be filed under the Companies Act 1993. The New Zealand Stock Exchange ("NZSE") is a securities market operated by NZSE Limited. The terms and conditions for the listing and trading of securities on the NZSE are governed by the NZSE Listing Rules. The conduct of sharebrokers and their business is regulated by the NZSE Business Rules 2002. The New Zealand Stock Exchange Market Surveillance Panel is established under the NZSE Listing Rules. It monitors information provided by listed issuers, investigates suspected breaches of the NZSE Listing Rules, and recommends changes to the Listing Rules[342]. The New Zealand Futures and Options Exchange (NZFOE) is a subsidiary of the Sydney Futures Exchange. The NZFOE undertakes surveillance and investigation of the conduct of dealers on the NZFOE.

The SC reviews securities practices and market participants and recommends any necessary changes to the law relating to bodies corporate, securities and issuers. The SC can command the delivery of documents or the testimony of witnesses from any person (sections 67 and 69D of the Securities Act). Regulations may be made by the Governor-General by Order-in-Council, in accordance with the recommendation of the SC. Before making a recommendation, the SC must do everything reasonably possible to advise persons who in its opinion will be affected by the proposed regulation and to give them the opportunity to make submissions on the recommendations to the SC.[343]

Part 2. The duty to disclose material information

Public offerings of securities must be made in an authorized advertisement or made in or accompanied by an investment statement or a registered prospectus (Section 33(1) of the Securities Act).[344] The Registrar

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[342] On 12 March 2003, NZSE Limited announced that it is formally reviewing the structure for the discharge of its regulatory responsibilities (including the structure of the existing compliance and enforcement bodies such as the Market Surveillance Panel).

[343] Section 70(1) of the Securities Act 1978. Section 70(1) is to be amended by section 25 of the Securities Amendment Act 2002, when that section comes into force on a date to be appointed by the Governor-General by Order in Council. When amended, section 70(1) will provide that the Governor-General may make regulations in accordance with the recommendation of the Minister (rather than the SC). The Minister will be required to consult with the SC before making a recommendation. The current requirement that the SC advise persons who will be affected by the proposed regulation and give them the opportunity to make submissions will be repealed when section 25 comes into force.

[344] The SC has the power to exempt an issuer from compliance with any provision in Part II of the Securities Act (which includes restrictions on the offer and allotment of securities to the public, including the prospectus, investment statement and advertisement requirements), and from any regulations made under section 70(1) of the Act.

may refuse to register a prospectus for failure to provide material information if by virtue of that failure the prospectus would fail to comply with the Securities Act 1978. The SC can suspend a prospectus if it does not comply with the Securities Act. However, neither the Registrar nor the SC have the power to oppose an offering document based solely on their own determination on the quality of the investment. The law does not establish a waiting period when issuer's shares may be offered, but actual sales may not be committed, agreed, or finalized without a registered prospectus and investment statement.

For equity securities, the prospectus must include, among others, the following information (Securities Regulations 1983, First Schedule[345]):

1. The names of the ten largest registered shareholders of the issuer, and the amounts of their respective holdings. Moreover, every person who has a relevant interest[346] in 5 percent or more of the voting securities of a listed issuer (that is, the person is a substantial security holder) is required to notify this to the listed issuer and to the exchanges by which the securities of the listed issuer are listed (Section 20, Securities Markets Act 1988). Also, the NZSE Listing Rules (LR 7.1.15) require that every offering document of a newly listed company include a statement of the identity of any substantial security holders disclosed to the issuer, the nature of the relevant interests held by each of them, and the consideration and other terms and conditions of any transaction under which the beneficial owner acquired and holds those securities as disclosed to the issuer.
2. A description of every material contract of members of the issuing group entered into in the preceding two years, other than a contract entered into in the ordinary course of business. (Clause 17 of the First Schedule to the Securities Regulations 1983)
3. Disclosure of any material transaction between the issuer (or its subsidiaries) and any company more than half of whose share capital is held directly or indirectly by any director or proposed director, or any immediate relative of any director or proposed director, of the issuer or a body corporate related to the issuer, in the preceding 5 years (Clause 15(4)(c) of the First Schedule to the Securities Regulations 1983). There is no requirement for the prospectus to disclose transactions in which officers or controlling shareholders have an indirect interest (unless they are promoters of the offer).

In contrast, directors' salaries are not required to be disclosed in the prospectus. If a director is entitled to remuneration from the issuer or any of its subsidiaries other than by way of directors' fees, and the remuneration is payable under a contract of service (other than a contract terminable without payment of compensation by the issuer or its subsidiary on notice of 2 years or less), the amount of the remuneration and all other principal terms of the contract must be disclosed in the prospectus. Particulars of the nature of the relationship between the director and the issuer, and of the services rendered by the director to the issuer must also be disclosed. (Clauses 15(1) and 15(2) of the First Schedule to the Securities Regulations). Provisions relating to retirement benefits of directors or compensation payable to directors for loss of office must be disclosed in the prospectus (unless they relate only to superannuation benefits payable to directors who are full-time employees of the issuer or any of its subsidiaries under a scheme open to other full-time employees). (Clause 15(3) of the First Schedule to the Securities Regulations) The

[345] Other schedules to the Securities Regulations 1983 prescribe the requirements for prospectuses for debt securities, participatory securities, units in unit trusts, life insurance policies and superannuation schemes.

[346] A person has a relevant interest in a voting security if that person: (1) is a beneficial owner of the voting security; or (2) has the power to exercise any right to vote attached to the voting security; or (3) has the power to control the exercise of any right to vote attached to the voting security; or (4) has the power to acquire or dispose of the voting security; or (5) has the power to control the acquisition or disposition of the voting security by another person; or (6) under, or by virtue of, any trust, agreement, arrangement, or understanding relating to the voting security may at any time have the power to: (a) exercise any right to vote attached to the voting security; or (ii) control the exercise of any right to vote attached to the voting security; or (iii) acquire or dispose of, the voting security; or (iv) control the acquisition or disposition of the voting security by another person. (Section 5, Securities Markets Act 1988).

total value of the remuneration and the value of other benefits received by each director and former director of the issuer (during the most recent accounting period) must be disclosed in the issuer's annual report (Section 211 of the Companies Act 1993).

There is no requirement to disclose the shareholding of directors and officers in the prospectus. However, particulars of directors' shareholdings (including shares in which the director has a relevant interest) and directors' share tradings must be disclosed in the issuer's annual report (Sections 211(e) and 148 of the Companies Act 1993). Directors of a listed issuer must also disclose particulars of any relevant interest they have in securities of the issuer (including any acquisition or disposition of a relevant interest) to the issuer and to the NZSE under the Listing Rules (Listing Rules 10.9.3 and 10.9.4).

Every prospectus must be signed by every director of the issuer and by every promoter[347]. A copy of a signed auditor's report must be included in the prospectus. A distributor or a controlling shareholder may have to sign as a promoter if she falls under the definition of "promoter". However, distributors are commonly regarded as acting in their professional capacity, and thus not assuming civil responsibility for the accuracy and completeness of the information in the prospectus. Distributors are not required by law to perform a due diligence review of the information contained in the prospectus and are not likely to perform such as a matter of commercial practice.

A distributor can be held liable for representations not included in a prospectus that turned out to be incorrect due to the distributor's negligence in conducting a professional evaluation. If the representation turns out to be incorrect, it would be false or misleading and could breach section 13 of the Fair Trading Act 1986. The distributor could be civilly or criminally liable. There is no requirement in section 13 that there be an intention to mislead or to make a false representation. However, with respect to criminal liability, section 44 of the Fair Trading Act provides the following defenses: (1) that the contravention was due to a reasonable mistake; or (2) that the contravention was due to reasonable reliance on information supplied by another person; or (3) that the contravention was due to the act of default of another person, or to an accident or to some cause beyond the defendant's control, and the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The SC may suspend or cancel the registration of a registered prospectus if it believes that the prospectus is false or misleading or omits any material particular (Section 44 of the Securities Act). The Commission cannot impose any other administrative sanction upon the issuer, the distributor or the accountant, or order either of them to refrain from, or perform, specific actions, in case of a defective prospectus.

3.2 Judicial sanctions

The issuer, its directors, and any other person who signs the prospectus (such as a promoter) may be criminally liable if the prospectus omits material, relevant or essential information, as the prospectus would contain an untrue statement (see Part 4 below) by reason of the omission (section 58(3) of the Securities Act). A successful conviction on indictment could result in imprisonment for up to 5 years or a

[347] According to Section 2 of the Securities Act, "promoter" in relation to securities offered to the public means a person instrumental in the formulation of a plan pursuant to which the securities are offered, but does not include the issuer's directors or officers or a person acting solely in her professional capacity. If the promoter is a body corporate, every director will be deemed a promoter and will have to sign the offering document. Because the definition is not aligned with ordinary usage of the term "promoter", persons who publicize the offer may or may not be "promoters" for the purposes of the Securities Act.

fine of up to $300,000 and, if the offence is a continuing one, to a further fine not exceeding $10,000 for every day or part of a day during which the offence is continued. A successful summary conviction could result in imprisonment for up to 3 months, or a fine as described above (section 58(5)). A statutory defense against such an action is available if the defendant proves either that the untrue statement was immaterial, or that she believed on reasonable grounds up to the time of distribution of the prospectus that the statement was true (section 58(4)).

The issuer, its directors and officers, and the promoters may be criminally liable under section 59(1) if the offering document omits material, relevant or essential information, as the offer would have been made, the prospectus distributed, or allotment made, otherwise than in accordance with the Securities Act and the Securities Regulations. On summary conviction, these persons may be liable to a fine of up to $300,000 and, if the offence is a continuing one, to a further fine not exceeding $10,000 for every day or part of a day during which the offence is continued. These persons cannot be convicted if the court finds the omission was immaterial, or the omission *"ought reasonably to be excused"*, or the person (other than the issuer) was unaware of and did not consent to the omission (section 59(2)).

In terms of general criminal law, directors, officers, managers and promoters may be criminally liable for an omission of material, relevant or essential information from the prospectus if the omission was made with intent to induce persons to become shareholders of the issuer or to deceive or defraud shareholders (section 250 of the Crimes Act 1961).

There is no provision for accountants and lawyers to be found criminally liable for omissions from the prospectus. A controlling shareholder may be criminally liable only if she is deemed to be a director under section 126 of the Companies Act 1993 or is a promoter. A distributor may be criminally liable only if she is a promoter. The definition of *"promoter"* excludes "*a person acting solely in his or her professional capacity"* (section 2 of the Securities Act). This exclusion applies in general to a distributor who sells shares as an underwriter.

3.3 Stock Exchange sanctions

The New Zealand Stock Exchange may delist the issuer, or suspend or cancel the quotation of the issuer's securities, if the issuer makes an offer to the public in contravention of the Securities Act (Listing Rule 5.4.2). The exchange can also publish a censure of, or a statement relating to, the conduct of the issuer or a director or officer of the issuer (the latter only if deemed an "associated person"), and refer the conduct of the issuer or director or officer to a statutory or governmental authority.[348]

Part 4. Investor's right of restitution for losses

In case of losses due to a defective prospectus, investors can obtain restitution through a judicial proceeding before a civil judge. Class action suits are available to this effect under the High Court Rules (Rule 78).

Under section 56(1) of the Securities Act, the issuer, its directors, and the promoters may be found civilly liable to compensate investors for their losses if the prospectus contains an untrue statement. Section 55(a) deems a statement to be untrue if it is misleading in the form or context in which it is included, even if it is so "*by reason of the omission of a particular which is material to the statement*".

[348] The NZSE Chief Executive commented on 13 March 2003 that the NZSE is considering introducing a range of further penalties, including fines.

Officers of the company, controlling shareholders[349], and the distributor[350] may be civilly liable if they are deemed directors or promoters, but not if they act only in their professional capacity.

Under section 57(1) of the Securities Act, accountants (but not auditors) and lawyers may be civilly liable as *"experts"* to compensate investors for their losses if the prospectus contains an untrue statement purporting to be made by them as an expert in respect of which they have given their consent to inclusion in the prospectus, and the investors losses were sustained by reason of the statement. Accountants and lawyers may not be liable in respect of other untrue statements in the prospectus. Auditors and officers of the issuer may be liable in respect of untrue statements in the prospectus under the general law of negligence, default, breach of duty or breach of trust.

To obtain restitution under section 56(1) of the Securities Act from the issuer, its directors or the promoters, an investor must prove, on the balance of probabilities, that: (1) she subscribed for the securities "*on the faith of*" the registered prospectus; (2) the registered prospectus contained an untrue statement; (3) she sustained a loss or damage; and (4) her loss or damage was sustained by reason of the untrue statement.

Sections 56(2) and 56(3) provide certain defenses to such a claim. A person will have a defense if she proves (on the balance of probabilities): (1) she withdrew her consent to the distribution of the prospectus prior to the distribution, or on becoming aware of the untrue statement after distribution but before subscription; and (2) she gave notice of her withdrawal of consent to certain persons (section 56(2), along with sections 56(3)(a) and 56(3)(b)). A person will also have a defense if she proves (on the balance of probabilities) that she believed on reasonable grounds, up to the time of subscription, that the statement

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[349] Under section 126 of the Companies Act 1993, a controlling shareholder may be a deemed director and would have to sign the offering document if:

- the issuer's constitution conferred a power on the controlling shareholder which is usually exercised by the board, and the controlling shareholder exercises that power, or takes part in deciding whether to exercise that power; or the issuer's constitution requires a director or the board to exercise or refrain from exercising a power in accordance with a decision or direction of shareholders, and the controlling shareholder takes part in making a decision that the power should or should not be exercised or takes part in making a decision whether to give a direction.
- or if he or she is a person:
    - in accordance with whose directions or instructions a director and/or the board may be required or is accustomed to act;
    - who exercises or is entitled to exercise, or who controls or is entitled to control the exercise, of powers which, apart from the issuer's constitution, would be exercised by the board;
    - to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board;
    - in accordance with whose directions or instructions a director or a person described in the three points above may be required or is accustomed to act in respect of his or her duties and powers as a director.

[350] The distributor may be deemed a director and have to sign the offering document if he or she is a person:

- in accordance with whose directions or instructions a director and/or the board may be required or is accustomed to act;
- who exercises or is entitled to exercise, or who controls or is entitled to control the exercise, of powers which, apart from the issuer's constitution, would be exercised by the board;
- to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board;
- in accordance with whose directions or instructions a director or a person described in the three points above may be required or is accustomed to act in respect of his or her duties and powers as a director.

was true (section 56(3)(c)). If the untrue statement was made by an "*expert*" a defense is available if the defendant proves (on the balance of probabilities) that: (1) the untrue statement "*fairly represented*" the expert's statement, or was a correct and fair copy of the statement; and (2) she believed on reasonable grounds up to the time of registration of the prospectus that the person making the statement was competent to make it; and (3) the expert had given, and not withdrawn, her consent to the inclusion of the statement in the prospectus before registration or, to the defendant's knowledge, before subscription (section 56(3)(d)).

To obtain restitution from an accountant (or other "*expert*") under section 57(1), an investor must prove, on the balance of probabilities, that: (1) she subscribed for the securities *"on the faith of"* the registered prospectus; (2) the registered prospectus contained an untrue statement; (3) the untrue statement was purported to be made by the expert; (4) she sustained a loss or damage; and (5) her loss or damage was sustained by reason of the untrue statement.

The accountant or *"expert"* may have a defense under section 57(2) if she proves (on the balance of probabilities) that: (1) before distribution, she withdrew her consent to the distribution of the prospectus in writing (section 57(2)(a)); or (2) after distribution, she withdrew her consent on becoming aware of the untrue statement or omission, gave written notice of her withdrawal to certain persons and gave reasaonable public notice of her withdrawal (section 57(2)(b)); or (3) she was competent to make the statement and believed on reasonable grounds up to the time of subscription for the securities that the statement was true (section 57(2)(c)). The accountant or *"expert"* shall not be liable to any person in respect of any withdrawal of her consent whether or not the statement is in fact untrue (section 57(3)).

An investor cannot obtain restitution from a distributor, even if she can prove that the distributor acted with intent to deceive, or that the distributor committed a crime, unless the distributor is also a promoter.

For the controlling shareholder not deemed a director or promoter, section 15 of the Companies Act 1993 provides that "a company is a legal entity in its own right separate from its shareholders". The corporate veil will only be pierced in extraordinary cases. In Re Securitibank Ltd (No 2) [1978] 2 NZLR 136, 158, the President of the Court of Appeal explained that the corporate veil should be pierced only if leaving it in place would "lead to a result so unsatisfactory as to warrant some departure from the normal rule". In Chen v Butterfield (1996) 7 NZCLC 261,086, 261,092 the High Court explained that "in essence, the corporate veil should be lifted only if in the particular context and circumstances its presence would create a substantial injustice which the court simply cannot countenance".

If a security is allotted without a registered prospectus, the allotment will be invalid and of no effect (Sections 37(1) and 37(4) of the Securities Act). Investors are entitled to reimbursement of their investment, and if this does not occur within 2 months of the date on which the issuer received the investment, the issuer and its directors are jointly and severally liable to repay the investment to the subscriber together with interest at a rate of 10% per annum, provided that a director shall not be liable if she proves the default in repayment was not due to any misconduct or negligence on her part (Section 37(6) of the Securities Act). If an investor does not receive an investment statement before subscribing, the allotment of the securities is voidable at the instance of the investor, by notice in writing to the issuer within one year of the security or certificate of the security being sent to the subscriber, or a period of six months after the subscriber knows or ought reasonably to know, that the allotment was made in contravention of the investment statement requirement, whichever is the earlier (Sections 37A(1)(a), 37A(3) and 37A(4) of the Securities Act). Upon receiving such notice, the issuer is required to repay the investor's investment (Section 37A(6) of the Securities Act). If the investment is not repaid within one month, the issuer and its directors are jointly and severally liable to repay the investment to the investor, together with interest at a rate of 10% per annum from the date of receipt of the notice to void the

securities, provided that a director shall not be liable if she proves the default in repayment was not due to any misconduct or negligence on her part. (Section 37A(7) of the Securities Act).

A case of prospectus liability, in which the defendant does not have a valid defense, may take approximately one year. In such a case, investors would be entitled to apply for summary judgment procedures, which allows the parties to move quickly to a trial on the papers rather than giving evidence in court. If summary judgment was unsuccessful, the matter would still be very brief and should be resolved in around 18 months. An unsuccessful party to a summary judgment application has normal rights of appeal to the Court of Appeal, to be filed within 28 days of the judgment being sealed (if successful), or delivered (if unsuccessful), and for which a fixture is required to be applied for within 6 months of that filing. New defenses may not be raised on appeal, if they require additional evidence or otherwise prejudice the successful party. If the appeal is successful, the matter would go to a full trial where it could be resolved within 2 to 3 years of filing the initial complaint.

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SECURITIES LAW OF NIGERIA

Part 1. The regulator and its supervisory and regulatory powers

The Securities and Exchange Commission (SEC), established under the Investment and Securities Decree 1999 (hereinafter referred to as the "ISD"), is the main securities regulator in Nigeria. Banks are regulated by the Central Bank of Nigeria, and insurance companies are regulated by the National Insurance Commission (See respectively, Central Bank of Nigeria Act 1999, the Banks & Other Financial Institutions Act 1991, National Insurance Commission Act, and the Insurance Act 1997).

The SEC shall consist of a Chairman, two full time Commissioners, and the Director General of the SEC, all of them appointed by the Head of State on the recommendation of the Minister of Finance; five part-time members of the SEC, and two ex-officio Commissioners representing the Ministry of Finance and the Central Bank of Nigeria. The method of appointment of part-time Commissioners is not stated in the ISD. However, the only appointments that have been made under the Act have been made by the Head of State. All members have tenure, except the members representing the Ministry of Finance and the Central Bank of Nigeria. However, on the recommendation of the Minister of Finance, the Head of State may in exceptional circumstances suspend the SEC for up to six months, thus vacating the office of all the members of the SEC (Section 247 of the ISD).

The SEC may issue rules and regulations to give effect to the provisions of the ISD, and specifically on the matters described in Section 262 of the ISD. Regulations made by the SEC shall come into effect fifteen days after receipt by the Minister of Finance or on publication in the Gazette or other official document unless the Minister of Finance, before the effective date of any regulation, orders that it be modified, amended or rescinded (ISD, 262(3)).

The SEC may call for or furnish to any agency such information as may be considered necessary by it for the efficient discharge of its functions (Section 8(r) of the ISD). In addition, the Commission may examine the records and affairs of or call for information from, *inter alia*, any company, registrar, issuing house, stockbroker, and investment adviser (Rule 9 of the SEC Rules and Regulations pursuant to ISD).

Part 2. The duty to disclose material information

It is unlawful to issue an application for securities unless it is issued with a prospectus (Section 48 of the ISD). The SEC may refuse to register a prospectus if it considers the prospectus fails to comply with the legal requirements (Section 57 of the ISD). No allotment shall be made and no proceedings shall be taken on applications made pursuant to a prospectus before three days after the date of issue of the prospectus (Section 66 of the ISD).

Among other items, the prospectus shall disclose the following information:

1. The interest of each director regardless of size (Third Schedule ISD, paragraph 13). In practice the disclosure requirement for directors has been interpreted to include indirect interests. There is no similar requirement to disclose the interest of officers.
2. The name and ownership of each shareholder who holds more than 5% (Rule 40(B)2(vi)).
3. Information on management and service contracts and bonus and profit sharing arrangements. It is not required, though, to disclose the salaries and compensation by any concept of directors and officers.
4. The date of, parties to and general nature of every material contract not entered into in the ordinary course of business (Third Schedule, paragraph 11).

5. Full particulars of the nature and extent of the interests, if any directly or through a firm, of every director in the promotion of the company, or in property to be acquired by the company (Third Schedule, paragraph 13).

A copy of the prospectus must be delivered to the SEC for registration, signed by every person who is named in it as a director or proposed director (ISD, Section 57). The written consent from any expert to issue the prospectus, including a statement made by him under the authority of expert, must be endorsed or attached thereat. In case a prospectus is issued, signed and delivered to the SEC without the necessary consents attached, the company and every person who is a party to the issue of the prospectus commits an offense punishable by fine.

The accountant is responsible for conducting a due diligence review of the financial matters included in the prospectus, while the attorney is responsible for legal matters. The distributor is not required by law to perform a due diligence review of the information contained in the prospectus, and it is not established in the law that the distributor assumes civil responsibility for the accuracy and completeness of the information in the prospectus. Therefore, the distributor is not likely to perform a due diligence review of the contents of the prospectus as a matter of commercial practice. Nonetheless, it is prohibited to recklessly or knowingly (or if should have reasonably known) make or disseminate a false or misleading material statement or information that is likely to affect the price of securities (Section 83 of the ISD), and thus the distributor may be held liable for false or misleading statements she makes outside of the prospectus.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

Registration and listing bring the issuer within the jurisdictions of the SEC and the exchange, respectively. The SEC, when it deems it necessary for the protection of the investors, can notify the exchange to prohibit trading in particular securities. Should the exchange fail to take action to prevent trading in those securities, the SEC may prohibit trading for up to 14 days by notice in writing to the exchange, notifying also the issuer, which can request the SEC to refer the matter to the Investment and Securities Tribunal (Section 27 of the ISD).

The distributor, as well as any dealer, stock broker, banker to an issue, issuing house, underwriter, registrar, trustee, investment adviser, fund/portfolio manager, rating agency, and other capital market consultant[351], must register with the SEC as a capital market operator (Rule 28), and the SEC may by order suspend or cancel the certificate of registration (Sections 29 & 30 ISD). In addition, the SEC may also suspend or expel a member of the exchange if the exchange fails to take disciplinary action against that member (Section 25 of the ISD). The SEC can also disqualify unfit individuals from being employed in the securities industry (Section 8(w) of the ISD). Directors and officers of an issuer are not required to register with the SEC (ISD, Section 29). As separate legal persons from their companies, the SEC and the exchange do not have any direct sanctioning powers against the issuer's directors and officers.

The Investment and Securities Tribunal has limited jurisdiction to adjudicate, as in the case of disputes between issuers and regulators, and can issue orders imposing sanctions such as fines, suspensions, withdrawal of licences, specific performance, and even restitution, as it find appropriate to the particular case. (Sections 234 and 241 of the ISD).

[351] Capital market consultant includes lawyers, accountants, auditors, engineers, estate valuers, any other professionals as determined by the SEC. See Rule 1.

3.2 Judicial sanctions

The ISD provide for criminal sanctions, including fines and/or imprisonment, upon conviction, against the following persons:

(1) Any officer who authorised the issue of a prospectus that includes any untrue statement, unless she proves that the statement was immaterial or that she had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe that the statement was true (Section 63 of the ISD). Although an expert is not to be deemed as a person who has authorized the issue of the prospectus by reason only of her consent, it is clear that she would be liable under this provision for her untrue statements if she is also an officer.
(2) Any person who issues any form of application for securities unless issued with a prospectus which complies with the legal requirements (Section 44 of the ISD).
(3) Any person, including officers and the issuing company, who makes an invitation to the public to acquire securities violating the provisions of Sections 50 to 63 of the ISD. Section 50 of the ISD excludes the directors or other responsible parties from liability for failing to include information in the prospectus, unless that person had knowledge of the matters not disclosed, if she proves either that she was not involved with the information not disclosed, or that the failure was an honest mistake or in the opinion of the Investment and Securities Tribunal was immaterial or reasonably excusable. Section 50 applies to administrative liabilities derived from failure to include the required matters in the prospectus. Section 62 deals with civil remedies. S.62(4) et seq. contain the corresponding saving provisions.
(4) Any person who makes a statement or disseminates information which is materially false or misleading and is likely to induce the sale or purchase of the securities if she knows or ought reasonably to have known that the statement or information was false or misleading (Section 83 of the ISD).

3.3 Stock exchange sanctions

A stock exchange can reprimand, fine, suspend, expel, or take any other disciplinary action against any of its members as provided for in its rules. All members of the Nigerian Stock Exchange (NSE) are obliged to adhere to the NSE rules and regulations and to report breaches by others. Under Regulation 36 the NSE has power to cancel or suspend the listing of any shares without giving any reason. The NSE has also produced Rules Governing Listing under which listed companies must commit to providing the NSE with material information as and when required. The SEC may review any disciplinary action taken by the stock exchange (Section 25 of the ISD; Rules 129 – 131.).

Part 4. Investor's right of restitution for losses

Investors are entitled to obtain restitution for losses caused by a defective prospectus through a judicial proceeding before a civil court. A class action suit is also available for this effect. A class action suit is provided for by the rules of procedure in our courts. Essentially, persons with the same interest in a suit may with the approval of the court authorize one of them to sue or defend the suit for the benefit of or on behalf of all of them. Damages cannot be ordered if it will require separate assessment for each member of the class. The representative party may withdraw only with the court's permission.

Under certain circumstances, in case of defalcation by a member of the stock exchange or its directors or employees, investors may also be compensated for pecuniary losses through an administrative procedure from an Investors Protection Fund. The SEC has not established the procedure for the Investors Protection Fund.

According to Section 62 of the ISD, a director, a promoter, or a person who has authorised the issue of the prospectus, shall be liable to pay compensation to any investor who subscribed shares relying on the prospectus for losses sustained by reason of any untrue statement. To this purpose, a statement included in a prospectus shall be deemed to be untrue if it is misleading in its form or context[352]. Consequently, a material omission that makes a statement misleading in its context would have the effect of turning such statement into an untrue one.

In order to obtain restitution of damages under Section 62, the investor or plaintiff must prove that (1) she subscribed shares relying on the information in the prospectus, (2) there is an untrue statement in the prospectus, (3) she suffered losses, and (4) that her losses were a sustained by reason of the untrue statement.

The director, promoter, or person who authorised the issue of the prospectus shall not be liable if she proves that she believed, and had reasonable ground to believe, that the statement was true. Similarly, an expert (such as an accountant, lawyer, and other person whose profession gives authority to a statement made by her) is liable for any untrue statement purporting to be made by her as an expert, unless she proves that she was competent to make the statement, and had reasonable ground to believe, and did believe at the time, that the statement was true.

There is not a clear legal argument providing for the distributor's civil liability in case of a defective prospectus, since section 62 of the ISD does not expressly name the distributor as civilly liable and the distributor is not required by law to authorise the issue of the prospectus. Unfortunately, there is very little judicial application of the relevant norms to clarify this issue. However, a distributor may be involved in the preparation of the prospectus and may sign it even though she is not required by law to do so. In such case, under common law, the distributor would owe investors a duty of care, and would be liable for losses caused by its negligent conduct. Under common law, the burden of proof against the distributor is that of a balance of probabilities.

The issuing company is not listed under Section 62 of the ISD as liable for damages. However, an investor may file a suit for the rescission[353] of the subscription and the repayment of the price paid in case the prospectus contained a false, deceptive, or misleading material statement, or omitted required material information. To this effect, the investor would only be required to prove the existence of the false or misleading material statement. In a suit for rescission, the burden of the proof is that of a balance of probabilities.

The controlling shareholders cannot be held responsible for the liabilities of the corporation. The business of a company is usually managed by its directors. In certain circumstances, the shareholders are entitled to act in place of the board, in which cases they will carry the same liability as the directors. In practice the shareholders would replace the directors rather than continue to act in their place for too long.

It may take approximately 3 years for a case of restitution for losses due to a defective prospectus to be resolved by the judiciary, from the moment of filing the complaint until first instance judgment. The court of first instance would be the Federal High Court, an appeal from the Federal High Court to the Court of Appeal would be available as of right, even if the appellant does not have a valid defense. A decision by the Court of Appeal may take 2 years. The ruling of the Court of Appeal may also be appealed to the Supreme Court. Appeal to the Supreme Court is available as of right only on a point of law, not on findings of fact. On findings of fact permission of the Supreme Court is required for the appeal to

[352] Section 60 ISD.
[353] Sections 44(3) and 71 ISD.

proceed. From the initial complaint to the last appeal, a civil judicial proceeding may take from 7 to 15 years.

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SECURITIES LAW OF NORWAY

Part 1. The regulator and its supervisory and regulatory powers

The official regulator of the securities market in Norway is the Norwegian Banking, Insurance and Securities Commission (also the "Commission" or "*Kredittilsynet*"). The main regulator of banking and insurance markets in Norway is the Ministry of Finance, while the Commission has a duty to supervise the financial institutions.

Members of the Board of the Commission are appointed by the King (the Cabinet Ministers), and the appointees are not subject to any further approval or confirmation. The five members of the Board of the Commission are appointed for a period of four years, though the King can discharge them at any point. Normally, discharge of a Board member is granted due to the member's request, as caused by an appointment such as State Secretary (or other political positions).

The authority to issue regulations under the Securities Trading Act[354] ("STA") lies with the Ministry of Finance. The Ministry, however, may make resolutions delegating the authority to adopt regulations under the STA to the Commission or to the Oslo Stock Exchange ASA. Regulations are adopted after discussion documents and green papers have been sent out for a public hearing and comments have been submitted by the affected entities. The Commission's issuance of regulations under the delegated authority is not subject to approval, either from the Ministry of Finance or from any other public authority. To date, the Ministry of Finance has only made such resolutions for the purpose of issuing individual decisions, e.g. license to offer investments services in Norway. [355]

The supervision of the securities market rests with both the Ministry of Finance and the Commission, as laid out in STA § 12-1. The Ministry is to supervise trading and compliance with trading legislation. The Commission is to supervise the investment firms' (distributors), option houses' and clearing houses' compliance with the STA. The Stock Exchange has a duty to inform the Commission if it has grounds for supposing that a party trading in financial instruments does not comply with the applicable rules. The Stock Exchange has a statutory duty to monitor the trading in the securities market, cf. Securities Exchange Act ("SEA") § 5-11. The Stock Exchange has to continuously follow-up the activities and trading of investors and markets participants, and in case of non-compliance with the SEA and/or regulations under the SEA, the Stock Exchange may issue a penalty fee or a fine. The Stock Exchange may also report to the prosecution authority a violation of the duty to provide the Stock Exchange with information, which must be assumed to have a material bearing on the price of the issuer's shares. Suspicion of violation of the insider trading rules, price manipulation or other market misbehavior shall be reported to the Commission, who will make further investigations and decide as to whether the case shall be reported to the national Authority for Investigation and prosecution of Economic and Environmental Crime ("*ØKOKRIM*").

The Commission can require the delivery of information and documents from those persons or entities under its regulation and supervision, including commercial and saving banks, insurance companies, auditors, and investment firms. Under the Supervision Act § 4 and 4a, the Commission may order the

[354] Act No. 79 of 19 June 1997 on Securities Trading.

[355] Authority has been delegated to the Commission regarding: (1) authorization to provide investment services (STA § 7-1 (1)); (2) authorization for investment firms with head office outside of the EEA (STA § 7-8 (1)); (3) application of the Securities Trading Act to foreign investment firms (STA §7-9 (3)); and (4) granting of credit (STA § 8-2 (1)).

institutions it supervises to submit information which the Commission finds necessary to perform its duties. If the Commission assumes such an entity or person is conducting activities without the license required, it may order information to be submitted.

Issuers shall furnish the Commission with such information as the Commission deems necessary to decide whether security law provisions have been violated in relation to financial instruments issued by the issuer.

If the Commission suspects breach of the prohibitions of misuse of information or price manipulation, any party may be ordered to provide the information requested by the Commission, unless the information is subject to a statutory duty of confidentiality. Such information may only be used in the case for which it was obtained. Any person may refuse to answer questions if the answer could expose that person or anyone close to that person to punishment or loss of public esteem. Credit institutions and finance undertakings may not invoke duty of confidentiality.

Part 2. The duty to disclose material information

Under STA § 5-1, a prospectus must be prepared if an invitation to subscribe for shares is directed at more than 50 persons in the Norwegian securities market and involves an amount greater than EUR 40,000 Euro (approx. NOK 315,000). This applies to both listed and unlisted companies. However, the requirements applying to listed companies are more extensive. The deadline for subscribing for shares on the basis of the existing shareholders' pre-emption rights must not be shorter than two weeks from the notice of the general assembly decision to issue new shares. This does not apply if the pre-emption rights are deviated in the general assembly resolution.

The acceptance period for a mandatory takeover bid on shares in Norwegian companies listed in Norway may not be shorter than four weeks and not longer than six weeks. There is no provision requiring the delivery of the prospectus to potential investors.

Prospectuses offering shares in a listed company shall be sent to the Stock Exchange for inspection before publication. If the Stock Exchange finds that the prospectus contains misleading or incomplete information, or that the prospectus does not comply with the applicable rules, the Stock Exchange may prohibit the offer from being made. The Stock Exchange will inform the Register of Business Enterprises if the share capital increase cannot be registered. Discretionary exercise, however, is not mentioned in the STA § 5-7.

Requirements for disclosure in the prospectus are laid out in STA 5-5, supplemented with the Prospectus Regulation[356] for unlisted shares and the Stock Exchange Regulations ("SER") for listed shares. For the listed shares, the Requirements include the following:

1. Remuneration paid and benefits of any kind granted to members of the corporate assembly, committee of shareholders' representatives, board of directors respectively and general manager (SER § 15-2 No. 5.2.0). Only the aggregate figure for each body need to be reported.
2. The name and ownership of the 20 largest shareholders, calculated both according to share of votes and proportion of share capital must be disclosed (SER § 15-2 No. 1.2.8). In addition, the prospectus must provide information, as far as it is known to the issuer, regarding the natural or legal persons who, directly or indirectly, severally or jointly, exercise or could exercise control over the issuer, and particulars of the proportion of the capital held giving a right to vote (SER § 15-2 No. 1.2.9). Note

[356] Dated 7 November 1997 No 1151.

should be taken that where an acquisition of shares causes the acquirer's proportion of shares and/or rights to reach or exceed 1/20[357], 1/10, 1/5, 1/3, 1/2, 2/3 or 9/10 of the share capital, or of shares representing an equivalent proportion of the voting rights, in a company whose shares are quoted on a Norwegian stock exchange, the acquirer shall notify such acquisition to the stock exchange (STA § 3-2). Duty to notify applies correspondingly to anyone who through disposal reduces her proportion of the share capital or votes to or below the mentioned thresholds.

3. Indication of the number of shares issued by the issuer or by an undertaking in the same group which are held, directly or indirectly, by each director, the chairman of the corporate assembly, the chairman of the committee of shareholders' representatives, the general manager and other senior employees (SER § 15-2 No. 5.2.2). The same applies to agreements conferring the right to acquire or sell financial instruments issued by the issuer or by an undertaking in the same group. Information shall also be given on the conditions for exercise.
4. Information on the issuer's principal activities, including: (a) location and size of establishments accounting for more than 10 % of the issuer's turnover or production; (b) patents and licenses, production and marketing agreements and on new production methods owned by the issuer and on which the issuer is dependent; (c) funding structure (e.g., main loan agreements); (d) any legal disputes, legal decisions or arbitration rulings which may have or have had a significant effect on the issuer's financial position in the recent past; (e) main investments; and (f) risk factors (SER § 15-2 No. 5.2.2). Moreover, issuers must continuously disclose price-sensitive information. However, the prospectus is not specifically required to disclose the terms of contracts made in or out of the ordinary course of business.
5. Information about the nature and extent of the interests of members of the corporate assembly, committee of shareholders' representatives, general manager and other senior employees in transactions effected by the issuer which are unusual in their nature or conditions (such as purchases outside normal activity, acquisition or disposal of fixed asset items) during the preceding financial year and the current financial year. Where such unusual transactions were concluded in the course of previous financial years and have not been definitively concluded, information on those transactions must also be given (SER § 15-2 No. 5.2.3).
6. Outstanding loans granted by the issuer to members of the corporate assembly, committee of shareholders' representatives, general manager and other senior employees and any guarantees provided by the issuer for their benefit (SER § 15-2 No. 5.2.4).
7. Such information as, depending on special circumstances of the offerer and the nature of the securities offered, is necessary to enable the investors to make a well-informed assessment of the issuer's financial position and prospects and of rights attached to the securities mentioned (STA § 5-5). Any new circumstance or material inaccuracy which may be of significance for evaluating the securities, and which comes to light between the date of publication of the prospectus and the date of final expiry of the period of subscription, shall be made clear in a supplement to the prospectus.

STA § 5-10 expressly states that the Board of Directors of an issuer is responsible for ensuring that the prospectus meets the applicable requirements. The prospectus shall be signed by all the issuer's directors, and the Board must issue a declaration stating that, to the best of its knowledge, the information contained in the prospectus is both in conformity with the facts and that the prospectus does not contain misleading or incomplete information about circumstances that are relevant for investors when deciding whether to accept the offer[358].

[357] The 1/20 notification threshold was added after the December 2000 update of this article, with effect from 1 January 2003.

[358] A similar provision is set forth in § 14-2 of the Stock Exchange Regulations.

The prospectus shall contain information of who assisted the issuer in the preparation of the prospectus (SER § 15-2 No. 6.1). Normally the legal adviser, the investment firm, and the accountant will issue statements as to the accuracy and completeness of certain parts of the prospectus.

Distributors are not required by law to conduct a due diligence review of the information in the prospectus. Nevertheless, if the distributor has assisted the issuer in the preparation of the prospectus, she may be liable for losses in accordance with Norwegian tort law, as further discussed in Section 4. As a matter of commercial practice, the investment firm that is involved in the placement and the preparation of the prospectus will normally conduct a due diligence review. Moreover, in connection with an application for a stock exchange listing, the Oslo Stock Exchange demands a foregoing due diligence of the applying company. The thus necessary due diligence review can be performed on behalf of the investment firm or on behalf of the applying company. The distributor may basically disclaim liability for forecasts.

According to the Stock Exchange Regulations[359], the prospectus shall indicate which information has been audited, and include the auditor's statement on the results of the auditing. In case of capital increases, a declaration by an independent external lawyer must be included in the prospectus or delivered to the stock exchange, stating that the capital increase has been duly adopted by the issuer's competent body[360].

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

In a case of defective prospectus, the Commission may not impose administrative sanctions on the issuer or its directors and officers. In contrast, the Commission may reprimand and warn distributors or accountants regarding prospectus irregularities, and may give them a deadline to implement the required corrections. The Commission may issue an investment firm a corrective order if the firm acts in contravention of law or regulations laid down pursuant to law (STA § 12-4). The Commission may further prohibit investment firms from carrying on activities that it deems not satisfactorily regulated, when such activities may expose the firm or its clients to unwarrantably large risk. The Commission may also order that such activities shall only take place on certain conditions.

The Commission may withdraw entirely or in part an authorization to provide investment services i.a. if the investment firm has seriously or systematically infringed provisions laid down in or pursuant to law or is guilty of misconduct which gives reason to fear that continuation of the activity may harm the general good, or fails to comply with an order made in pursuance of § 12-4.

In addition, the Kredittilsynet may withdraw an authorization to provide investment services (which is necessary for underwriting issues and placing offerings), if the investment firm has seriously or systematically violated the law or its regulations, or is guilty of misconduct which gives reason for fear that its activity may harm the public interest or fails to comply with the Commission's order made pursuant to STA § 12-4 (STA § 12-5).

When the Kredittilsynet assesses an application for conducting investment services, it makes an evaluation of the fitness of key personnel. Persons who have previously violated the law will basically not be eligible as employees or officers. Similarly, the authorization to provide investment services may be

[359] § 15-2 No. 6.4 of the Stock Exchange Regulations.
[360] § 18-3 No. 10 of the Stock Exchange Regulations.

refused if a member of the board or a major shareholder have acted in breach of rules of good business conduct during their work with the financial instruments (STA § 7-2).

The auditor may be held liable for its audit of the annual accounts quoted in the prospectus and any other part of the prospectus that it may have audited. The Commission may withdraw an authorization as registered or state authorized auditor or as audit firm, if the auditor or the company is deemed unfit because the person concerned has committed a criminal offense and this must be presumed to impair the confidence necessary for the practice the profession, or seriously or repeatedly has violated the auditor's duties under law or regulations (Auditor's Act § 9-1). Depending on the circumstances, negligent failure to prevent untruthful or incomplete information from being published in a prospectus may thus cause withdrawal of the auditor's authorization.

3.2 Judicial sanctions

Anyone who willfully or negligently gives misleading or incorrect information in a prospectus is subject to fines or imprisonment (STA § 14-3). Aiding and abetting is subject to the same penalties as the actual violation of STA. Therefore, in case of a defective prospectus, the issuing company, the issuer's directors, the officers who have contributed to the violation[361], and the distributor, the lawyers and the accountants, if involved in the preparation of the prospectus, can be criminally liable, depending on the circumstances.

Under the Marketing Act[362], a firm may not seek to benefit by using misleading representations likely to influence the demand for its goods and services. This provision applies also to misrepresentation in the public offer of shares. The issuing company and the parties responsible for the misrepresentation may be punished with fines or imprisonment if the violations are intentional and with fines if the violations are negligent.

Deficiencies in the auditor's audit of the annual accounts presented in the prospectus or of other parts of the prospectus it may have audited may constitute a violation of generally accepted auditing standards. Serious or repeated violations of generally accepted auditing standards is punishable by fines or by imprisonment of up to one year (Auditor's Act § 9-3). Aiding and abetting shall be punishable in the same way. The limitation period for instituting criminal proceedings is five years.

3.3 Stock exchange sanctions

A prospectus must be approved by the Stock Exchange before a public offering of securities, which are quoted on a stock exchange, or for which quotation has been applied. A dialogue between the issuer, the distributor, and the Stock Exchange will normally take place prior to the approval and offering of shares. The Stock Exchange may demand that additional information be included in the prospectus and demand corrections to be made in the draft.

The stock exchange shall review the prospectus, and if it finds that that the prospectus contains misleading or incomplete information, the exchange may prohibit the offer (STA § 5-7). The stock exchange may also suspend quotation and trading, or even de-list securities, if they do not satisfy the conditions for listing, such as the issuer's requirement to publish all material information for the correct evaluation of the securities. Temporary de-listing by the stock exchange is also possible when the circumstances that caused the de-listing can be rectified in a reasonable time, in which case the exchange will specify the conditions needed for readmission, specially disclosing the required information (Stock Exchange Act ("SEA") § 5-8, § 5-9 and § 5-7, and SER § 25-1, § 25-2 and § 25-3).

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[361] Normally, the CEO, the CFO and other officers in the management will participate in the preparation of the prospectus.

[362] Dated 16. June 1972 No. 47.

The issuer's or a stock exchange member's violation of the provisions of the SEA or the SER is subject to a violation charge (SEA § 5-12 and SER § 25-5). The issuer or the stock exchange member and their officers and employees may also be subject to daily fines in case of violation to the information requirements (SEA § 5-13 and SER § 25-4).

The stock exchange may withdraw distributor's approval for membership in case of violations of the law or regulations (SEA § 5-5).

If a stock exchange member acts in breach of law, regulations, good business conduct or in other way proves unfit as a stock exchange member, the stock exchange may give the stock exchange member a warning, suspend the stock exchange member from participation in the trading or withdraw the stock exchange membership for the member or withdraw the right to participation in the trading (SER § 25-6).

Upon breach of provisions of the SEA or the SER the Stock Exchange may impose on the stock exchange member a non-compliance charge to be paid to the Stock Exchange (SER § 25-6).

In contrast, the accountant may not be sanctioned by the Stock Exchange in case of a defective prospectus.

Part 4. Investor's right of restitution for losses

An investor may obtain restitution for losses incurred by reason of a defective prospectus through an ordinary civil law suit before a civil court.[363] A class action suit is not available for this purpose but an officially-appointed committee has proposed such a remedy, which is likely to be implemented in the near future.

Tort liability for members of the issuer's board regarding losses by investors is based on STA § 5-10 and on general principles. These principles set forth three conditions for compensation. To obtain compensation from any party the investor has to prove in court that: (i) there is basis of liability (normally negligence, occasionally objective liability); (ii) the investor suffered an economic loss; and (iii) the loss was caused by the basis of liability (for example the defendant's negligence). A part of proving that the loss was caused by the basis of liability is proving that the investor based her investment decision on the prospectus.

Regarding (i):
If the board's declaration in the prospectus is qualified to the knowledge of the board members (as allowed in SEA § 5-10 and SER § 14-2), the board members are only liable if they were negligent or knew about the fact omitted/misstated in the prospectus. The question is whether each individual board member has undertaken sufficient investigation about the relevant facts for the omission/misstatement can be diligent. A board member claimed for damages based on defective prospectus can thus seek to dispute that the prospectus contains errors/omissions, based on the information, which the board member reasonably could have been expected to acquire.

If the board's declaration in the prospectus is <u>not</u> qualified to the knowledge of the board members, the board members are liable almost objectively/without regard to negligence.

[363] Civil Procedure Act § 54.

Regarding (iii):
In prospect defect cases and similar cases, defendants often dispute the causal relation between the negligence and the loss. Basically the plaintiff has the burden of proof for the casual relation. However, depending on the circumstances, causality between a value sensitive omission/misstatement in the prospectus and an economic loss for the investor is presumed.

These general principles of torts as described above apply to other groups of possible liable persons and entities, with the modifications as discussed below.

Even when the board is liable, the issuer can generally not be held liable towards the investor for restitution or compensation after the new shares are registered in the Norwegian Company Register[364]. This provision is made in the interests of the creditors of the issuer. The new shares will be registered shortly after the end of the subscription period and before the new shares are tradable.

The issuer's main executive officers and distributor can be held liable for the content of the prospectus on the basis of negligence, unless liability is disclaimed in the prospectus. Liability for gross negligence or deliberation cannot be disclaimed.

Liability can arise even for a party who has not assisted in the preparation, if that party under the particular circumstances can be reproached for not having taken steps to correct omissions/misstatements, which that party was or should have been aware of in the prospectus.

Investment firms shall have insurance or other security covering liability in connection with their activities (STA § 8-13), e.g. preparing prospectuses. A guarantee from a financial institution or insurance company must be deposited with the Commission. Coverage shall be at least NOK 200,000 (approx. USD 26,800) per investor per damage and may be limited to NOK 25 millions (approx. USD 3,350,000).

The civil liability of the auditors of the issuer's financial statements is partly codified in the Accountant Act. An auditor shall compensate any loss it has cause negligently or deliberately in the performance of her assignment (Auditor's Act § 8-1). An auditing firm is jointly and severally liable with an auditor who has performed the assignment on its behalf. Not detecting omissions/misstatements in the accounts or possible parts of the prospectus, which the auditor may have audited, may be negligent based on the strict norm for professional liability, which applies in Norwegian tort law. A part of the norm for professional liability is that the burden of proof is partly placed on the defendant, especially for facts, which are difficult to substantiate for the plaintiff but easier for the defendant. A similar shift in the burden of proof applies for distributors, as these also act as professionals. However, these have normally disclaimed liability for common negligence. For directors the liability is usually less strict, as these usually would not have profited on the omission/misstatement.

The attorneys who issued the statement required by the Stock Exchange Regulations can be liable on basis of negligence with regards to such statement or for any part of the prospectus that they may have prepared.

The controlling shareholder is not as such civilly liable for a defective prospectus. To the extent the controlling shareholder has been involved in the preparation of the prospectus or it has made specific promises to investors, the controlling shareholder may in such capacities incur liability on the basis of negligence – like any other.

[364] STA § 5-13 (2) and Rt 1996 page 1463, "the Labogas verdict".

A decision of the court of first instance in Oslo District Court in a prospectus liability case may take between one and two years. The first-instance ruling may be appealed to the Appeal Court and, in certain circumstances, further to the Supreme Court. The appeal of the first-instance judgment to the Appeal Court will be granted even if the defendant does not have a valid defense and may take another year or two to be resolved. Appeals to the Supreme Court are granted by an Appeal Committee based on the relevance of the issues. Cases brought to the Supreme Court may be decided in three or four years.

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SECURITIES LAW OF PAKISTAN

Part 1. The regulator and its supervisory and regulatory powers

The main regulator of the securities markets in Pakistan is the Securities and Exchange Commission of Pakistan ("SECP"), established by the Securities and Exchange Commission of Pakistan Act of 1997 ("SECP Act"). The SECP is also the main regulator for insurance companies. Commercial banks are supervised by the State Bank of Pakistan, the central bank.

The Federal Government appoints all (between five and seven) Commissioners of the SECP, as well as all nine Members of the Securities and Exchange Policy Board ("Board") of the SECP. The Commissioners are appointed for a term of three years and the Members of the Board are appointed for a term of four years. The Commissioners and Members of the Board cannot be discharged at the will of the Federal Government. They may be removed from office only for cause on the grounds set out in the SECP Act.

The SECP is in charge of both the regulation and supervision of the securities markets while the Federal Government issues statutory rules to carry out the purposes of the SECP Act. The SECP is responsible for the regulating the issuance of securities and the business of Stock Exchanges and any other securities markets. Regulations can be made by the SECP in consultation with the Board or by Board on the recommendation of the SECP and in consultation with the Federal Government.[365] Rules and regulations must be published to elicit public opinion before issuance.

An investigative officer of the SECP may, by notice in writing, require the delivery of documents from any person or require the appearance of any person to be examined orally (Articles 30 and 32 of the SECP Act). Failure to do so constitutes an offense punishable with fine or imprisonment.

Part 2. The duty to disclose material information

Securities may not be offered or sold unless a prospectus has been approved and registered with the SECP. Moreover, no one can issue any form of application for securities unless the form is accompanied by an approved prospectus. The SECP has the authority to withhold the approval of a prospectus if it determines that such prospectus fails to provide material information, and can also impose mandatory conditions for compliance (Section 57 (2) of the CO). An order passed by the SECP in this regard may be subject to appeal to the High Court.

A prospectus must be issued at least seven days (but not more than thirty days) before the subscription list is due to open, when subscribing is available (therefore investors' assessment of the security can be achieved without commitment).[366] The prospectus must state the matters specified in Part I of the Second Schedule of the Companies Ordinance ("CO") which includes the following information:

1. The number and value of shares, if any, and the nature and extent of the interest of the shareholders in the property and profits of the company.
2. Names, addresses, descriptions and occupations of the signatories to the issuer's memorandum of association and the number of shares subscribed for by them. Note that the main shareholders of the company may change after the publication of the prospectus and the listing of the

[365] Articles 39 and 40 of the SECP Act.
[366] Section 53 (2) of the CO.

securities. Moreover, no trust or beneficial ownership of shares is required to be disclosed in the prospectus.

3. The nature and extent of the interests (either directly or indirectly as a result of being member or director of a firm) of every director or promoter in the promotion of the company and in any property acquired by the company. Where the interest of such director or promoter consists in being a shareholder of a company, the nature and extent of the interest of the firm or company, with a statement of all sums paid or agreed to be paid to him or to the firm or company in cash or shares or otherwise by any person either to induce her to become, or to qualify her as, a director, or otherwise for services rendered by her or by the firm or company in connection with the promotion or formation of the company.
4. Any provisions in the articles of incorporation of the issuer regarding the remuneration of the directors, and any provision in those articles or in any contract regarding the appointment of a chief executive, managing agent, or secretary, and their remuneration. Similarly, any provision in the articles or in any contract which has been entered into as to the appointment of a chief executive, managing agent, if any, or secretary, the remuneration payable to her or them, and the compensation, if any, payable to her or them for loss office.
5. Contracts or arrangement providing for options or preferential rights in the subscription of shares or debentures, and nature or extent of any consideration or commission paid for subscribing or procuring subscription for the shares or debentures.
6. The dates of, parties to, and general nature of every material contract, not being a contract entered into in the ordinary course of the business carried on by the company or a contract entered into more than two years before the date of the prospectus.

There is no express requirement that the prospectus includes all information that a reasonable investor would likely consider important to make an investment decision.

An issuer cannot publish a prospectus unless it has been approved by the SECP and a copy signed by every director has been delivered to the Registrar (Article 57 of the CO).[367] There is no requirement for the accountant or attorney to sign the prospectus. However, an "expert", which includes an accountant or an attorney who has made a statement in the prospectus, is required to give her written consent to the issue of the prospectus containing the statement made by her (Section 55 of the CO). A report by the auditors with respect to profit and losses and rates of dividend for the previous five financial years is to accompany the prospectus (Section 1(28) of the Second Schedule of the CO).

The distributor is not required by law to perform a due diligence review of the information contained in the prospectus. Since the distributor is not responsible for the accuracy and completeness of the information contained in the prospectus, she is not likely to perform such due diligence review as a matter of commercial practice.[368] If the distributor makes any representations which are not included in the prospectus and which turn out to be incorrect, she could be liable under general principles of law. A distributor can be held liable in tort or misrepresentation when another party acquired the shares on reliance of a representation made by her in relation to the prospectus.

Part 3. Sanctions for failure to disclose

[367] According to clause 30-A of Part I of the Second Schedule of the CO, inserted by SRO dated 3/13/2001 (not applicable to the survey which refers to legal provisions in force as of December 2000), the Chief Executive and the Chief Financial Officer shall certify that the prospectus truthfully discloses all material facts.

[368] It should be noted, however, that, according to clause 30-B of Part I of the Second Schedule of the CO, inserted by the SRO dated 3/13/2001 described above, the underwriter is deemed to have given his consent to the prospectus and shall certify that to the best of his knowledge the prospectus truthfully discloses all material facts.

3.1 Administrative sanctions

If after the listing of a security, the SECP or the Stock Exchange finds that the application is deficient in a material respect or that the issuer failed to comply with the applicable requirements, the SECP or the Stock Exchange may order to correct the deficiency or revoke the listing (Section 9 (4) of the Securities and Exchange Ordinance). In case of a defective prospectus, the SECP and the Stock Exchange do not have power to issue any other orders to refrain from or to perform specific actions.

If a prospectus is issued, published or circulated without complying with or in contravention of the requirements of the CO (which include the omission of material information in the prospectus), then every person who is knowingly a party to such issue, publication or circulation will be liable to a fine and to additional fines until the fault is rectified (Section 57 (6) the CO). Similar sanctions are available if a prospectus does not meet statutory disclosure requirements (as specified in Part I of the Second Schedule of the CO; Section 53 (3) of the CO). These administrative sanctions under the CO can be imposed on the issuer, its responsible directors and officers, and the accounting firm involved. In the case of a distributor who has not been involved in the preparation of the prospectus, no liability for any omission of material information in the prospectus will be attributable to her.

3.2 Judicial sanctions

Every person who signs or authorizes the issue of a prospectus is criminally liable for any untrue statement therein, unless she proves that she had reasonable grounds to believe that the statement was true (Section 60 of the CO). Offenders may be imprisoned for up to two years, fined, or both. Criminal liability does not apply to: (i) experts only by reason of having given their consent to the inclusion of their statements in the prospectus; or (ii) a legal adviser, attorney, solicitor, banker or broker only by reason of having given consent to be named as such in connection with the issue of the prospectus.

On the other hand, it is prohibited to omit to state or actively conceal a material fact while having knowledge of such fact, for the purpose of inducing or influencing the sale of securities (Section 17 of the SEO). Such violation is subject to imprisonment for up to three years, or a fine, or both. When the offense is committed by a legal entity, its responsible directors and officers would be deemed criminally liable if they acted with knowledge. This offense would be brought to court only upon a report on the facts by the SECP.

3.3 Stock exchange sanctions

The Stock Exchange to revoke the listing of an issuer due to material omissions of information in a prospectus and to order the necessary corrections (Section 9(4) of the SEO, Rule 32 of the Karachi Stock Exchange Listing Regulations). Moreover, the Stock Exchange may impose a pecuniary penalty on a defaulting company (Rule 9 (7)).

Part 4. Investor's right of restitution for losses

Investors may obtain judicial restitution for the losses caused by false statements or material omissions in a prospectus through a procedure before a civil court. A class action is also available[369] for this purpose. Alternatively, investors may obtain compensation after the criminal conviction of the person who signed or authorized the issue of the defective prospectus. Finally, restitution may also be available to investors under an administrative procedure. Specifically, the SECP can, subject to appeal to the judiciary, order restitution to an investor when enforcing the penal provisions of the CO.

[369] Order 1 Rule 8 Civil Procedure Code, 1908.

Under Section 59 of the CO, an investor who subscribes shares on the faith of the prospectus can seek damages before a civil judge for any loss or damage she may have suffered by reason of any untrue statement in the prospectus. The liable parties under this provision include the issuer's directors (and every person who has authorised herself to be named as such or as having agreed to become one), a promoter[370], and an expert (which includes the auditor of the financial statements and the legal adviser) in respect to the information provided by her. A prospectus shall be deemed to include an untrue statement if a statement is misleading in the context it is included, or where an omission from a prospectus of any matter is calculated to mislead (Section 63 of the CO). Accordingly, in the case of an omission (as opposed to a positive misstatement) the subscriber must prove intent to mislead. As a result, a negligent omission will only be actionable under common law.

To obtain restitution under Section 59 of the CO, the investor must prove that: (1) the prospectus contained an untrue statement; (2) she subscribed shares on the faith of the prospectus; (3) she suffered losses, and (4) the damages were caused by the untrue statement in the prospectus.

The defenses available for the liable party are set out in Section 59(2) to (5) of CO. According to Section 59(2)(d)(i), no person would be liable if she had reasonable grounds to believe, and actually believed, that the statement in the prospectus was true. Regarding statements purporting to be made by an expert, she would also be required to prove that she was competent to make the statement pursuant to Section 59(3)(c).

In respect of persons not covered in Section 59 of the CO, a claim may be made against them for restitution by an investor on the basis of the general principles of the law of tort for misrepresentation, provided that the criteria of duty of care, breach of such duty, and causation can be established. Specifically, since the distributor is not civilly responsible for the information in the prospectus, in order to obtain restitution from the distributor, investor would need to prove that the distributor made certain representation to her, and that she was induced by such representations to purchase the shares of the issuer, and suffered loss as a result thereof.

Note also that restitution from the issuer is only available under tort since the issuing company is not listed under Section 59 of the CO.

Investors may claim rescission and elect to rescind and claim damages or continue with the contract. In the case of rescission the investor may have to prove misrepresentation in the prospectus, the reliance on the misstatement provided in the prospectus and the loss suffered.

The controlling shareholder of a company is only liable to the extent of her unpaid shares and will not be civilly liable due to acts or omissions of the corporation or its directors and officers. However, the Courts of Pakistan will pierce the corporate veil if there is a justifiable reason. Courts do not hesitate to look behind the veil of incorporation where the corporate personality is being merely used as a cloak for fraud or improper conduct or where it can be established that the corporate personality is merely acting as an agent or trustee for someone else be an individual or another subsidiary company, or where it is necessary to determine the true character of the corporate personality for other purposes (e.g., to determine its tax

[370] Promoter is defined in Section 59 of the CO as: a promoter who was party to the preparation of prospectus or a portion thereof containing the untrue statement but does include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company. Under English Common Law 'promoter is defined as: as the person(s) who plan the scheme for the formation of a company, has the documents prepared and registered, finds the directors, negotiates preliminary contracts and deals with the drafting, printing, registration and circulation of any prospectus. A controlling shareholder does not *per se* fall within the definition of a 'promoter' under Section 59(6)(a) of the CO.

liability). Unfortunately prospectus liability cases are uncommon in the company law Jurisprudence in Pakistan. However, as a matter of legal principle it would be equally applicable to a prospectus issue as well.

A prospectus liability case may take between 8 to10 years to be resolved in first instance. The litigants would likely exhaust all defenses and remedies available in law, which could be protracted and time consuming. If the first-instance judgement is appealed, even in a case where the defendant does not have a valid defense but resorts to all defenses and recourses available under the law, it may take between 2 and 3 additional years until a final and firm judgment is issued.

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SECURITIES LAW OF PERU

Part 1. The regulator and its supervisory and regulatory powers

The main securities regulator in Peru is the *Comisión Nacional Supervisora de Empresas y Valores* (CONASEV). The *Superintendencia de Banca y Seguros* (SBS) is the main regulator of banks and insurance companies. However, such entities are also subject to the supervision of the CONASEV when they participate in the securities market.

The Board of Directors of CONASEV has nine members. The Ministry of Economy and Finance appoints all directors but the President of Peru elects one of them. Directors may only be discharged by the Ministry of Economy and Finance before the expiration of their three-year term due to a serious offense.

CONASEV has administrative and functional autonomy and it is empowered to regulate the securities market. Regulations issued by CONASEV do not require a previous authorization or approval from any governmental authority. The LMV[371] granted CONASEV regulatory power regarding public offering of securities. For example CONASEV issued the ROPV[372], the NC[373] and the MOP[374], regulations which establish diverse requirements for issuers in order to launch a public offering of securities. The Lima Stock Exchange (LSE) has some regulatory and control powers with respect to its listed companies, investor and associates. Specifically, the Stock Exchange is empowered to issue all the regulations regarding transactions made within the Stock Exchange.

The Board of CONASEV may direct inquires and require testimony from any person that it considers can contribute to the success of its investigations (Article 11 of the LO[375]). The General Manager of CONASEV can also order the inspection of books and documents of entities under the supervision of CONASEV and require their representatives to appear for clarifications.

Part 2. The duty to disclose material information

An offering document or prospectus must be distributed before the placement of shares through a public offering takes place. Until recently, the LMV required that a prospectus be delivered to potential investors before shares could be placed (Art 58 of the LMV). However, this requirement is no longer in place. Instead, the prospectus must be available for review by potential investors at the offices of the distributor or the issuer, and must be delivered only to those who request a copy of it (Law 27649).

The prospectus must contain all the necessary information for investors' decision (Article 56 of the LMV) and all the information regarding the development of the issuer since its incorporation that may be relevant to make an investment decision (e.g., major acquisitions and asset dispositions – Art 7210(c.i) of NC). Among other items, the prospectus must include information on the name and ownership of the

[371] LMV: "Ley del Mercado de Valores", the Peruvian Securities Market Law.
[372] ROPV: "Reglamento de Oferta Pública Primaria y de Venta de Valores Mobiliarios", which regulates the Public Offering of Securities.
[373] NC: "Normas comunes para la determinación del contenido de documentos informativos", which defines the content of, among others, the OFFERING DOCUMENT of a public offering.
[374] MOP: "Manual para el Cumplimiento de los requisitos aplicables a las Ofertas Públicas de Valores Mobiliarios", which establishes the requirements for public offerings of securities.
[375] LO: "Ley Orgánica de la Comisión Nacional Supervisora de Empresas y Valores", which creates and regulates the CONASEV.

main shareholders (defined as shareholders who own at least 5% of the issuer's capital) and the economic group to which they belong.[376] Therefore, the prospectus must include all information regarding beneficial ownership of 5% shareholders. However, there is no further requirement to disclose the ownership of shares by directors and officers of the company. The prospectus must disclose if the issuer has given loans or guarantees to another firm which taken together represent more than 10% of the issuer's capital (Art 7210(c.viii) of NC). However, there is no express requirement to disclose the terms of all material contracts made outside of the normal course of business, or of transactions in which directors, officers, or major shareholders have an interest.

The prospectus must be signed by the distributor and the main officers of the issuer. The officers required to sign the prospectus are: (i) the Main Chief Officer (General Manager); (ii) the Finance Chief Officer; (iii) the Accounting Chief Officer; and, (iv) the Legal Chief Officer (if one exists). In contrast, the accounting firm and the attorney advising the transaction need not sign the prospectus. However, the distributor and the officers of the issuer may require that the accounting firm and the attorneys involved also sign the prospectus to avoid liabilities derived from the information included in the offering document.

The distributor is not compelled to perform a due-diligence review of the information included in the prospectus unless she is an offeror.[377] However, as a matter of commercial practice, the distributor may perform such review since it is her only available defense to avoid civil liability for the contents of the prospectus. Note that the distributor may be held liable for representations made outside of the prospectus that, without being fraudulent or false, turned out to be incorrect due to the distributor's negligence in conducting a professional evaluation (articles 195 LMV and 16 ROPV).

CONASEV must file the prospectus if it meets disclosure requirements. However, CONASEV has some discretion to request amendments or additional information and documentation. However, CONASEV does not have the authority to oppose a prospectus based only on its assessment of the financial situation of the issuer (Articles 18 and 19 LMV).

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

Violations of securities law will be sanctioned according to general norms issued by the CONASEV (Art 342 of LMV). CONASEV issued the "Reglamento de Sanciones en el Mercado de Valores" (RSMV), a regulation which defines the events in which the CONASEV is entitled to apply sanctions. The Second

[376] Large shareholders are not required to disclose their ownership to CONASEV or the Stock Exchange. However, the issuer must disclose (monthly) to CONASEV information regarding the ownership of shareholders who own 0.5% or more of the issuer's capital (Article 11 of the RPI). Such information is not publicly available to investors. Notwithstanding the foregoing, the issuer must disclose to CONASEV and the Stock Exchange, as public information: (a) any transfer of common share that involves 10% or more of the issuer's capital or that allows the purchaser to acquire such equity stake (article 32 of the LMV); and (b) any share transfer that involves an equity stake of 1% or more of the issuer's capital that is being made by or in favor of any issuer's directors, officers or their close relatives (article 32 of the LMV).

[377] The Distributor could act: (1) only as an advisor who designs the financial structure of the public offering of securities; (2) only as an offeror; and (3) as both. For instance, an investment bank may act as the financial advisor while the issue is underwritten by a broker-dealer agent. The distinction between financial advisor and offeror has implications for liability. The financial advisor is responsible for all the information contained in the Prospectus (unless she has a due-diligence defense). In contrast, the offeror is liable only for the information related to its function within the public offering of securities.

Final Rule of the RSMV allows CONASEV to sanction any infringement to the securities market laws that has not been specifically defined as infringement in the RSMV itself.

The omission of material information from the prospectus violates the disclosure principle stated by the LMV (article 12), but has not been specifically identified as infringement by the RSMV. Therefore, the CONASEV may apply a sanction based on Second Final Rule of the RSMV. Pursuant to the RSMV, CONASEV would be able to qualify said infringement as extremely severe, severe or non severe, based upon the nature of the infringement and its influence within the market. If CONASEV qualifies the sanction as "extremely severe," it could: (i) cancel the issuer's registration for securities market, pursuant to article 8.e of the RSMV; (ii) command the violator to pay fines for substantial amounts, pursuant to article 8.a of the RSMV, or (iii) apply employment restrictions on the directors and officers involved in such event, pursuant to article 8.g of the RSMV. Likewise, if the CONASEV qualifies the infringement as "non severe" or "severe", the issuer could be commanded to pay fines for minor amounts, pursuant to articles 6 and 7.a of the RSMV, respectively.

Similarly, CONASEV can apply the respective administrative sanction under the referred Second Final Rule of the RSMV upon the distributor, in case of omissions of material information in a prospectus. If CONASEV qualifies the sanction as "extremely severe," it is entitled to: (i) suspend the distributor's license from 15 up to 45 days, pursuant to article 8.b of the RSMV; (ii) suspend the securities firms representatives from 20 up to 30 days, pursuant to article 8.c of the RSMV; (iii) cancel the distributor's license, pursuant to article 8.f of the RSMV; or (iv) command the distributor to pay substantial fines pursuant to article 8.a of the RSMV. In the event the CONASEV qualified the infringement as "severe," it can: (i) suspend the distributor's license up to 20 days, pursuant to article 7.c of the RSMV; or (ii) command the distributor to pay fines, pursuant to article 7.a of the RSMV. Likewise, if the infringement is qualified as "non severe" by CONASEV, it is entitled to command the distributor to pay fines pursuant to article 7.a of the RSMV.

Regarding the accounting firm, the omission of material information in a prospectus constitutes an "extremely severe" infringement to securities laws. According to article 9.3.b of the RSA,[378] the accounting firm is prohibited to issue an "Audit Statement" including incomplete, false, misleading and/or fraudulent information. Likewise, the auditor is prohibited to deny information that he is compelled to disclose. In such events, the CONASEV could: (i) disqualify the infractor from 6 months up to 5 years or for an indefinite period depending on the seriousness of the infringement, pursuant to article 7 of the RSA; or (ii) command the infractor to pay fines, pursuant to article 7 of the RSA.

CONASEV is also entitled, within the framework of an administrative procedure, to command the issuer, the distributor, or the accounting firm, to stop or refrain from a specific action or to undertake specific actions. The activities of CONASEV are regulated by the LPA[379] which does not grant it explicit power to issue orders. However, the First Final Rule of the CPC[380] gives CONASEV power to apply any of the provisions established therein, including the precautionary measures ("Medidas Cautelares") regulated by articles 608 to 687 of the CPC. Pursuant to article 687 of the CPC, CONASEV can order the issuer, the distributor, or the accounting firm, to maintain an existing factual or legal situation when there is substantial evidence that an irreparable damage may occur. Likewise, according to article 682 of the CPC, CONASEV can order the issuer, the distributor, or the accounting firm, to undertake a specific action in order to return to a pre-existing factual or legal situation. Such orders are exceptional and will be granted

[378] RSA: "Reglamento de Sanciones Aplicables a las Sociedades Auditoras y Auditores Independientes", regulation that defines the events in which CONASEV is entitled to apply sanctions to auditing firms
[379] LPA: "Ley de Normas Generales de Procedimientos Administrativos", the law that establishes and regulates the faculties of governmental entities in administrative procedures
[380] CPC: "Código Procesal Civil", the Peruvian Civil Procedures Code

only when there is no other applicable precautionary measure to ensure the enforcement of a judicial or administrative final ruling. And they are issued only when there is a substantial risk that the final ruling could not be effectively enforced. If the prospectus is defective, CONASEV may issue, within an administrative procedure, the following orders: (1) a precautionary measure to suspend the execution of the public offering of securities; and (2) a precautionary measure to suspend the transactions of negotiations of the securities within the Stock Exchange.

There are no administrative sanctions established against lawyers advising the issue of shares, in case of a defective prospectus, except for the sanctions that the Lima Bar Association may apply to lawyers.

3.2 Judicial sanctions

Criminal liability can arise for the infringement of securities laws, independently from the applicable administrative sanctions or civil liabilities (Art 347 of LMV). The CP[381] typifies several conducts that may be applicable to omissions of material information in a prospectus. Specifically, article 196 of the CP prohibits attaining illegal profits by inducing third parties to error or keeping them in error, through any kind of fraudulent mechanism. Therefore, those responsible for the prospectus (i.e., the issuer's main officers, the distributor, and the accounting firm when signing the prospectus) can be held criminally liable in case of intentional false statements or omissions of material information. Likewise, article 198.2 prohibits directors and officers of the issuer to distribute false information related to the general situation of the company to third parties.

In addition, those who sign the documentation submitted to CONASEV, including the representatives of the company, will be liable for the truthfulness of said documentation since the information provided to CONASEV has the status of a sworn affidavit ("*Declaración Jurada"*) pursuant to article 12 of the ROPV. Accordingly, those who sign the prospectus could face criminal charges for having infringed article 429 of the CP, which prohibits omitting information that is required to be disclosed, in public or private documentation, in order to generate a fact or an obligation.

Finally, the judiciary may apply the precautionary measures ("Medidas Cautelares") of the CPC described in the previous section, on application of a private party, prior to, or during a civil lawsuit.

3.3 Stock exchange sanctions

In case of false statements or material omissions in the prospectus, the Exchange may delist the securities of the issuer if necessary to protect investors or preserve market safety (Art 27 of the RIE[382]). The Exchange may also sanction the distributor (Art 1 of RSBVL[383]). Specifically, in case of false statements or material omissions in the prospectus, the Exchange may suspend the distributor's license and command her to pay fines (as described above under the application of the Second Final Rule of the RSMV). However, according to, the Exchange is not entitled to cancel the distributor's license to operate in the securities market (Art 3 of RSBVL).

Part 4. Investor's right of restitution for losses

In case of losses due to a false statement or an omission of material information in the prospectus, investors can obtain restitution through a civil lawsuit or as part of a criminal judicial proceeding. In order

[381] CP: "Código Penal", the Peruvian Criminal Code

[382] RIE: "Reglamento de Inscripción y Exclusión de Valores Mobiliarios en la Rueda de Bolsa de la Bolsa de Valores de Lima", regulation that establishes the requirements for the listing and delisting of securities in the Lima Stock Exchange

[383] RSBVL: "Aplicacion del Reglamento de Sanciones del Mercado de Valores por la Bolsa de Valores", regulation that authorizes the Lima Stock Exchange to apply the RSMV

to obtain restitution under criminal proceedings, investors must litigate as civil third parties in such proceedings. Investors must choose to file their claims either before a criminal or civil court.. Investors must pursue civil claims individually as a class action procedure is not available for this purpose[384].

A civil action for reparation of damages would be based upon the Civil Code and the securities laws. Generally speaking, pursuant to article 1969 of the CC, any person who suffers damages intentionally or recklessly caused by another person, is entitled to obtain restitution for the said damages from the injurer. Turning to securities laws, LMV article 56.d requires that the prospectus includes the name of the persons responsible for its preparation, and to that effect the names of the distributor ("structuring entity"), and the issuer's main administrative, legal, accounting and financial officers. Article 60 of the LMV holds the issuer and the parties listed under articles 56.d are jointly liable for inaccuracies and omissions in the prospectus. In addition, Article 347 of the LMV requires that those who intentionally violate the provisions of the LMV must repair the damages resulting from their actions.

Additionally, under article 17 of the ROPV, the following parties are jointly liable for the contents of the prospectus: (i) issuer, (ii) offeror, (iii) distributor ("entidad estructuradora"); (iv) the responsible officers of the issuer; and (v) the responsible officers of the offeror. However, the liability rules vary depending on the liable party, as follows:

Issuer and offeror*:* The issuer and the offeror, are strictly liable for the information related to the public offering, the offered securities, and the issuer itself (articles 16 and 17 of the ROPV). Thus, an investor will only be required to prove (i) that she has suffered damages (losses); and (ii) the casual link between such damages and the omission of material information from the prospectus. In turn, the latter requires proving that the investor relied on the offering document to invest.

Distributor and responsible officers of the issuer and offeror*:* According to article 17 of the ROPV, the distributor and the responsible officers of the issuer and offeror are liable for the content of the prospectus, but have a due diligence defense. Specifically, they can escape civil liability if they establish that they have performed an appropriate investigation that led them to believe that the information they are responsible for complied with legal requirements.

In addition, when the information included in the prospectus has been examined by professional experts, or is based on a "Professional Statement" issued by such experts, the distributor and the responsible officers of the issuer and offeror can avoid liability by showing that they could not have reasonably known, or could not have been reasonably expected to have known, that the information subject to examination was false, misleading, or incomplete.

Article 190 of the LGS provides an alternative mechanism to obtain restitution for injuries resulting from intentional actions by the chief executive officer ("gerente") of the issuer. Under Article 191 of the LGS, officers are also liable if they participate in events that could generate liability for the issuer's directors. Such events are those acts which involve directors' liability (for example, articles 181 and 182 of the LGS). Accordingly, the officers will be also liable if they participate in such events.

The LGS liability regime for officers is completed by provisions established by article 1969 of the CC requiring that: (i) defendants prove that they have not acted with intent to deceive; and, (ii) plaintiffs prove that they have suffered injures caused by the officers' acts.

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[384] The Ministry of Economy and Finance prepared a project regarding class actions, which is likely to be discussed in the Peruvian Congress in 2002.

Therefore, in order to obtain restitution from officers of the issuer, investors must file a complaint: (i) under securities laws regime (articles 56.d, 60 and 347 of the LMV and 17 of the ROPV); or (ii) under LGS regime (articles 190 and 191). In both cases, article 1969 and the pertinent legal provisions related to tort law of the CC are applicable as supplementary regulation. But there is a substantial difference: securities laws establish a strict liability regime for officers among others (specifically, article 17 of the ROPV, as stated above) and, therefore, the application of the CC's legal provisions, while supplementary, is quite limited. Instead, under the LGS regime, the liability of the officers is exclusively determined under the legal provisions of the CC.
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***Issuer's directors**:* The LMV does not explicitly address the directors' civil liability for omissions in the prospectus, unless they were involved in the preparation of the prospectus or signed it. However, investors could obtain restitution, pursuant to the generic statement of liability established in the article 347 of the LMV (intentional misrepresentations), and article 182 of the LGS. Specifically, Article 182 of the LGS, allows shareholders or any third parties who have suffered damages derived from acts or omissions of directors of the company, to file a lawsuit in order to obtain restitution. Pursuant to said provisions, any person who suffered direct damages resulting from the acts or omissions of any of the issuer's directors, may file a complaint in order to obtain restitution.

Accountants and lawyers: The liability of both the Attorney and the Accountant, derives from article 17 of the ROPV. According to such article, if the Attorney and the Accountant prepare the legal or financial section of the Prospectus, respectively, or if any of them issue a "Professional Statement" which serves for the preparation of the legal or financial section of the Prospectus, respectively, they are both liable before the investors.

The auditing firm is liable for the financial information included in the prospectus, only when it: (i) subscribes the prospectus; or (ii) authorizes the distributor or the issuer's officers to divulge its role in the preparation of the financial information included in the prospectus; or (iii) authorizes the distributor or the issuer's officers to divulge its role in the preparation of the "Professional Statement" (which serves as the basis for the financial information included in the prospectus).

Similarly, the attorneys advising the transaction are liable only if they: (i) participate in the preparation of the prospectus and sign it, or (ii) authorize the distributor or the issuer's officers to divulge their role in the preparation of the legal information included in the prospectus.

If liable, accountants and attorneys have the same responsibilities for omissions in the prospectus (including criminal liabilities) and are subject to the same rules of responsibility (including a due diligence defense) as the officers of the issuer.

Controlling shareholder: The controlling shareholder of a corporation can only be held civilly liable for the liabilities of the corporation if she exploits the protection of limited liability to abuse investors. No specific statutory provision regulates this matter, and the judiciary may pierce the corporate veil on this argument in a case-by-case basis.

The rescission of the contract is an alternative available to investors. This action must be filed exclusively against the issuer by the investors, who will have to demonstrate the infringement of the agreement (false or defective prospectus) by the issuer.

A case for restitution for damages due to a defective prospectus may take at least 3 years to reach a first-instance judgement. If the case is appealed and the defendant resorts to the defenses and recourses

generally available, it may take at least five years to reach a firm and final resolution from the moment of filing the initial complaint. Appeal is always available for defendants even when they do no have a valid defense. Courts are obligated to grant appeals filed by defendants according to the Political Constitution of 1993.

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SECURITIES LAW OF THE PHILIPPINES

Part 1. The regulator and its supervisory and regulatory powers

The Philippine Securities and Exchange Commission (SEC or the Commission) administers the Securities Regulation Code ("SRC"[385]) and is the main regulator of the securities markets. Banks and insurance companies are mainly regulated by the Bangko Sentral ng Pilipinas (Central Bank)[386] and the Insurance Commission[387] respectively. However, the primary franchises or incorporation papers of such companies are issued by the SEC with favorable recommendation of the BSP or the Insurance Commission[388]. Public offerings of bank stock need to be registered with the SEC.

The President of the Philippines appoints the Chairperson and four Commissioners of the SEC. The Commissioners serve a term of seven years each and may not be discharged at will by the President.

Both the regulation and the supervision of the securities markets are assigned to the SEC. The SEC formulates policies and recommendations (Section 5 of SRC). It also prepares, approves, amends or repeals rules, regulations and orders. In addition, it issues opinions, provides guidance on, and supervises compliance with such rules, regulations and orders. Once the regulations are approved by the SEC, they are published in the Official Gazette or in two newspapers of general circulation after which they become effective. The SEC may consult other governmental authorities such as the Central Bank and the Insurance Commission with respect to regulations issued by the SEC which would affect entities regulated by the latter authorities.

The SEC can generally order the examination, search and seizure of all documents and records of any entity or person under investigation as may be necessary, as well as summon witnesses[389].

Part 2. The duty to disclose material information

Securities required to be registered shall not be sold unless a prospectus, filed with the registration statement, is widely disseminated and sufficient copies have been made available so that all who desire may obtain one. The use of selling documents other than the final prospectus during the offering period is prohibited. As a general rule, shares may not be offered unless the registration statement has been declared effective. The Implementing Rules and Regulations, however, authorize the circulation of a preliminary prospectus prior to the effectiveness of the registration statement, provided certain requirements have been met. In this case, no offer to purchase or tender of the purchase price may be accepted until the registration statement has become effective.

The law provides that the SEC shall enter an order declaring the registration statement effective if it finds that the registration statement, together with all the other papers and documents attached thereto, is on its face complete and that the requirements have been complied with. Meanwhile, the law also gives the SEC power to reject a registration statement or suspend its effectivity if the SEC, after due notice and hearing, finds that, among others, the registration statement omits to state a material fact required to be stated

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[385] Republic Act No. 9799, Securities Regulation Code ("SRC"), which became effective on 8 August 2000.
[386] Republic Act No. 8791. General Banking Law of 2000 ("GBL"), which became effective on 13 June 2000, Sec. 4.
[387] Presidential Decree No. 1460, as amended, The Insurance Code of 1978 ("IC"), Sec. 414.
[388] Batas Pambansa Blg. 68, The Corporation Code of the Philippines ("CC"), approved May 1, 1980, Sec. 17.
[389] SRC Sec. 5.1(l).

therein or necessary to make the statements therein not misleading. The Philippine SEC has expressly abandoned "merit regulation" in favor of the full disclosure principle, and cannot oppose an offering document based solely on its own determination of the quality of the investment.

SRC Rule 12 Non financial Disclosure Requirements Annex C describes the content requirements for issuers' non-financial statement portions of the prospectus for a public offer of shares. Among other information, the prospectus must include:

1. Details of the compensation paid or estimated to be paid to the issuer's CEO and its four most highly compensated officers, and the aggregate compensation of all directors and officers as a group.
2. The name and number of shares of any person, or group, known to be directly or indirectly the beneficial owner of more than 5% of any class of issuer' voting securities. Note that any person who acquires directly or indirectly the beneficial ownership of more than five per cent (5%) of any class of equity security of a firm with securities listed for trading on an Exchange is required to submit a sworn statement of such ownership to the issuer of the security, to the Exchange where the security is traded, and to the Securities and Exchange Commission ("Commission") (Section 18 of the Republic Act No. 8799).[390] Beneficial owners of more than five per centum (5%) of any class of any equity security issued by an issuer with securities listed on an Exchange are required to file an annual report with the Commission within one hundred thirty-five (135) days after the end of the issuer's fiscal year. This annual report is also filed with the Exchange and each holder of such equity security is also furnished a copy of this annual report by the issuer.
3. The stock ownership by directors and officers, including the indirect ownership of directors and officers through corporate entities which, in turn, own shares of the issuer, if such corporate entities are parents or subsidiaries of the registrant. Specifically, with regard to security ownership of management, information on the (1) title of class, (2) name of beneficial owner, (3) amount and nature of beneficial ownership, and (4) percent of class, shall be furnished as of the date the registration statement is filed, in substantially the tabular form indicated, as to each class of equity securities of the registrant or any of its parents or subsidiaries other than directors' qualifying shares, beneficially owned by all directors and officers.
4. With some exceptions, transactions to which the issuer was or is to be a party, in which any of its directors, officers or controlling shareholders, and members of their immediate family, had or is to have a direct or indirect material interest.
5. Major existing supply and sales contracts, and every contract not made in the ordinary course of business which is material to the issuer, under the conditions established in SRC Rule 12 Annex C.

According to the SRC, "the registration statement shall be signed by the issuer's executive officer, its principal operating officer, its principal financial officer, its comptroller, its principal accounting officer, its corporate secretary or persons performing similar functions accompanied by a duly verified resolution of the board of directors of the issuer corporation. The written consent of the expert named as having certified any part of the registration statement or any document used in connection therewith shall also be filed." In addition, the issuer must declare under oath that all requirements have been met and the information in the prospectus is true and correct.

The underwriter is required by law to perform a due diligence review of the information contained in the prospectus. Penalties may be imposed on any underwriter who has failed to conduct an inquiry with

[390] Also, any person who is directly or indirectly the beneficial owner of more than ten per cent (10%) of any class of any class of equity security of a firm with Exchange-listed securities, or is a director or officer of such issuer, shall file, at the time the firm first lists any securities or within ten (10) days after he becomes such a beneficial owner, director, or officer, a statement with the Commission and the Exchange, of the amount of all equity securities of such issuer of which he is the beneficial owner (Section 23 of the Republic Act No. 8799).

reasonable diligence to ensure that the registration statement is accurate and complete in all material respects (SRC Sec. 54). In addition, the distributor assumes civil responsibility for the accuracy and completeness of the information in the prospectus. Specifically, SRC Sec. 56 expressly provides that an underwriter is liable for civil liabilities on account of false registration statement (which includes the prospectus) and SRC Sec. 57 provides for civil liabilities of persons selling securities by means of a false or incomplete prospectus, communication, and report. Therefore, as a matter of legal requirement as well as a matter of commercial practice, the distributor performs a due diligence review of the contents of the prospectus.

The controlling shareholder is not required to sign the registration statement. However, when the registration statement includes shares to be sold by a shareholder, whether a controlling shareholder or not, a written certification by such selling shareholder as to the accuracy of any part of the registration statement contributed by such selling shareholder shall also be filed. As a result, the selling shareholder shall be responsible for omissions in the registration statement or prospectus, when the shareholder is selling shares through the prospectus, and regarding information contributed to the registration statement by such selling shareholder. The controlling shareholder may also be liable jointly with the issuer for the contents of the prospectus, as explained in Part 4 of this document.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

In case of violations of the SRC and its rules and orders, and in case of omissions of material information in a prospectus, the SEC may order pecuniary fines and the suspension or revocation of any registration for the offering of securities. Specifically, if after due notice and hearing, the Commission finds that any registrant or other person (which includes the persons involved in the preparation of the prospectus, such as issuer's directors and officers, the distributor, the accountant, or the lawyers) has in a registration statement or in other reports, applications, accounts, records or documents required by law or rules to be filed with the Commission made any untrue statement of a material fact, or omitted to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission shall in its discretion, in addition to the suspension or revocation of any registration for the offering of securities as it may resolve, impose a fine of not less than 10,000 Pesos nor more than 1,000,000 Pesos plus not more than 2,000 Pesos for each day of continuing violation (SRC Sec. 54.1). The SEC may revoke the effectivity of a registration statement and the registration of a security if it finds that the registration statement is on its face incomplete or inaccurate in any material respect, or includes any untrue statement of a material fact, or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading (SRC Section 13.1). The SEC also has power to generally suspend the right to sell and offer for sale a security by entering an order directed to the issuer (and the underwriter and brokers), if the information in the registration statement filed is or has become misleading, incorrect, inadequate or incomplete in any material respect (SRC Section 15).

Moreover, the SEC has the power to issue cease and desist orders to prevent fraud or injury to the investors (SRC Sec. 5.1 (i)), although an order of the SEC may be appealed to the Court of Appeals by petition for review (SRC Sec. 70). Cease and desist orders may also be issued to stop an act or practice if the SEC considers that it will likely harm the investing public (Sec. 64.1).[391] Therefore, in case of a defective prospectus, the SEC may issue such orders against the issuer, the distributor, or the accountant. In addition, the SEC also has authority to issue orders to perform certain actions. Specifically, if a registration statement is on its face incomplete or inaccurate in any material respect, the SEC may issue

[391] Sec. 53.3 also provides for SEC injunctions in case a person is engaged in a violation of the SRC.

an order directing the amendment of the registration statement, and it may require from the issuer such further information as may in its judgment be necessary to enable the Commission to ascertain whether the registration of such security should be revoked (SRC Sec. 14.1). Finally, the SEC may also agree to a settlement offer[392] proposed by a party being investigated under the SRC, as long as such settlement would be in the public interest. (SRC Sec. 55)

Disqualification from being a director or an officer of a publicly-held company is imposed only in case of violation of certain specified sections of the SRC, which do not include omission of material information in an offering document.

3.2 Judicial sanctions

The law also allows, upon conviction, the imposition of fine or imprisonment or both. Any person who violates any of the provisions of the SRC, or the rules and regulations promulgated by the Commission, or any person who, in a registration statement, makes any untrue statement of a material fact or omits to state any material fact shall be convicted to a fine between 50,000 Pesos and 5,000,000 Pesos or imprisonment between 7 and 21 years, or both (SRC Section 73). These sanctions may be imposed on the issuer, its directors and officers, the distributor of the issue, the accounting firm, and the lawyers involved, as long as knowledge and intent can be established. If the offender is a corporation, the penalty may, in the discretion of the court, be imposed upon such corporation and upon the officer or officers of the corporation responsible for the violation. And if such officer is an alien, she shall in addition to the penalties prescribed, be deported without further proceedings after service of sentence.

3.3 Stock Exchange sanctions

When the Regulator has revoked or cancelled the registration of a security, the Philippine Stock Exchange may consider the listed company for delisting. Under the Philippine Stock Exchange Listing and Disclosure Rules Book, in case of violation of the listing rules, the Exchange in its discretion shall, after proper notice and after granting the issuer the opportunity to be heard, revoke the approval for listing and impose fines up to 300,000 Pesos. For the second and third infractions, in addition to the fine, there is a reprimand to be made public through the exchange's publications and newspapers of general circulation.

Part 4. Investor's right of restitution for losses

Investors may obtain restitution in a prospectus liability case through a judicial proceeding before a civil or commercial judge. To this effect, a class action suit is available (Rules of Court, Rule 3, Section 12). Alternatively, investors may be awarded damages through a judicial proceeding before a criminal judge, after conviction under SRC Section 73. Investors may also obtain restitution through an administrative action[393] when the parties being investigated for violations of the law propose an offer of settlement to the Commission, which may agree to it only if it finds that such settlement is in the public interest.

Investors are legally entitled to obtain restitution for false statements in the registration statement (SRC Section 56) and in prospectuses, communications and reports (SRC Section 57). Specifically, SRC Section 56.1 provides that any person acquiring a security, the registration statement of which or any part thereof contains on its effectivity an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make such statements not misleading, and who suffers

[392] The law does not provide an explicit definition of the term "settlement offer". The Securities Regulation Code ("SRC"), merely states that parties being investigated and / or charged may propose in writing an offer of settlement with the Commission.
[393] SRC Section 55.

damage, may sue and recover damages from the issuer, its directors, the underwriter, and the auditor or auditing firm, unless it is proved that at the time of such acquisition, the person acquiring the security knew of such untrue statement or omission. Similarly, SRC Section 57.1 provides that any person who offers to sell or sells a security, by means of a prospectus or other written or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall fail the burden of proof that she did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from her, who may sue to recover the consideration paid for such security with interest thereon.

In sum, in order to obtain restitution, the investor must establish that: (1) the registration statement or prospectus contained an untrue statement or omitted a material fact; and (2) she suffered losses. The defendant in an action under SRC Section 56.1 may only avoid liability by proving that at the time of acquisition, the person acquiring the security knew of such untrue statement or omission. In contrast, the defendant (i.e., the seller or offerer) under SRC Section 57.1 may be released of any liability by proving that she did not know, and could not have known, of such omitted information despite the exercise of reasonable care.

In theory, an attorney may be held liable under par. (e) of SRC Sec. 56.1, e.g. with respect to the counsel's opinion on the legality of the issue, which is required to be filed or incorporated by reference as part of the registration statement. However, there has been no case holding an attorney liable on account of a false or incomplete registration statement or prospectus.

In general, a shareholder cannot be held civilly responsible for the liabilities of the company. However, the controlling shareholder shall also be jointly and severally liable with the issuer (as controlled person), unless she can prove that, despite the exercise of due care, she had no knowledge of the existence of the facts that make the issuer liable (SRC Section 51.1).

The estimated duration of a prospectus liability case is 2 to 3 years for the first instance judgment. The suit to recover loses is filed with the Regional Trial Court. The first-instance judgement may be appealed first to the Court of Appeals and subsequently to the Supreme Court. Appeal will likely be granted as a matter of law. Including appeals to the Court of Appeals and to the Supreme Court, a prospectus liability case may take 8 to 10 years to reach a firm and final resolution. If the defendant does not have a valid defense and the prosecutors are diligent, it may take six (6) to eight (8) years for a prospectus liability case to reach a final resolution.

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SECURITIES LAW OF PORTUGAL

Part 1. The regulator and its supervisory and regulatory powers

The main regulator of the securities market is the Portugese Securities Commission (*Comissão do Mercado de Valores Mobiliários or "CMVM")*. Banks and insurance companies are supervised by the Bank of Portugal and the Portuguese Insurance Institute, respectively. The Securities Commission, however, is the regulator for all public offering of securities, even when the issuer is a bank or an insurance company.

The Board of Directors of the Portuguese Securities Commission is composed by one chairman, one vice-chairman and three other board members, appointed by resolution of the Council of Ministers (the Portuguese cabinet) upon proposal of the Minister of Finance. Members of the board are appointed for a five-year term of office and may only be discharged before the expiration of their term in case of duly evidenced gross default of any of their obligations in the exercise of their duties. Discharge is made through a resolution of the Council of Ministers.

Regulations issued by CMVM are not subject to any governmental approval and are published in the Portuguese Official Gazette. When related to a specific regulated market, they are published in the corresponding official bulletin. However, these regulations may be considered illegal by courts, including the Constitutional Court, whenever they breach the Portuguese Constitution, international treaties or basic laws.

While the Portuguese Securities Commission is the main regulator of the securities market, the following authorities are also responsible for regulating and supervising the following activities within the scope of their functions:

- Stock exchange associations: they regulate the way regulated markets function, notably by defining how bid and offer prices are quoted, ways of transmission of orders, listing requirements and approval of admission to listing, etc.
- Clearing systems: they regulate clearing and settlement of trades on regulated markets and OTC trades, custody and registration of securities, etc.
- Commercial Registry: it regulates registration of securities and assures validity of securities issuances.

When supervising the securities markets, the CMVM may: (a) request any elements and information, examine books, registers and documents, whereby the supervised entities[394] may not invoke professional confidentiality; and (b) hear any person, whether or not a supervised entity (Article 360/2), summoning them when necessary (Article 358).

Part 2. The duty to disclose material information

It is prohibited to sell shares to the general public without first either making brochures available in the registered offices of the issuer and at the premises of the stock exchange, or publishing the prospectus in a

[394] Supervised entities include: (a) market managing entities, settlement systems and managers of centralised systems of securities; (b) financial intermediary and autonomous adviser; (c) security issuers; (d) institutional investors and holders of qualifying holdings in public companies; (e) sinking funds and investor compensation schemes and their respective managing entities; (f) auditors and rating companies, registered at CMVM; (g) others that exercise, as principal or secondary, activities relating to the issue, distribution, negotiation, registration or deposit of securities or, in general, to the organisation and functioning of the security markets.

nationwide newspaper. No offer may start without prior distribution of the prospectus (Securities Code, Article 125). Orders for the execution of securities transactions (including offer of shares) executed by a non-institutional investor away from the offices of the distributor, in the absence of a previous client relationship or a solicitation from the investor[395], will only become effective three business days after such issue or execution. During such period, the investor is entitled to withdraw from such transaction.

The prospectus should be approved if it complies with the list of disclosure items and formal requirements. In practice, however, the CMVM exercises some discretion in the request of information, especially where dissemination of information in the media suggest that a material information may have not been properly disclosed in the prospectus. The prospectus must include the following statement: "The registration is based on legal criteria and does not involve any guarantee as to the content of the information, the issuer's economic and financial situation, the feasibility of the offeror or the quality of the securities". The regulator may not generally oppose the offering of shares at its discretion.

Schedule 2 to CMVM regulation 10/2000 lays out the requirements for disclosure in the prospectus. The prospectus must disclose, among other items, the following:

1. Remuneration and benefits in kind paid in any connection during the previous fiscal year to members of the managing and supervisory bodies, indicating the overall totals for each type of governing body (CMVM - Schedule 2 - 3.1.2).
2. Details of the private individuals or corporate entities that, directly or indirectly, separately or jointly, own holdings of 10% or more of the voting capital of the issuer (CMVM - Schedule 2 - 3.1.7). Furthermore, whoever reaches or exceeds a holding of 2%, 5%, 10%, 20%, 33%, 66%, or 90%of the voting rights in a public company listed in a regulated market and whoever reduces its holdings to a value smaller than any of those limits, must, within 3 days after the occurrence of such event inform the CMVM, the investee company, and the stock exchange where the company is listed (Securities Code, Article 16).
3. Total number of shares of the issuer held by all office holders in its managing and supervisory bodies and any rights of subscription, acquisition or tranfers of the issuer's shares that may have been granted to them (CMVM - Schedule 2 - 3.1.3).
4. A statement of the nature and extent of the interests of the members of the managing and supervisory bodies in any extraordinary transactions effected by the issuer and their nature and conditions in the course of the previous fiscal year and the current one (CMVM - Schedule 2 - 3.1.3).
5. A description of the business of the issuer where all material issues must be disclosed (e.g., an indication of any exceptional event in the last three years, that has significantly affected, or which may predictably have a significant impact on the business activities of the issuer or its interests; CMVM - Schedule 2 - 4.4).
6. Complete, true, updated, clear, objective and lawful information allowing investors to make an informed assessment of the securities being offered, and of the issuer's assets, economic and financial situation (Securities Code, Article 135).

[395] A previous client relationship is deemed to exist whenever: (i) a portfolio management agreement has been executed between the financial intermediary and the investor; (ii) the financial intermediary frequently receives orders from the investor; or (iii) the financial intermediary has securities accounts opened in the name of the investor. A contact made by a financial intermediary is presumed to be non-solicited if there is no previous client relationship between the financial intermediary and the investor. Under the definition of the Securities Code, institutional investors are expressly defined as including credit institutions, investment firms, UCITS, investment funds and the corresponding management companies, insurance companies and pension fund management companies. Institutional investors do not include ordinary corporations or high net worth individuals.

The prospectus filed with the CMVM is a brochure that is not usually signed. Authorship and responsibility for the brochure, however, mandatorily fall under the directors and the distributor. In addition, officers may be held responsible for this duty.

The use of distributors is mandatory in public offerings, and one of their functions is the preparation and filing of the offering document. Under the old securities code, distributors were only responsible to cooperate with the issuer in the preparation and filing of the prospectus. Under the new Securities Code, effective since March 2000, distributors are responsible for drafting the prospectus and, like the issuer and other liable parties, are responsible for its contents if they have acted with negligence. Distributors are therefore strongly advised to carry out an independent due-diligence review of the information included in the prospectus.

All information relating to a public offer provided by a distributor which may influence decisions of investors must be complete, truthful, up-to-date, clear, objective and lawful (Securities Code, Article 7). Therefore, distributors are liable for information not included in the prospectus that, while not false or fraudulent, turned out to be incorrect.

The accountants that audited the issuer's financial statements must sign the audit report included in the prospectus (but not the prospectus itself). Finally, any attorney who is named in the offering document as having prepared or revised any information included therein must sign a responsibility statement for such information.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The information relating to securities, public offers, and issuers, that can influence the decisions of investors, must be complete, truthful, up-to-date, clear, objective and lawful (CVM, Article 7). Furthermore, the prospectus must contain complete, true, updated, clear, objective and lawful information, in order to allow the recipient of such information to make an informed assessment about the offer, the securities and its rights, and the issuer's assets, economic and financial situation (CVM, Article 135). Including false statements or omitting material information from the prospectus (an action attributable to the issuer, its directors and officers, and the parties involved in the preparation of the prospectus such as the distributor and the auditors) is a very serious infraction[396], subject to a penalty of up to 2,500,000 Euros (CVM, Article 389). The CVM can also order a stock exchange to suspend or exclude any securities from trading, if the admission requirements for listing are no longer met, and the stock exchange has not suspended or excluded the securities when required to do so (CVM, Articles 206 and 207). In addition, the distributor's registration for the performance of financial intermediation may be revoked or cancelled (Article 404 of the CVM). Similarly, the auditor's registration may be cancelled if, in the opinion of the CVM and the Association of Chartered Accountants, its work does not reach the required standard of quality (Article 12 of CMVM Regulation 6/2000).

Additionally, if, between the date of approval of the prospectus and the end of the offer period, any deficiency in the prospectus is detected or if any new fact occurs or if any fact not previously considered is brought to light, material to the decision to be reached by the addressees, the approval for amendment or rectification of the prospectus must be immediately requested to CMVM.

[396] Whenever a syndicate of banks is used, practice has been for the underwriting agreement to expressly mention that only the lead manager of the syndicate is responsible for drafting the prospectus. In such case, other members of the syndicate will hardly be responsible under Article 389.

It is noteworthy that both intentional and negligent administrative infractions are punishable (CVM, Article 402). Legal persons (e.g., members of the management bodies, attorneys-in-fact, officers or employees) are jointly liable for violations of the CVM when, in the exercise of their functions, they performed actions in the name or on behalf of the company (CVM, Article 401).

3.2 Judicial sanctions

The Securities Code prohibits market manipulation by providing that any person who shall disclose false or misleading information, make fictitious transactions or carry out fraudulent manoeuvres with a view to artificially changing the regular operation of securities markets or markets relating to other financial instruments, notably by modifying the conditions of formation of the corresponding quotations, the normal conditions of the offering or demand of any securities or other financial instruments on the secondary market and the normal conditions of launching and acceptance of public offers, shall be punished with imprisonment of up to three years and a fine. Although not likely to occur (there is effectively no precedent) such provision can be theoretically applicable to a case of false statements in a prospectus provided that the relevant circumstances described above are met.

3.3 Stock exchange sanctions

Depending on whether the fault can be remedied or not, the stock exchange may suspend or exclude any securities from listing if the admission requirements for listing are no longer met (Articles 206 and 207 of the CVM). It is not likely however that the stock exchange decides to suspend or exclude any securities from listing due to the omission of material information or false statements in the prospectus of admission as the CMVM is the competent authority to approve the content of the prospectus.

Part 4. Investor's right of restitution for losses

Investors may obtain judicial restitution for the damages they incurred by reason of an inaccurate or incomplete prospectus through a proceeding before a civil court under Article 149 of the CVM. Moreover, if the omission is a crime according to the Criminal Code, a claim for damages suffered by investors should generally be filed in the same criminal law suit ("Pedido de Indemnização Civil"), as prescribed by Article 71 of the Code of Criminal Procedures.

Article 31 of the CVM establishes the right to class action suits for the protection of individual or collective interests of non-institutional investors. The CMVM also offers a voluntary arbitration service to resolve conflicts between non-institutional investors, on one side, and investment firms, stock exchange associations, and issuers, on the other side.

Regarding civil liability, under the Portuguese Civil Code, an entity is not generally responsible for pure advice, recommendations or information given to third parties, even in case of negligence. However, an obligation to indemnify the damaged parties arises when there is a legal obligation to provide such advice, recommendation or information, and there was negligence or deceit causing damages. Articles 135 of the CVM effectively establishes such obligation for the content of the prospectus, and Article 149 expressly provides for the liability in case of non-compliance.

The parties listed in Article 149 of the CVM are jointly and severally liable for damages caused by a defective prospectus. Liable parties are, among others, i) the issuer; ii) the members of the issuer's management body; iii) the members of the auditing body, accounting firms, and individuals that have certified or verified the accounting documents on which the prospectus is based; iv) the financial intermediaries assisting with the offer; and v) any other person that accepts being appointed in the prospectus as responsible for any information, forecast or study included therein. Such parties are liable for damages caused by a defective prospectus unless they are able to evidence that they have acted

without fault. Therefore, the issuing company itself, its directors and main executive officers[397], the accounting firm that audited the issuer's financial statements, and the distributor, are clearly civilly liable for the content of the prospectus.

The lawyers advising the transaction would only be liable if they accept being named in the prospectus as having prepared or revised any information included therein. However, attorneys may avoid liability by simply removing any reference to their names in the prospectus (even if they have effectively acted for the issuer), in which case they would not be required to sign a responsibility statement.

A controlling shareholder of a corporation is not civilly liable for the content of the prospectus, and would not be responsible for the corporation's liabilities, or to the acts or omissions of directors and officers of the corporation.

Under general law principles, the plaintiff generally has to prove the following five elements to obtain compensation for damages:

(1) That there was an action, such as providing wrong information in a prospectus, or an omission, such as failing to include material information. Omissions are relevant only when, as in the case of the prospectus, there is a legal duty, arising either from law or contract, to act in a specific way.
(2) That the act or omission was illicit, since it breached an obligation established in the law.
(3) That there was fault resulting from either negligence ("mera culpa") or gross negligence ("dolo"). Pure negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. Gross negligence is the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. In case of prospectus liability, fault is judged according to the highest standards of professional care, as explicitly established in Article 149.
(4) That the plaintiff has suffered damages.
(5) That there is a direct causal relationship between the breach and the plaintiff's injury. The doctrine maintains that the cause of a damage is the action or omission that, in abstract, seems appropriate to produce such result. Therefore, civil liability would not arise from an illicit action that causes damage, even if the wrongdoer acted with fault, if the action is not theoretically appropriate to produce such result.

Plaintiffs bear a lower burden of the proof for a case of losses resulting from a defective prospectus. Under Article 149 of the CVM, the investors do not have to prove the defendant's fault. On the contrary, the defendant must prove that he acted without fault to avoid liability.

According to the same Article 149, the defendant may be relieved by proving that the investor knew or should have known about the deficiency of the prospectus' content on the date of contract (e.g., transmission of the order to subscribe for securities) or when cancellation was still possible.

Moreover, Article 150 of the CVM has determined some cases of strict liability, where establishing civil responsibility on one party deems other parties liable, independent of their own fault. Thus, the issuer is jointly liable if the members of the issuer's management body, or the members of the auditing body, accounting firms, or any other individual that have certified or verified the financial statements, are found civilly liable for the content of the prospectus. Similarly, the leader of the underwriting consortium is jointly liable if a financial institution acting as a member of the placing syndicate is found civilly responsible.

[397] Note that Portuguese corporate law does not provide for the concept of "officers" in the sense of persons appointed by the directors to perform the management of a company.

Regarding the award of damages, the CVM states that the indemnification must place the injured party in the exact situation it would be in if, at the moment of acquisition or disposal of securities, the prospectus content had been in accordance with the relevant provisions of the Securities Code. The amount of the indemnification is reduced should those liable entities prove that the damages are also due to reasons others than the lack of information or forecasts contained in the prospectus. The right to indemnification must be exercised within six months from the knowledge of the deficiency in the prospectus's content and not later than two years from the date the result of the offer was disclosed.

There are few precedents of liability for information included in the prospectus, probably because losses suffered by retail investor are always very small, and class actions are still rare in the Portuguese securities market.

A case for restitution for losses incurred by reason of an incomplete or untruthful prospectus may take approximately eight years to be resolved by the judiciary, until a final and conclusive judgement is rendered by the court ("res judicata"). A first instance judgement would be issued in approximately four years from the initiation of the lawsuit. Appeal from the first instance judgement would be available as a matter of law, regardless of the merits of the case. There are two levels of appeal, based on the monetary value of the action. Claims for damages exceeding 3,740.98 Euros may be subject to appeal to the Court of Appeal ("Tribunal da Relação"), and claims for damages exceeding 14,963.94 Euros may be subject to appeal to the Supreme Court. Appeal may only take place when the court decision has been unfavorable to the appellant in an amount exceeding half of the above mentioned thresholds, respectively. The Supreme Court may only resolve disputes over legal issues, but not case facts.

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SECURITIES LAW OF SINGAPORE

Part 1. The regulator and its supervisory and regulatory powers

The regulation of the securities market in Singapore is generally assigned to two regulators, the Monetary Authority of Singapore ("MAS") and the Registrar of Companies and Businesses[398] ("RCB"). The general policies relating to the securities markets and licensing of market participants is the responsibility of the MAS, while the actual administrative processing of Offering Documents is under the supervision of the RCB. The Securities Industry Council ("SIC") is generally responsible for advising the Minister of Finance concerning the securities industry, and MAS may consult SIC from time to time relating to the proper and effective implementation of the Act. The SIC also administers the Singapore Code on Takeovers and Mergers.

The President of the Republic of Singapore appoints the Chairman, Deputy Chairman, Managing Director, and other directors of the MAS. These appointments are made based on the recommendations of various persons, which may include the Cabinet, the Minister of Finance, and the Public Service Commission. The President may revoke his appointment to the MAS at any time, if he does not concur with the advice of the recommending authority. The Minister of Finance appoints the RCB and the members of the SIC. The RCB may be removed at any time by the Minister of Finance, but there is no explicit power of removal granted in relation to members of the SIC.

Regulations are not issued by the MAS, but by the relevant Minister. For example, the Companies Act lays out the requirements that must be satisfied by the prospectus and gives the Minister power to make changes to those requirements (Companies Act, Article 45(8)). The MAS, after consultation with the Securities Industry Council and a committee of a securities exchange, may amend the rules or the listing rules of an approved securities exchange (Securities Industry Act ("SIA"), Article 18(3)). Other regulatory actions are generally subject to ministerial oversight by way of rights of appeal.

The investigation and prosecution of securities law violations generally falls within the scope of responsibility of the police authorities and Attorney-General's Chambers. This would include investigations and prosecutions in relation to defective prospectuses. However, according to the SIA the SIC has the power to summon persons and to require the production of documents in connection with an inquiry relating to the securities industry (Section 14(4) of the SIA). Additionally, if the MAS has reason to suspect that any person has committed an offence under a provision of the SIA or has been guilty of fraud or dishonesty regarding a dealing in securities, it may make such investigations as it thinks appropriate (Section 11 of the SIA). The MAS may at any time give a direction to any person who is or has been a party to any dealing in securities (among other persons who have access to information or documents) requiring the production of such books as specified relating to a securities dealing (Sections 5, 10 and 12 of the SIA).

Part 2. The duty to disclose material information

No offer of shares may be made to the general public in Singapore unless an offering document has been lodged and registered by RCB. The offer must be accompanied by either a prospectus or a profile statement (essentially an abridged prospectus) under Section 43 of the Companies Act. There is no

[398] The Registrar of Companies and Business is responsible for the administration of lodgments of Offering Documents.

waiting period when the issuer's shares may be offered but sales may not be finalized. The regulator does not generally possess the authority to oppose an offering document whether it meets formal disclosure requirements or not.

The Fifth Schedule of the Companies Act sets forth the requirements for disclosure in the prospectus. In addition, Article 713 of the Listing Rules to the Singapore Stock Exchange requires that the prospectus contains the information required by the International Organization of Securities Commissions in "International Disclosure Standards for Crossborder offerings and initial listings by foreign issuers." The prospectus must disclose, among other items, the following:

1. The amount of compensation paid, and benefits in kind granted, to the company's directors and members of its administrative, supervisory or management bodies by the company and its subsidiaries for services in all capacities to the company and its subsidiaries by any person. Disclosure of compensation is required on an individual basis. If any portion of the compensation was paid (a) pursuant to a bonus or profit-sharing plan, provide a brief description of the plan and the basis upon which such persons participate in the plan; or (b) in the form of stock options, provide the title and amount of securities covered by the options, the exercise price, the purchase price (if any), and the expiration date of the options (IOSCO Rules – Section 6.B).
2. The number of shares of the issuer owned by each shareholder with an interest in at least 5% of the votes in the company (Companies Act - Schedule V - PART VI – Article 10). The definition of "interest" is quite broad (Companies Act – Article 7). In particular, where a body corporate is deemed to have an interest in a share and (a) the body corporate is, or its directors are, accustomed or under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of a person; or (b) a person has a controlling interest in the body corporate, that person shall be deemed to have an interest in that share (Companies Act – Article 7.4). Also, where a body corporate is deemed to have an interest in a share and (a) a person is; (b) the associates of a person are; or (c) a person and his associates are, entitled to exercise or control the exercise of not less than 20% of the votes attached to the voting shares in the body corporate, that person shall be deemed to have an interest in that share (Companies Act – Article 7.4A).
3. Stock ownership of company's directors and members of its administrative, supervisory or management bodies by the company and its subsidiaries. For each person, disclosure shall include the number of shares and percent of shares outstanding of that class held by the persons listed and options granted to them on the company's shares. Information regarding options shall include: the title and amount of securities called for by the options; the exercise price; the purchase price, if any; and the expiration date of the options (IOSCO Rules – Section 6.E).
4. The date of, parties to, and general nature of every material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the corporation or a contract entered into more than two years before the date of issue of the prospectus (Companies Act - Schedule V - PART VI – Article 13).
5. Full particulars of the nature and extent of the interest, direct or indirect, if any, of every director and of every expert in the promotion of, or in the property proposed to be acquired by, the corporation (Companies Act - PART I –Article 17). In addition, listing rules (IOSCO Rules – Section 7.B) require that the issuer disclose, for the most recent three fiscal years, information with respect to transactions or loans between the company and related parties[399] including: (a) the nature and extent of any

[399] Related parties include: (a) enterprises that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with, the company; (b) associates; (c) individuals owning, directly or indirectly, an interest in the voting power of the company that gives them significant influence over the company, and close members of any such individual's family; (d) key management personnel, that is, those persons having authority and responsibility for planning, directing and controlling the activities of the company, including directors and senior management of companies and close members of such individuals' families; and (e) enterprises in which

transactions or presently proposed transactions which are material to the company or the related party, or any transactions that are unusual in their nature or conditions, involving goods, services, or tangible or intangible assets, to which the company or any of its parent or subsidiaries was a party; and (b) the amount of outstanding loans (including guarantees of any kind) made by the company or any of its parent or subsidiaries to or for the benefit of any of the persons listed above. The information given should include the largest amount outstanding during the period covered, the amount outstanding as of the latest practicable date, the nature of the loan and the transaction in which it was incurred, and the interest rate on the loan.

6. All the information that investors and their professional advisers would reasonably require to make an informed assessment of the securities being offered (Companies Act, Section 45(1)(a)).

The Fifth Schedule of the Companies Act requires that only the accountant sign the prospectus. As a matter of practice, however, the Offering Document will generally be signed by the directors. However, the issuer's directors, distributor and accountant (regarding financial information) are liable for the truthfulness and completeness of the material information included in the prospectus (Companies Act, Sections 55 and 56).

The distributor is not required by law to perform a due diligence review of the information contained in the prospectus. In practice, distributors are likely to perform a due diligence review because, in most cases, they would otherwise be liable under Section 55(3) of the Companies Act for false or misleading statements in the prospectus (this can arise by reason of statements made, an underwriting role, or otherwise). If representations were made connected to the sale of shares but not included in the prospectus, a distributor might be held liable if they turned out to be incorrect. Negligence on the part of the distributor would form the basis of a cause of action in this regard.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

The law does not provide explicitly for sanctions that the MAS may impose for untrue statements or omissions of material information in a prospectus[400]. However, if the MAS considers necessary to prohibit the trading in particular securities, it may give notice in writing to the exchange of that opinion. If the exchange fails to take action or prevent trading in those securities, the MAS may prohibit trading in those securities for up to 14 days. The issuer may request to refer the matter to the Minister, who can order to revoke the MAS notice, or confirm the prohibition (Section 22 of the SIA).

The MAS may, by notice in writing, direct a licensed dealer, investment adviser, or representative, to comply with such requirements as the MAS considers necessary in the public interest, and may also revoke a license if the MAS has reason to believe that the licensed person has not performed his duties efficiently or honestly (SIA, Sections 33A and 38). This power could be invoked if the licensee was

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a substantial interest in the voting power is owned, directly or indirectly, by any person described in (c) or (d) or over which such a person is able to exercise significant influence. This includes enterprises owned by directors or major shareholders of the company and enterprises that have a member of key management in common with the company. Close members of an individual's family are those that may be expected to influence, or be influenced by, that person in their dealings with the company. An associate is an unconsolidated enterprise in which the company has a significant influence or which has significant influence over the company. Significant influence over an enterprise is the power to participate in the financial and operating policy decisions of the enterprise but is less than control over those policies. Shareholders beneficially owning a 10% interest in the voting power of the company are presumed to have a significant influence on the company.

[400] There are however sanctions for making a false or misleading statement generally.

found responsible for a defective prospectus. In addition, as explained below, the MAS may apply to High Court to order a person who has committed an offence under the SIA or has contravened its license or the listing rules, to refrain from or to perform specific actions (Section 13 and 20 of the SIA).

3.2 Judicial sanctions

Civil liability (see Part 4) may be imposed for (1) false or misleading statements in a prospectus, (2) omission to state information required to be disclosed in a prospectus, or (3) omission to state a new circumstance that has arisen since registration of the prospectus and would have been required to be included in the prospectus if it had arisen before the prospectus was registered (Companies Act, Section 55). In addition, each of the above conducts is also a criminal offense, punishable upon conviction with a fine or imprisonment (Companies Act, Section 56). The criminal sanctions apply to the issuer or person making the offer, each director of the issuer, an underwriter to the issue named in the prospectus with her consent, a person named in the prospectus who gave a consent and made a statement included in the prospectus, and a person who made the false or misleading statement, or omitted to state information, as the case may be. Liable parties may be relieved from criminal liability by proving that the statement or omission is not materially adverse or that she made all inquiries reasonable in the circumstances and after doing so believed on reasonable grounds that the statement was not false or that there were no omissions (Companies Act, Section 55B).

On application of the MAS or of the exchange, if it appears that a person has committed an offence under the SIA or has contravened its license or the listing rules (or is going to incur in such offence or contravention), the High Court may make an order (1) restraining a person from acquiring, disposing or dealing with any securities, (2) declaring a securities contract void, or (3) for the purpose of securing compliance with any other order, or if considered desirable in consequence of other order, directing a person to do or to refrain to do a specific act or any other ancillary order (SIA, Section 13).Similarly, the High Court may make an order giving directions to a person associated with a body corporate that has been admitted to the official list concerning the compliance with, observance or enforcement of, or the giving effect to, the rules or listing rules of the stock exchange (SIA, Section 20).

3.3 Stock exchange sanctions

In case of a defective prospectus, the stock exchange cannot impose sanctions on the issuer, its directors or officers, the distributor, or the accounting firm. The stock exchange may, however, remove any securities from listing if the issuer does not comply with the applicable requirements, such as the listing rules, and the exchange considers delisting would be in the public interest.

Part 4. Investor's right of restitution for losses

Investors may obtain restitution for the damages incurred due to untruthful or incomplete information in a prospectus through a civil claim before the judiciary. Each investor suffering a loss has to be a party to an action since class action suits are not available. However, there are rules regarding the consolidation of actions relating to the same facts.

Section 55 of the Companies Act sets out the civil remedy for false or misleading statement or omissions of the information in an offering document. A wide range of persons can be subject to the liability established under this Section, including: (1) the issuer, (2) each of its directors (and proposed directors), (3) an underwriter (but not a sub-underwriter) named in the prospectus with her consent, and (4) any person named in the prospectus with her consent as having made a statement (e.g., the accounting firm that audited the issuer's financial statements).

Section 55 of the Companies Act imposes strict liability on the liable parties. Initially, the burden of proof is on the investor seeking restitution. The plaintiff needs to prove that there was either (1) a false or misleading statement in the prospectus, (2) an omission to state information required to be disclosed in the prospectus, or (3) an omission to state a new circumstance that has arisen since registration of the prospectus, and would have been required to be included in the prospectus if it had arisen before the prospectus was registered. The plaintiff will also need to prove loss or damage, and that such loss or damage was a result of the false or misleading statement in or omission from the prospectus. The materiality of the statement or omission would be relevant in order to establish the cause of action.

If the strict liability test above is met, the burden of proof is then reversed and the defendant bears the onus of establishing a defense, among those available under the law, to be released from liability. The state of mind of the defendant (i.e., whether she acted with negligence or intent, etc.) is irrelevant.

Once the burden of the proof is reversed, the defendant will need to establish a defense, such as the fact that the statement in the prospectus is true or that there were no omissions. The defendant can raise the general "due diligence" defense set out in Section 55B.[401] In addition, a proposed director, an underwriter, or any person named in the prospectus with her consent as having made a statement can also establish a defence if she can prove that she publicly withdrew her consent to being named in the prospectus in respect of a particular statement.

Section 55 is not meant to override, but to supplement the existing law. However, plaintiffs face a higher burden of proof under alternative remedies (for example, negligence under tort law). Accordingly, investors may be less likely to choose to make a civil claim in respect of false statements or omissions in a prospectus by choosing a cause of action other than that provided by Section 55.

Controlling shareholders are not liable under Section 55 for false or misleading statements or omissions of information in a prospectus. It is unlikely that the controlling shareholder of a corporation may be held civilly liable due to acts or omissions of directors and officers of a corporation, unless the controlling shareholder had given some sort of guarantee in respect of the directors' or officers' decisions, or if it could be held that the directors and officers were agents of the controlling shareholder.

Corporate veil piercing is possible under common law, but only in certain circumstances, which are not easy to prove in a court of law (for example, if the corporation is used as a vehicle to commit fraud, or if the corporation was a sham to disguise true facts, or if the corporation was an agent for the controlling shareholder).

The pace of litigation in Singapore is relatively quick. A case for restitution for losses due to false or misleading information in a prospectus may take between one and two years, from the commencement of the process until first-instance judgement (including time for filing a defense, discovery, and usual interlocutory applications). If the defendant has no valid defense, this process may be accelerated, and it would also be unlikely for any leave to appeal (on a point of fact) to be granted.

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[401] Section 55 B provides that a person is not liable under Section 55 if she proves that she made all the inquiries (if any) that were reasonable under the circumstances, and after doing so believed on reasonable grounds that the statement was not false or misleading or believed on reasonable grounds that there was no omission from the prospectus

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SECURITIES LAW OF SOUTH AFRICA

Part 1. The regulator and its supervisory and regulatory powers

The Financial Services Board Act 97 of 1990 ("FSBA") established the Financial Services Board ("FSB") to be in charge of supervising the compliance with laws regulating financial institutions and the provision of financial services. The term "financial institution" includes any stock exchange, any of its members and stockbrokers, and investment managers. The FSB also regulates insurance companies, while the South African Reserve Bank regulates banks.[402]

The FSB is governed by so many members as the Minister of Finance may deem necessary and appoint. The executive officer of the FSB, appointed by the Minister after consultation with the FSB, is the Registrar of Stock Exchanges (Stock Exchanges Control Act 1 of 1985).[403] The Minister of Finance may terminate the term of any member of the FSB at any time[404]. The FSB can make any rules it may deem fit regarding any matter in order to achieve the objects of the FSBA[405]. The FSB has wide powers of investigation with Court imposed criminal sanctions in the event of obstruction (FSBA 12).

The Registrar of Stock Exchanges licenses stock exchanges and approves and amends the exchange's rules. The Registrar may require any issuer of listed securities to disclose to her any information at such issuer's disposal pertaining to such securities or to the affairs of that issuer which is in the public interest and, after giving such issuer an opportunity of making representations to her, require such issuer to disclose that information to the registered holders of the securities in question (SECA 19). The Registrar of Stock Exchanges may also appoint inspectors to carry out inspections of the affairs of financial institutions[406]. The inspectors may administer oath or otherwise examine any director, member, or employee of a financial institution, and any other person who may be able to provide information relating to affairs of the institution under inspection. Refusal to comply with the request of an inspector is a criminal offense.

The Minister of Finance may make regulations as to all matters which are required or permitted to be prescribed under the Stock Exchanges Control Act (e.g., the minimum requirements in regard to experience and education to be complied with by applicants for membership of a stock exchange and the minimum capital which a member shall hold, what that capital may be comprised of and the basis of valuation of such capital).[407]

The Registrar of Companies, a department in the Department of Trade and Industry, administers the Companies Act 61 of 1973 ("CA") and the Close Corporations Act 69 of 1984. It is staffed by full time government employees and administers those provisions in the Companies Act that apply to the primary market in securities. The Registrar of Companies is appointed by the Minister of Trade and Industry subject to the laws governing the public service, and cannot be discharged at the Minister's will.

The Registrar of Companies issues Practice Notes as to the practice in the office (i.e. the lodgment of prospectuses, etc.), but does not have any other legislative powers. The Minister of Trade and Industry can make regulations (subordinate legislation) if the Companies Act authorizes it for a particular aspect

[402] Banks Act 94 of 1990.
[403] Section 2 SECA.
[404] Sections 4 and 6 FSBA.
[405] Section 19 FSBA.
[406] Inspection of Financial Institutions Act, 1998.
[407] Section 51 SECA.

(Section 15 of the Companies Act). Presently the Minister has this power to exclude certain companies (other than those defined in the Companies Act) to comply with the prospectus requirements[408] and to increase the prospectus exemption in respect of the "sophisticated investor" (presently R100 000).[409] The Registrar of Companies cannot directly command the delivery of documents or the testimony of witnesses. However, the Minister of Trade may appoint one or more inspectors to investigate the affairs of a company if its members have not been given all the information with respect to its affairs they might reasonably expect (Companies Act, 258). Any director, officer or agent of a company or other body corporate whose affairs are being investigated by an inspector shall at the request of such inspector produce to her all books and documents under the control or custody of the company (Companies Act 260). Also, an inspector may for the purpose of any investigation conducted by her: (1) summon any director, officer, employee, member or agent of the company or other body corporate to appear before her to be interrogated or to produce any book or document so specified; and (2) administer an oath to any person appearing before her in pursuance of a summons, and interrogate such person and require her to produce any such book or document.

Part 2. The duty to disclose material information

It is prohibited to make any offer to the public for the subscription or the sale of shares unless it is accompanied by a prospectus registered in the Companies Registration Office (Sections 145 and 146 of the Companies Act). If the prospectus complies with the Companies Act, the Registrar of Companies must register it. The Registrar does not evaluate the quality of the information. The shares may not be allotted or an offer may not be accepted until the beginning of the third day (or later date stipulated in the prospectus) from the date the prospectus was first issued.

The prospectus must contain "a fair representation of the state of the affairs of the company" (Section 148 of the Companies Act). The information specified in the Schedule 3 of the Companies Act includes the following:

1. Names, occupations, and addresses of the issuer's directors (including the chairman and the managing director, if any), and their remuneration, and a summary of existing or proposed contracts relating to the directors' managerial remuneration.[410]
2. Details on material loans, purchases of fixed assets and immovable property, and the dates, nature and parties to every material contract not in the ordinary course of business.[411] A copy of the referred material contracts must be attached to the prospectus for registration.
3. Full particulars of any material interest, either direct or indirect (including through the membership of another corporate body or association), of every director, in the promotion of the company or in any property acquired or to be acquired by the company.[412] However, there is no requirement to report the ownership of directors and officers of the issuer, except in the case of directors of a listed company.

The register of members is a public document and any shares beneficially held by a registered shareholder must be disclosed every three months and this information is available from the company and is disclosed in the annual financial statements (Section 140A of the Companies Act). However, note that there is no

[408] Section 143 (2) CA.
[409] Section 144 (b) CA.
[410] Paragraphs 2 and 16 of Schedule 3.
[411] Paragraphs 9, 12, and 16 of Schedule 3.
[412] Paragraphs 12 and 17 of Schedule 3.

requirement that the prospectus discloses the name and percentage of the issuer's capital held by the main shareholders of the company.

The prospectus must be signed by every person named as a director of the issuer. The accounting firm must give its written consent for the issue of the prospectus containing any statement made by it. The lawyer involved in the transaction must also give a written consent to the Registrar of Companies that her name be used in the prospectus as well as the context in which it is used.[413] The distributor, if used, is also required to sign the prospectus. In South African law, the distributor is the equivalent of a firm underwriter in the United States securities laws and in practice either the issuer or the distributor offers the shares to the public. Therefore, while there will be a contractual relationship between the issuer and the distributor that may regulate the integrity of the information, there is no general duty in law to do a due diligence review. However, it would be prudent for the distributor to do such review in light of possible civil or criminal liability, as explained below in Part 4.

The distributor can also be liable under common law for fraudulent or negligent misrepresentation in case of representations not included in the prospectus that subsequently turned out to be incorrect.

If the shares are to be listed on the JSE Securities Exchange the prospectus must comply with the requirements of the pre-listing statement in terms of the JSE Listings Requirements (Sections 6 and 7).

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

The law in South Africa does not provide for administrative sanctions in a case of omission of material information in a prospectus for the public offer of shares to be applied against the issuer, its directors or officers, the underwriter, the accounting firm, or the lawyers involved in the public offer.

3.2 Judicial sanctions

If the prospectus contains an untrue statement, a director, promoter, any person who has authorized the issue of the prospectus, and any expert who has consented to a report or extract with an untrue statement, shall be guilty of an offense and may be punished with a fine, or imprisonment for up to two years, or both (Sections 162 and 441 of the Companies Act). Note that the definition of "untrue statement" under the Companies Act (Section 148) includes not only statements which are misleading in the form and context in which they are included, but also omissions of any matter, regardless on whether such matter is required to be included by the Act or not, where the omission is calculated to mislead (i.e. the common law equivalent of fraud). Under statutory law, the liable party may be excused of any criminal liability if it is proved that the untrue statement was immaterial, or that after reasonable investigation, the person had reasonable grounds to believe and did believe that the statement was true and that there was no omission of any material fact necessary to make a statement not misleading.

In the case of the auditor, negligence in the performance of her duties is an offense punishable with a fine (Section 27 of the Public Accountants' and Auditors' Act, 1991).

3.3 Stock exchange sanctions

[413] Section 151 of the Companies Act

The committee of a stock exchange administers the list of securities with powers to suspend or remove a security from the list if it is in the public interest[414] and to request information from issuers[415]. Its decisions may be appealed to a board of appeals appointed by the Minister. According to the rules of the JSE Securities Exchange, pre-listing statement must be issued before listing and if a prospectus is registered, it must contain all the required information to qualify as a pre-listing statement. The exchange can suspend or delist a security in case of untrue statements or omissions of material information in the pre-listing statement or impose various other sanctions such as a fine, public censure or publication of the sanctions. The directors of the company assume responsibility.

Part 4. Investor's right of restitution for losses

In order to recover losses due to a defective prospectus, an investor can start a judicial proceeding before a civil or criminal judge.

According to Section 160 of the Companies Act, any person who has acquired shares on the faith of the prospectus may recover losses or damages sustained by reason of any untrue statement included in the prospectus. To this effect, untrue statements include: (1) a statement which is misleading in the form and context in which it is included therein; and (2) an omission from a prospectus of any matter where such omission is calculated to mislead. The liable parties include the issuer, its directors, a promoter[416], the distributor[417], and any person who has authorized the issue of the prospectus or has made the offer for sale in pursuance of a prospectus. Experts who have given the consent required as per Sections 151 of the Companies Act can also be liable for untrue statements made by them, under Section 161 of the Companies Act. In addition, Section 20 (9) (b) of the Public Accountants' and Auditors' Act, 1991 establishes that any accountant and auditor shall be liable with respect to any opinion, certificate, report, or statement made pursuant to a negligent performance of her duties, to any third party who relied on such opinion, certificate, report, or statement, for financial losses incurred therefrom.

The statutory remedy enables the subscriber or purchaser to recover damages by merely proving that she acquired the shares on the faith of a prospectus and sustained loss or damages by reason of an untrue statement contained therein without having to establish fault. No causal link is required between the particular untrue statement or omission and the loss suffered. However, under the Companies Act, an omission in a prospectus will only be actionable in statutory civil or criminal law if the omission is "calculated" to mislead (i.e., done with intent). Accordingly, in the case of an omission (as opposed to a positive misstatement) the subscriber must prove intent to mislead. Therefore, a negligent omission will only be actionable under common law.

The issuer's directors, promoters, the persons who authorized the issue of the prospectus, and the experts who gave the consent required by Sections 151 may escape liability if they can prove that they had reasonable grounds to believe, and did believe, that the statement was true. Experts would also need to establish that they were competent to make the statement included in the prospectus.

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[414] Section 17 SEC

[415] Section 19 SECA.

[416] The term "promoter" in relation to civil and criminal liability in respect of an untrue statement in a prospectus, means a person who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company or preparing the said prospectus. In practice a promoter can be a person who registers and floats the company, but who is not necessarily a director of manager of the company.

[417] In terms of Section 160 of the Companies Act the distributor has the same criminal and civil liability as if she was the issuer and in terms of Section 146 she has the duty to issue the prospectus.

It should be noted that in common law, anybody who made a misrepresentation in a prospectus (by act or omission) is liable. If the omission was material (actually induced the contract), then the injured party can claim restitution and/or damages. If it was not material, only damages suffered directly as a result of the omission can be claimed. The liable parties may include the company (if it can be proved that the person who made the misrepresentation acted as agent for the company within the scope of her authority) and also that particular person. If a person makes a misrepresentation in the prospectus, irrespective of the status of that person (e.g. an accountant, officer, or controlling shareholder, or for that matter anybody else), the company and that person will be liable as it is obvious that the representation was made for and on behalf of the company.

At common law the remedies for misrepresentation are rescission of the contract and/or damages.The subscriber or purchaser seeking to recover damages for misrepresentation from a director or other person responsible for the prospectus would have to prove all the elements of the delict. Therefore, there must be a misrepresentation (act or omission), the act must be wrongful[418], there must be fault (either intent or negligence), there must be damage and the damage must be a direct result of the misrepresentation (causation). In practice, it is virtually impossible to prove the causation element. If the fault present is intent (not negligence), then it is also a criminal offence (i.e. fraud) as explained above under judicial sanctions. The present position in South African law, however, is that a person must rescind the sale in order to claim damages, because non-rescission coupled with damages would mean that the shares are obtained at a discount, which is unlawful under sections 81 and 82 of the Companies Act.

In South African law, unlike that of the United States of America, a shareholder, whether controlling or a 100% owner of the company, has no duties towards the company, either in common law or in statute. However, it is possible to pierce the corporate veil, if the act is fraudulent, dishonest, or is deemed to be improper conduct. Shareholders, whether controlling or not, cannot be held civilly responsible for the acts or omissions of directors or officers.

A prospectus liability case may take approximately three years to reach first instance judgement. If appealed, a firm and final decision may take an additional two years. However, the right to appeal is not automatic, and will depend on the merits of each case.

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[418] Wrongfulness, as one element of the delict, is present also if a legal duty (to act positively or to prevent a loss) is breached. There is, however, no general duty to act positively or to prevent a loss, but it is submitted that such a duty on the directors would be present in the case of a prospectus. See Neethling, Potgieter and Visser Law of Delict (1999) 55 et seq and Lötz Skadevergoeding op grond van Nalatige Wanvoorstelling in die Suid-Afrikaanse Koopreg LLD thesis UP 1994. See also Pretorius, Delport, Havenga and Vermaas Hahlo's Company Law through the Cases 92 on the choice of remedies.

SECURITIES LAW OF SPAIN

Part 1. The regulator and its supervisory and regulatory powers

The main regulator of the securities market in Spain is the National Exchange Securities Commission (CNMV). Banks and insurance companies are regulated by the Bank of Spain and the General Directorate of Insurance, respectively.

The Securities Market Law (LMV) creates the National Exchange Securities Commission (CNMV), which is governed by a Board of seven members (Chairman, Vice-Chairman and 5 commissioners),. At the proposal of the Ministry of Economy, the Government appoints the Chairman and Vice-Chairman for terms of four years. The Managing Director of the Treasury and Financial Policy *(Director General del Tesoro y Política Financiera*) and the Deputy Governor of the Bank of Spain (*Subgobernador del Banco de España*) are commissioners by reason of their position. The other three commissioners are appointed by the Ministry of Economy for 4 years terms. Commissioners other than those by reason of their position may be removed by the Government before the expiration of their term only for legal causes and after the corresponding files are conducted by the Ministry of Economy.

The CNMV regulates and supervises the securities market. With regard to regulation, the CNMV only develops Royal Decrees enacted by the Government and Orders enacted by the Ministry of Economy. The regulations approved by the CNMV (*circulares*) do not require prior approval by other governmental authority, but they must compulsorily refer to matters for which a law or decree or order has permitted implementation (LMV, Article 15). Regulations may be revised by the administrative courts or by the Constitutional Tribunal if they violate the law or the Constitution, respectively. With regard to supervision, the LMV has granted certain authority to other entities, whose powers are limited to their specific scope and which are likewise subject to the supervision by the CNMV. Such entities with supervision powers are: Management Corporations of the Stock Exchanges *(Sociedades Rectoras de las Bolsas de Valores*), Stock Exchange Corporation (*Sociedad de Bolsas*), Management Corporations of the Options and Futures Markets *(Sociedades Rectoras de los Mercados de Opciones y Futuros*) and Securities Compensation and Liquidation Service *(Servicio de Compensación y Liquidación de Valores*). In addition, the LMV has also granted authority to several Autonomous Communities, but only with regards to individuals and legal entities which act exclusively in the territory of the relevant Autonomous Community. Finally, LMV also sets forth that the public debt market is supervised and regulated by the Bank of Spain.

The CNVM may command the delivery of documents from persons or entities performing activities related to the securities market (LMV, Article 85), including issuers of securities, financial institutions, and investment firms. While the law does not include an express power to command testimonies, such power could be deemed implicit within its supervision and monitoring authority.

Part 2. The duty to disclose material information

A prospectus must be made available to potential investors before shares may be sold, but Spanish law does not require the actual delivery of the prospectus to potential customers (Article 26 of the LMV and Articles 5 and 23 of Royal Decree 291/1992). No waiting period is established by law between the offer and the completion of the sale.

Royal Decree 291/1992 and Order of July 12, 1993 stipulate the disclosure requirements for a prospectus. Among other items, the prospectus must disclose the following:

1. Total salaries and other remuneration paid to founders and members of the board of directors and management (Order 12/7/93 VI.2.3).

2. Name and ownership of persons who, directly or indirectly, exercise control (Order 12/7/93 VI.3). As a matter of practice, the CNMV requests disclosure of shareholders owning more than 5% of the issuer's capital, consistently with Royal Decree 377/1991, of March 15, which requires persons directly or indirectly acquiring or transferring shares in Spanish listed companies so that the acquisition results in that person holding 5% (or multiples thereof) of the share capital or the disposal takes any existing holding below 5% (or multiples thereof) of the share capital, to report such acquisition or disposal to the CNMV, the Stock Exchange and the relevant company.[419] Reportings are publicly available at the CNMV's registries and web page.
3. Number of voting shares and securities that give right to acquire voting shares owned, directly or indirectly, by founders and members of the board of directors and management (Order 12/7/93 VI.2.1).
4. Description of unusual and relevant transactions occurring during the previous or current financial year in which founders and members of the board of directors and management have a direct or indirect material interest (Order 12/7/93 VI.2.2).
5. All relevant information for a reasonable investor to obtain a fair image of the issuer and well-based assessment of the offer (Article 15 of the Royal Decree).

The CNMV may request that any further information that it deems appropriate be included in the prospectus (Article 20.6 of the Royal Decree). Likewise, the CNMV may include in the prospectus clarifying statements. However, the CNMV may not oppose a prospectus on grounds that the investment is speculative, inadequate, or generally of poor quality.

The offering document must be signed by the issuer, duly represented by a person with authority to act in its name and on its behalf. This person would normally be the issuer's Chairman or CEO or an issuer's director or officer. The Order and the Royal Decree hold the issuer liable for information in the prospectus.

According to Article 20.3 of Royal Decree 291/1992, as amended by Royal Decree 2590/1998, of 7 December, the distributor, when acting as a global coordinator or manager, (hereinafter, the "Distributor"), must sign a letter stating that it has carried out all the required due diligence activities, and that the information contained in the prospectus is consistent with the due diligence and complete. This letter is to be attached to the prospectus. A Distributor can be held liable for representations not included in a Prospectus that, without being fraudulent or false, turned out to be incorrect due to the Distributor's negligence in conducting a professional evaluation. This would be based in article 1902 of the Spanish Civil Code according to which anyone causing damages to other parties with acts or omissions carried out with willful misconduct or negligence is obliged to restitute the damages so caused.

Pursuant to Act 19/1988 and its applicable regulations, auditing accounting firms must state that the financial statements have been audited in accordance with generally accepted auditing standards, and that such financial standards present fairly the financial condition and results of operation of the issuer, in accordance with generally accepted accounting principles. As a result, any misleading or incorrect information in audited accounts attached to a prospectus could imply the responsibility of the accounting firm for the damages caused to investors, and sanctions may be imposed by the Accounting and Audit Institute (ICAC), as detailed below.

Part 3. Sanctions for the failure to disclose

[419] In cases where the acquirer or seller resides in a tax haven, a country which has no regulator of the securities market, or a country whose regulator does not exchange information with the CNMV, the threshold triggering the reporting obligation falls down to 1% (and multiples thereof).

3.1 Administrative sanctions

Intentionally circulating misleading information that can induce the public to error on the assessment of securities, or failing to comply with the issuer's obligation to provide information capable to affect the price of the securities where a serious damage to the market is caused, or providing the CNMV with untrue, misleading or incomplete information, are considered "***very serious infractions***" (LMV, Article 99). The sanctions that may be imposed in case of a very serious infraction include (1) a fine of up to five times the amount of the benefit attributed to the violation, or, if not applicable, the greatest among 5% of the violator's assets or 5% of the resources involved in the violation, or 50,000,000 pesetas (approximately EUR 300,000), (2) suspension of the violator's operations in the securities markets (which may be the suspension of the activities of the Distributor) for up to five years, (3) public reprimand published in the official gazette, and (4) the discharge of the violator from a management position (Article 102 of the LMV). Therefore, if the prospectus fraudulently includes false information or omits material information, the issuer, the accountant, and the Distributor[420], may incur in a very serious infringement of the LMV, and are subject to the applicable sanctions. Furthermore, when the infringing party is a corporation, its directors and officers may also be liable if they were responsible for the relevant action or omission, and thus subject to specific sanctions including fines and the suspension or discharge from exercising managerial duties (LMV, Article 105).

On the other hand, failure to comply with the applicable rules regarding information that must be delivered to clients by entities operating in the securities markets, as in the case of a Distributor in regards to a defective prospectus, is considered a "***serious infraction***" (Article 100 of the LMV). Applicable sanctions for a serious infraction may be (1) a fine of up to the amount of the benefit attributed to the violation, or, if not applicable, the greatest among 2% of the violator's assets or 2% of the resources involved in the violation, or 25,000,000 pesetas (approximately EUR 150,000), (2) suspension of the violator's operations in the securities markets (which may be the suspension of the activities of the Distributor) for up to one year, (3) public reprimand published in the official gazette, (4) the temporary suspension of the violator as market member and (5) the temporary suspension of the violator from management duties (Article 103 of the LMV).

The violations of the securities laws provisions that are not very serious or serious infractions are deemed as ***petty infractions*** and subject to a private reprimand or a fine up to 5,000,000 pesetas (approximately EUR 30,000) (Articles 101 and 104 of the LMV).

Sanctions for ***very serious infractions*** are imposed by the Ministry of Economy at the proposal of the CNMV, while sanctions for ***serious***, as well as for ***petty infractions***, are imposed by the CNMV (Article 97 of the LMV). Without prejudice of the authority of criminal courts to determine whether the relevant action constitutes a crime, the Contentious Administrative Courts are the only courts with authority to review sanctions imposed by the CNMV and the Ministry of Economy, as established by Act 29/199 on the contentious administrative jurisdiction.

As regards auditors, it is considered a serious infraction to issue audit reports (which must be attached to the prospectus) without performing due diligence review (Article 16 of Act 19/1988). Applicable sanctions for a serious infraction may be (1) a fine of up to 10 per cent of the audit activities' turnover for the last fiscal year, (2) suspension of the auditing license for up to five years, (3) definitive removal from the auditors' Official Registry (Article 17 of Act 19/1988).

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[420] Where a distributor who sells shares as an underwriter does not act as a coordinator or manager and therefore is not involved in the preparation of the prospectus, it will not be administratively liable for the content of the prospectus, unless it provides investors with false information or make misleading recommendations in relation to the shares. In such case, the distributor would commit a very serious infraction and would be subject to the relevant penalties.

3.2 Judicial sanctions

The directors of a company who intentionally falsify the financial statements or other documents describing the legal or economic situation of the corporation (e.g., a prospectus), in a way that can produce economic damages to the corporation, its shareholders, or investors and other third parties, will be sanctioned with imprisonment and a fine (Criminal Code, Article 290). The crime of fraud[421], punishable with imprisonment, may also apply to intentionally including false or misleading information in a prospectus. In addition, directors or officers of the Distributor and Accountant can be subject to criminal sanctions if they co-operate or participate in the criminal offence explained in the previous paragraph. Note that corporations cannot commit criminal offences under Spanish law.

Judicial injunctions (*"medidas cautelares"*) may only be decided by a judge upon request of a plaintiff in a civil action. Injunctions may include orders to stop or refrain from a specific action or commanding the undertaking of specific actions. Injunctions are ordered to avoid further damages that may result from delay before a final judgement is issued (Article 727 of Spanish Civil Proceedings Act [422]).

3.3 Stock exchange sanctions

The stock exchange cannot impose any sanctions on the issuer, its directors or officers, the Distributor, or the accountant, in case of false information or omissions of information in a prospectus.

Part 4. Investor's right of restitution for losses

Investors may obtain restitution for losses incurred by reason of false information or material omissions in a prospectus through a lawsuit before a civil court. Investors may also have a cause of action based on a criminal conviction in accordance with Article 109 of the Spanish Criminal Code, which provides that the perpetrator of a crime is legally obliged to repair the damages caused.

A class action suit is available in limited cases under Article 15 of Spanish Civil Proceedings Act, when investors are part of a Consumers Association or Damaged Parties Association. In cases where the investors affected by losses due to false information in a prospectus have established an Association, all such investors are afforded the right to participate in any legal proceedings of restitution for losses regardless of whether they have initiated the proceedings or not. To this effect, the lawsuit filed by any damaged investors must be made public.

Civil restitution for damages incurred due to a defective prospectus is governed by principles of general civil law from two different perspectives: tort law and contractual law (i.e., securities laws do not provide a mechanism for restitution).

As regards tort law, Article 1902 of the Spanish Civil Code establishes that any person who causes damages to another by means of a negligent act or omission is obliged to repair the loss.

Under general civil law principles, the issuer's directors and officers who have participated in the preparation of the prospectus or knew the relevant inaccuracies or omissions, and the issuing company itself, may be held civilly liable to investors for losses caused by false information or material omissions in the prospectus.

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[421] Fraud is defined as using deceit to induce another person to transfer her property, with the purpose of benefiting from the deception (Criminal Code, Article 248).

[422] "Ley de Enjuciamiento Civil", Act 1/2000, of 7 January

In respect of the Distributor, it assumes non-contractual liability (e.g. tort) for any damages that may be caused by the investor's reliance on the due diligence letter attached to the prospectus, if the Distributor has acted with willful misconduct or negligence.

Similarly, the accounting firm may also be held responsible under Article 1902 of the Civil Code for damages caused to investors for any misleading or incorrect information in the audited financial statements.

As a general rule, a controlling shareholder is not liable for the acts of the corporation beyond her share capital, and is under no duty to prepare or review the prospectus. However, she may be held liable for the contents of the prospectus in the following cases. First, under Article 1902 of the Civil Code, a controlling shareholder may be held liable for negligently causing damage to investors by omission, if she was aware that the prospectus contained false or misleading information and failed to direct the corporation to remedy the violation, although these circumstances are hypothetical and may be difficult to prove. Second, Courts may eventually determine that the issuing corporation is a mere instrument of the controlling shareholder and pierce the corporate veil.

In order to obtain compensation for losses from the issuer, its directors and officers, its Distributor, or its accountant, investors must prove in court the following four elements: (1) the damage, (2) the action or omission causing the damage, (3) the consequential link between the relevant action or omission and the damage, and (4) the party causing the damages acted with willful misconduct or negligence.

For this purpose, the damage would normally be the loss of value in the securities acquired by the investor on the basis of false or incomplete information when such information is discovered or disclosed. The action causing the damage would be the false information or the omission of material information in the prospectus; in this respect, the fact that it was the omitted or false information and no other reason, that affected the price and produced the losses would need to be proven. And the consequential link between the relevant action and the damage would be the investor's reliance in the prospectus. However, although there is no rule nor case-law on the matter, a judge may reasonably conclude that the investor based her decision to invest on the prospectus since it is the main document available to her on the proposed investment. In such a case, in order to avoid liability, the defendant would bear the burden of proof that the investor did not rely on the content of the prospectus.

In principle, investors would normally need to prove that the party causing the damages acted with willful misconduct or negligence. However, the burden of proof may shift to the defendant in cases for restitution against the issuing company or its directors and officers. Although there is no specific precedent for cases regarding the issuance of securities, certain scholars affirm that the defendant's liability in such cases would be governed by the case law on non-contractual liability due to "objective situations of risk." Under this theory, the preparation of a prospectus in connection with a securities offer creates an objective situation of risk for the investor. In such cases, based on existing case law, the defendant would then bear the burden of proof and would need to show that she acted with diligence.

Regarding Distributors and auditors, case law has generally stated that professionals bear the burden of proof in cases of non-contractual liability and must show that they acted according to professional standards of care. Nevertheless, there is no specific precedent for cases of non-contractual liability of professionals acting in the securities market.

In a case of prospectus liability, the main defenses available to the defendant are to rebut the plaintiff's assertions of damage and defective prospectus, to prove that the investor did not rely on the prospectus, or to prove that the defendant acted with diligence.

As regards contractual liability, it should be noted that Article 1124 of the Civil Code provides the right to terminate a contract when a contracting party does not comply with its obligations under the contract. In that case, the damaged party may demand compliance or request termination, in addition to claiming the payment of damages incurred. In this respect, if the offeror does not comply with any of the obligations assumed in the prospectus as part of the offer (e.g. delivery of the securities, listing, deferred discounts), this could be taken as contractual default and the investor would then be entitled to request compliance or termination (which normally entails restitution of the price paid and the securities delivered) with compensation for damages in either case. Damages will need to be proven as explained for tort liability under Article 1902 of the Spanish Civil Code. Finally, in cases of false or incomplete information in the prospectus, the investor may also try to render the contract null and void (with restitution of price and securities) on the basis of willful misconduct by the offeror or error in the contract's object which vitiates the acceptance by the investor. In this second case, damages would need to be claimed under Article 1902 of the Civil Code.

A judicial proceeding to obtain restitution for losses in a case of prospectus liability may take approximately, as a mere illustrative indication, 5 years, including first instance, appeal and where legally possible, second appeal before the Spanish Supreme Court or the Superior Justice Courts. The duration required for the first-instance trial alone would be approximately 18 months. An appeal from first instance judgement may be filed by requesting a new decision on the facts and legal grounds considered in the first instance or on the basis of procedural defects, and may include a petition to evaluate new proofs (Article 456 of Spanish Civil Proceedings Act). Appeal before the Spanish Supreme Court or the Superior Justice Courts is only available on limited grounds: where fundamental constitutional rights are involved, where the amount involved exceeds 25 million pesetas (approximately Euro 150,250), where the second instance judgement is against case-law (Article 477 of Spanish Civil Proceedings Act) or where substantial procedural rules have been infringed (Article 469 of Spanish Civil Proceedings Act). If appeal before the Supreme Court is unavailable, the total duration of the case may be reduced, as a mere illustrative indication, by 12 to 18 months.

Nevertheless, the relevant court may adopt injunctions ("medidas cautelares") from the beginning of the proceeding upon request of the plaintiff. In addition, the plaintiff is also entitled to request the provisional enforcement of the judgement rendered in the first instance where the defendant has appealed the resolution. Pursuant to the Spanish Civil Proceedings Act, the enforcement is automatically granted, with limited grounds defendant opposition.

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SECURITIES LAW OF SRI LANKA

Part 1. The regulator and its supervisory and regulatory powers

The Securities and Exchange Commission of Sri Lanka regulates securities market. Banking and insurance companies are regulated by the Monetary Board of Sri Lanka and the Insurance Board of Sri Lanka respectively.

The Minister of Finance appoints several "appointed members" to the commission. Specifically, the Minister appoints a Deputy Governor of the Central Bank nominated by the Governor of such Bank and six other persons who he believes have wide experience and capacity in legal, financial, business or administrative matters. In addition, the Deputy Secretary to the Treasury, the Registrar of Companies, and the President of Institute of Chartered Accountants (established by the Chartered Accountants Act No. 23 of 1959) are ex-officio members. The Minister nominates from amongst the members of the Commission, one member to be the Chairman of the Commission. Appointments of Members of the Regulator are not subject to any approval or confirmation by another Authority.

The Minister of Finance may, by Order published in the Gazette, remove any appointed member from office without any reason, and such removal shall not be questioned in any court. If any appointed member of the Commission is temporarily unable to perform the duties of her office during any period, due to ill-health or absence from Sri Lanka or for any other cause, the Minister of Finance may appoint some other person to act in her place during such a period having regard to the provisions of paragraph (a) of subsection (1) of section 3 of the Securities Exchange Commission of Sri Lanka Act No. 36 of 1987 ("SECA") as amended.

The Commission has no power to make regulations and it can only make rules in terms of Section 53(1) of SECA.[423] These rules are not subject to approval of any governmental authority but every rule made under the said Sec. 53(1) of SECA should be published in the Government Gazette and comes into operation on the date of such publication or such later date as may be specified therein. Section 52(1) of SECA, however, empowers the Minister to make regulations with respect to matters required by SECA to be prescribed or with respect to which regulations are authorized to be made. Regulations made by the Minister of Finance are subject to approval by the Parliament.

Regulation and Supervision of the Securities market of Sri Lanka is vested in the Securities and Exchange Commission of Sri Lanka alone. The Commission can grant licenses to Stock Exchanges. A Stock Exchange has been granted certain powers under the Securities Exchange Commission of Sri Lanka Rules

[423] Specifically, the Commission shall formulate rules regarding: (a) listing of securities in a licensed stock exchange; (b) disclosures by licensed stock brokers and stock dealers about share transactions and transactions relating to units in a licensed unit trust by persons who acquired or disposed of securities and by a licensed stock exchange about security transactions; (c) proper maintenance of books, records, accounts and audits by a licensed stock exchange, licensed stock broker or dealer or the managing company of a licensed unit trust and regular reporting by such licensed stock exchange, licensed stock broker or dealer or managing company to the Commission of their affairs; (d) the annual audit of the books, records, accounts and the preparation financial statements by a licensed stock exchange, licensed stock broker and stock dealer and the managing company of a licensed unit trust; (e) regulation of takeovers or mergers where such take-over or merger is between one or more listed companies or where at least one of the parties involved in such take-over or merger is a listed company; (f) a code of conduct to be observed by the trustee and managing company of a licensed unit trust; (g) matters in respect of which rules are required by SECA to be made.

1990 (including the power to list a Company on the Stock Exchange or to de-list it). Sri Lanka Accounting Standards Monitoring Board monitors the maintenance of the Sri Lanka Accounting Standards by the prescribed Companies.

When investigating a violation of the securities laws, the Commission or any person authorized by the Commission may, by notice in writing, require any person to furnish to the Commission or to the person authorized, within such period as shall be specified in the notice, all such returns or information as shall be specified in such notice (SECA, Section 45). The power of the Commission to command witness testimony is not explicit, though Rule 9 of the Securities Exchange Control Rules, 1990 ("SECRU") provides that "The Director-General or any other person authorized to do so by the Commission, may, conduct such inquiry or inquiries, including the examination of books of account, receipts, vouchers, documents and any other records in relation to the affairs of the Governing body of the stock exchange or the affairs of any member of such stock exchange, in relation to the securities market, as the Director-General or the Commission may deem necessary for the purpose of enabling the Commission to exercise, perform and discharge any of its powers, duties or functions under the Act." Under this provision, it may be possible to argue that the Commission can command witness testimony from any person when investigating the affairs of the Stock Exchange or its members.

Part 2. The duty to disclose material information

It is unlawful to issue any form of application for shares in, or debentures of, a company, unless the form is issued with a prospectus (COA, Section 40(3). The list for subscribers shall be kept open for a minimum of five market days from the proposed date of opening (CSE, Rule 4). During that period, investors may withdraw their offer according to the general principle of a contract.

The SECRU, Part 4, explains disclosure requirements for the prospectus in the form of a guideline. Among others, these include:

1. Details of directors' existing and proposed service contracts. In contrast, there is no express requirement to disclose the salaries and compensations of officers (SECRU, Part IV 5(6)).
2. Indication of the persons, so far as known to the Company, who, directly or indirectly, exercise control over the Company and particulars of the proportion of the voting capital held. Also, the names together with the respective interests of the substantial (10% and above) shareholders of the Company. (SECRU, Part IV 3(3)).
3. The interests of each director in the share capital of the Company (SECRU, Part IV 3(3)). There is no specific requirement to disclose interests through entities controlled by the director. Similarly, there is no requirement to disclose the interest of officers in the share capital of the Company.
4. The dates of and parties to all material contracts (not being contracts entered into in the ordinary course of business) from the two years preceding the publication of the prospectus together with a summary of the principle contents of each contract should be disclosed (SECRU, Part IV 3(6)).
5. Full particulars of the nature of the interest, direct or indirect, if any, of every director in the promotion of or in any assets which have been, within the two years preceding the publication of the prospectus, acquired or disposed of by or leased to the Company or any of its subsidiaries, or are proposed to be acquired or disposed of or leased to the Company or any of its subsidiaries (SECRU, Part IV 5(8)). Also, full particulars of any contract or arrangement subsisting at the date of the prospectus in which a director of the Company is materially interested in relation to the business of the Company and any of its subsidiaries (SECRU, Part IV 5(9)). These provisions do not extend to officers and controlling shareholders.

6. Disclosure requirements are not exhaustive. Additional information shall be included to the extent necessary to enable investors to make an informed assessment of the securities being issued (SECRU, Part IV).

By section 43 of the COA, the directors must sign the prospectus. Section 45 of the same law holds them liable for the information therein. The distributor is neither required by law nor expected under commercial practice to perform a due diligence review of the prospectus information, and only assumes civil responsibility for this information when participating in the preparation of the prospectus (section 40, COA). Distributors can be held liable for breach of duty of care. The SEC Rule 13 provides for disciplinary action relating to professional conduct or activities of a stock brokers or stock dealers who is a member of stock exchange.

Even though approval of a prospectus is performed by the Exchange, the Commission has the power to inspect the activities of stock exchange. CSE Rule 1.14 gives the regulator the authority to oppose an offering document inconsistent with the list of disclosure items and requirements.

According to Section 43 of the COA, a copy of the prospectus, signed by every person who is named therein as a director or proposed director, has to be delivered to the Registrar. The written consent of experts, whose statements are included in the prospectus (such as an auditor, accountant, or valuer), must be attached also.

The distributor is not required by law to participate in the preparation of the prospectus or to perform a due diligence review. In the absence of a legal duty to conduct a due-diligence review, the distributor may not be held civilly liable for being unaware that the prospectus contained untrue statements.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

In case of a defective prospectus, the Commission may not impose administrative sanctions on the issuer's directors and officers, or the accountant and experts involved in the preparation of the prospectus. In contrast, in the interest of the public and for the protection of investors, the Commission may direct a licensed stock exchange to remove the securities of a listed company from the official list (SECRU, Rule 6(3)). The Commission may make this decision in case of false statements or material omission of information in the prospectus.

The SEC Act provides that the Commission shall cancel or suspend the licence granted to a stock broker or a stock dealer if it considers that she has acted in breach of any provision of the Act or any rules or regulations thereunder (SEC Act, Section 21). The SECRU, on the other hand, provides that, in case of a complaint of the professional conduct of a stock broker or a stock dealer who is a member of the stock exchange, the Commission may direct the stock exchange to take disciplinary action against such broker or dealer. This sanction may include a fine, suspension or expulsion of such member in accordance with the rules of the exchange (SECRU Rule 13).

3.2 Judicial sanctions

Any person who has authorized the issue of a prospectus shall be guilty of an offence and shall be liable to a fine or to imprisonment if the prospectus includes any untrue statement[424], unless she can establish

[424] Untrue statements include the omission of material facts that has the effect of making the prospectus, in whole or partially, false.

that the statement was immaterial or that she had reasonable grounds to believe, and did believe at the time of the issue of the prospectus, that the statement was true (COA, Section 46). Therefore, the issuer's directors are criminally liable for untrue statements in a prospectus. Note that, to this effect, experts are not considered to have authorized the prospectus.

Criminal liability for violations of the securities laws is also provided under the SEC Act. Fines or imprisonment may be imposed on conviction generally to any person who violates any provision of the Act or its regulations, and specifically to any person who knowingly provides, for the purposes of the Act and its regulations, any information which is untrue, incorrect or misleading (SEC Act, Section 51). This provision may be invoked against the issuer, and its directors regarding untrue, incorrect or misleading information in a prospectus.

The accountants cannot be held criminally liable for the information included in the prospectus, except in the case of fraud under common law.

Injunctive remedy can be obtained from a court during a civil action.

3.3 Stock exchange sanctions

The stock exchange may remove securities from the official list at any time for any reason (SECRU, Rule 6(2)). Any person aggrieved by this decision may appeal against it to the Commission, which will resolve based on the interests of the public and investors.

Part 4. Investor's right of restitution for losses

In case a prospectus includes an untrue statement (or a statement deemed to be untrue because it is misleading in the context in which it is included)[425], investors may obtain restitution through a judicial proceeding before a civil court under Section 45 of the COA. A class action suit is not available in Sri Lanka for a case of prospectus liability.

According to Section 45 of the COA, any director or promoter[426]of the issuer, and any person who has authorized the issue of the prospectus (including experts to the extent of their report), shall be liable to pay compensation to an investor who subscribes shares on the faith of the prospectus for the losses sustained by reason of any untrue statement.

In order to obtain restitution for damages, the investor must prove in a court of law that: (i) the prospectus contained an untrue statement; (ii) that she relied in the prospectus; and (iii) that she suffered damages that were caused by the untrue statement. The liable party may avoid liability if she proves in court that she had reasonable grounds to believe, and did believe at the time of the allotment of the shares, that the statement was true. Experts, as in the case of the accounting firm that audited the financial statements included in the prospectus[427], shall also be liable with respect to an untrue statement made by them, unless they can prove that they were competent to make the statement and had reasonable ground to believe and did believe at the time that the statement was true.

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[425] Section 48 COA

[426] For the purpose of Section 45 of the COA, "promoter" is defined to mean a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company.

[427] Section 41(3) COA

The distributor would only be civilly responsible for the accuracy and completeness of the prospectus if she has participated in its preparation, which she is not required to do by law. However, at common law, the distributor may incur civil liability if the prospectus contains untrue statements and the plaintiffs can prove that the distributor engaged in fraud.

An investor who subscribed shares in a company relying on a prospectus that contained a material misrepresentation has also a remedy against the company under common law, as well as under statutes dealing with misrepresentation in contracts. To obtain restitution from the company, the investor would need to prove: (i) the actual loss incurred; (ii) that the loss was due to the issuer's negligent or intentional acts or omissions; and (iii) that the issuer owed a duty of care to the claimant. The investor must prove that he had relied on the prospectus and that he would not have become a shareholder had he known of the non-disclosure.

If a contract of sale was induced by an untrue statement of any material fact in any material particular in the prospectus, whether fraudulently or innocently, such contract of sale is voidable at the option of the subscribers of the shares. To succeed in such a claim for recession the claimant must prove that (i) the Company was responsible for the mistake; (ii) the prospectus contained misrepresentation of the facts; and (iii) he subscribed to the shares on the faith of the prospectus and he was thus induced by the representations made in the contract of sale to purchase the shares. However, investors may not pierce the corporate veil" to go after the assets of the shareholder when the corporation is unable to satisfy investors' claims in a case of a defective public offer prospectus. Similarly, shareholders cannot be held liable for the acts or omission of the directors of the company.

A civil case for restitution can be instituted in the Commercial High Court if the value of the action is not less than Rupees Three Million. If an action is instituted in the Commercial High Court for losses incurred by an investor due to omissions or misleading information in a prospectus it may take one or two years to be disposed of in the first instance. The party against whom the judgment in the first instance is made will have the option of appealing directly to the Supreme Court and disposal of the appeal by the Supreme Court may take about 1 or 2 years. If the value of the amount is less than Rupees Three Million, the action has to be instituted in the District Court and the disposal of the action in the District Court may take about 2 to 3 years and thereafter the party who loses the action will have the option of appealing to the Court of Appeal and disposal of such appeal by the Court of Appeal may take about 3 to 4 years. A person who loses the appeal in the Court of Appeal can appeal to the Supreme Court only with the leave obtained under the applicable law. In other words, an action in the District Court may go further up in two appeals.

If the defendant opposes the lawsuit and resorts to defenses and recourses generally available, it may take up to 3 to 4 years if instituted in the Commercial High Court and about 7 to 8 years if instituted in the District Court to reach a firm and final resolution by the judiciary from the moment of filing the initial complain.

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SECURITIES LAW OF SWEDEN

Part 1. The regulator and its supervisory and regulatory powers

The primary regulator of securities markets in Sweden is the Financial Supervisory Authority, "FSA" (Sw: *Finansinspektionen*). The FSA is also the main regulator of banks and insurance companies. Securities markets are also regulated by several other institutions, including governmental agencies, self-regulatory organizations and, indirectly via listing and member agreements with securities exchanges and other regulated markets.

In addition, it should be noted that in connection with the listing of the shares, the exchange has regulatory powers. In particular, if the issuer seeks a listing on the Stockholm Exchange's (Sw: *Stockholmsbörsen*) A-list, the exchange will formally approve the prospectus. If the issuer seeks a listing on the O-list, the FSA will approve the prospectus. Further, the Stockholm Exchange monitors trading (market supervision), has a disciplinary committee, and decides on sanctions against members and issuers.

Members of the FSA's board are appointed by the government for a predetermined period of time, though the government has the authority to discharge them at will before the expiration of their term. The exchange is a privately held limited liability company and its board of directors are appointed by the shareholders.

Generally, the regulation and supervision of the securities market is the responsibility of the FSA. The FSA supplements current legislation by issuing regulations and general guidelines. The regulations issued by the FSA, within the powers given to it by Swedish law, are not subject to the approval of other government authorities.[428] The major areas covered by regulations issued by FSA include: (1) mandatory capital requirements for various types of financial companies; (2) portfolio risk diversification; (3) internal controls and risk management; and (4) information concerning the financial position of companies and rules for satisfactory external auditing.

When investigating a violation of securities laws, the FSA may request information from persons or entities under its supervision and certain other categories of entities, such as those which have made a public offer for shares. If a person or entity does not provide the FSA with the information requested, the FSA may sanction it under penalty by way of fine. The legal basis for this authority rests *inter alia* in the Financial Instruments Trading Act[429]. However, the FSA may not request the testimony of witnesses or the delivery of specific documents from persons or entities under its supervision.

Part 2. The duty to disclose material information

Swedish law requires the issuer to produce a prospectus. The prospectus shall be made available not later than three days prior to the first day on which subscription or purchase may occur[430] and must be publicly announced before the period for subscription or purchase starts, or at a date which the securities exchange

[428] Cf. Instrument of Government (Sw: *Regeringsformen (1998:1437))* Chapter 11, Sections 7 – 9.
[429] Financial Instruments Trading Act "LHF" (Sw*: Lag (1991:980) om handel med finansiella instrument*) Chapter 6, Section 1.
[430] Swedish Companies Act "ABL" (Sw: *Aktiebolagslag (1975:1385))* Chapter 4, Section 25.

stipulates, but not before the FSA or, as the case may be, the securities exchange,[431] has approved the prospectus.[432] However, no formal requirement exists that the investors actually must have received the prospectus before final sales may be made. The FSA which, depending on the circumstances, shall approve the prospectus, shall, according to preparatory works[433], merely ensure that the prospectus contains the required disclosure items and is not obligated to validate the information. However, should errors nevertheless be identified, those errors must be corrected before approval.

Disclosure requirements for the prospectus are primarily found in enactments 1995:21 issued by the FSA and in Recommendations issued by the Swedish Industry and Commerce Stock Exchange Committee for Preparing Prospectuses ("NBK Recommendation"). The NBK Recommendation does not have the force of law, but is mandatory in the sense that the Stockholm Exchange requires under its listing requirements that the issuer prepares the prospectus in accordance with it. Moreover, the NBK Recommendation is generally considered as market practice when prospectuses for the Swedish market are prepared. Specific disclosure requirements include:

1. Total remuneration and the value of other benefits paid during the preceding fiscal year, or due to be paid, to members of the board of directors, senior executives and auditors.[434]
2. Names of major shareholders, including the percentage of share capital and voting rights held, directly or indirectly, by each of them. Such information shall, as far as known to the issuer, include shareholders whose share in capital or voting rights amounts to three percent or more.[435] (It should be noted that there are no particular requirements for large shareholders to disclose their shareholdings to the issuer or otherwise in connection with an IPO and the issuer's drafting of a prospectus. Information on their holdings may however be available through other sources, such as the shareholders' register or information made available as a result of rules on disclosure of acquisitions and transfer of shares[436].)
3. Stock ownership by each director, senior executive and auditor.[437] Direct as well as indirect ownership is normally disclosed under a broad interpretation of the relevant provisions.
4. Agreements which are of material importance for the issuer whether they are made in the ordinary course of business or not.
5. Information concerning the nature and scale of the benefits derived by directors, senior executives and auditors from business activities undertaken by the company which involved unusual features or terms.[438] Again, transactions in which related parties have an indirect interest are often disclosed as well under a broad interpretation of the relevant provisions.
6. All information which are needed for the investors to make a well-based judgment.[439]

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[431] If the issuer applies for listing on the Stockholm Exchange's A-list, the exchange, and not the FSA, shall approve the prospectus. If however the issuer applies for listing on the Stockholm Exchange's O-list, the FSA shall approve the prospectus

[432] LHF Chapter 2, Section 6, and the Securities Exchange and Clearing Operations Act "LBC" (*Sw: Lag (1992:543) om börs- och clearingverksamhet*) Chapter 5, Section 5b, and Enactments 1995:21 issued by the FSA "FFFS 1995:21" (Sw: *Finansinspektionens författningssamling 1995:21*) Chapter 10, Section 2 and Chapter 19, Section 2.

[433] Legislative Bill from the Government 1992/93:90 page 80.

[434] FFFS 1995:21 Chapter 3, Section 64 and Chapter 17, Section 20, and the NBK Recommendation, Section 9.

[435] FFFS 1995:21 Chapter 3, Section 35 and Chapter 17, Section 24, and NBK Recommendation, Section 8.

[436] See NBK recommendations concerning the disclosure of acquisitions and transfers of shares, etc (*Sw: NBK:s rekommendation angående offentliggörande vid förvärv och överlåtelse av aktier m.m.*), disclosure rules in LHF and in the Insider Act (*Sw: Insiderlagen (1990:1342))* (The Insider Act is now abrogated, but corresponding disclosure rules are found in the Act on Reporting Obligation Regarding Certain Holdings of Financial Instruments (*Sw: Lag (2000:1087) om anmälningsskyldighet för vissa innehav av finansiella instrument*)).

[437] FFFS 1995:21 Chapter 3, Section 65, and NBK Recommendation, Section 9.

[438] FFFS 1995:21 Chapter 3, Section 66, and NBK Recommendation, Section 9.

[439] LHF Chapter 2, Section 1, and LBC Chapter 5, Section 5, and FFFS 1995:21 Chapter 3, Section 50.

The issuer's board of directors is responsible for producing the prospectus.[440] The prospectus shall include an assurance made by the board of directors stating that, as far as the board is aware, the information in the entire prospectus or the part of the prospectus for which the board is responsible complies with actual circumstances and that nothing of material importance which might affect the picture of the company presented in the prospectus has been omitted.[441] The assurance is then followed by the signatures of the board of directors.[442]

There is no requirement that the distributor signs the prospectus, but it is common practice that the name of the distributor is included in the prospectus. The law does not expressly require the distributor to perform a due diligence review, but imposes a general requirement on securities firms to act with due care and skill. Furthermore, the Stockholm Exchange, which listing requirements stipulate that the management and directors shall be fit and proper for their assignments, has held in a policy statement that the distributor, together with the issuer, is responsible that management and the directors meet this requirement when the company's shares are listed. This implies that the distributor has to at least conduct a due diligence on publicly available material in order to evaluate the past performance of directors and management. Under any circumstances, the distributor is likely to perform a due diligence review as a matter of commercial practice.

Various provisions require that the issuer's auditors examine the prospectus.[443] The examination may not include the entire prospectus, but the extent of the examination should be included in an auditor's statement which shall be included in the prospectus. Although the issuer's auditors do not sign the prospectus, they sign the auditors' statement.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

A party under the supervision of the FSA may be subject to administrative sanctions if such party breaches any provision of law that applies to its operations (including regulations issued by the FSA) or if it is otherwise evident that such party is not fit and proper to conduct its operations under the permit given by the FSA.[444]

In the event that the public does not have equal access to information regarding a particular traded financial instrument, or does not have sufficient access to information regarding the issuer, or where special cause exists, a securities exchange shall decide to stop trading in the relevant financial instrument.[445] In the event that a securities exchange fails to suspend trading, the FSA may order that trading in the instrument shall be suspended.[446]

The FSA has the authority to enforce provisions in Swedish securities legislation on securities institutions by issuing orders under penalty by way of fine. For example, the FSA may, under penalty of fine, order

[440] ABL Chapter 4, Section 18 (The provision refers only to prospectuses prepared under ABL. Cf. note 45 below).
[441] FFFS 1995:21 Chapter 3, Section 6 and Chapter 17, Section 6, and NBK Recommendation Section 2.
[442] NBK Recommendation Section 2.
[443] ABL Chapter 4, Section 24, FFFS 1995:21 Chapter 3, Section 7 and Chapter 17, Section 7, and NBK Recommendation Section 12.
[444] See e.g. LBC Chapter 11, Section 7, and the Securities Business Act "LVR" (Sw: *Lag (1991:981) om värdepappersrörelse*) Chapter 6, Section 9.
[445] LBC Chapter 10, Section 1.
[446] LBC Chapter 10, Section 4.

corrective action from anyone not fulfilling the obligation to draw up and submit a prospectus to the FSA in accordance with the requirements of the Financial Instruments Trading Act.[447] Further, if trading in financial instruments is not conducted in such manner that public confidence in the securities market is upheld and that capital committed by individuals is not unduly placed at risk, the FSA may order anyone who participates in such trading to stop.[448] Also, when a securities firm has taken a decision contravening the Securities Business Act or other applicable laws and regulations, the FSA may enjoin the implementation of such decision or order rectification if possible.[449] The FSA orders or injunctions may be issued with a conditional fine.[450] Authorization granted to a Swedish securities institution shall be revoked by the FSA if the institution has shown itself unsuited to conduct its business as authorized.[451]

Other parties (e.g. accountants and lawyers) may be subject to administrative sanctions if they do not act with due care or violate any legal provision or other rule (including applicable ethical standards) that apply to their operations. Disciplinary matters against accountants are tried by a specific disciplinary body, the Supervisory Board of Public Accountants (Sw: *Revisorsnämnden*).[452] The Board may revoke the authorization or issue a warning to an auditor who violates the standards stipulated in the Act on Accountants. Negligence in connection with the examination of a prospectus is likely to be considered a violation of such standards. Decisions by the Board may be appealed to administrative court.

3.2 Judicial sanctions

Criminal sanctions may be imposed if a false statement or omission of material information in a prospectus is an element in the perpetration of a criminal act, such as fraud, swindle, or market manipulation, or if a party acts as abettor with respect to such crimes. A party responsible for or signing the prospectus may, under certain circumstances, also be liable for untrue affirmation and alternatively for false certification if material, relevant or essential information was omitted. Criminal liability generally presupposes that the party is aware of that information was omitted.

Under the Penal Code, fine or imprisonment may be imposed as a criminal sanction in the cases listed below, which may apply in case of false or misleading information in a prospectus and may involve the issuer's directors as well as employees of the distributor or the auditors. The listed provisions apply only if the criminal conduct has been intentional, with the exception for 3 and 4 below which apply also in cases of gross negligence.

1. A person who by deception induces someone to commit an act which involves gain for the accused or someone else and loss for the deceived.[453]
2. A person who publishes or otherwise disseminates misleading information among the public in order to influence the price of securities.[454]
3. A person who assists in organizing an enterprise or who, because of his position ought to possess special knowledge about the enterprise, publishes or otherwise disseminates misleading information among the public or among those holding an interest in the enterprise of a nature to influence the assessment of the enterprise from a financial point of view and thereby causes damage.[455]
4. A person who in a written deposition, which according to law or statute is made under oath, gives untrue information or withholds the truth, if the act jeopardizes proof.[456]

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[447] LHF Chapter 6, Section 3.
[448] LHF Chapter 6, Section 2 and Chapter 1, Section 2.
[449] LVR Chapter 6, Section 7.
[450] See e.g. LVR Chapter 6, Section 12.
[451] LVR Chapter 6, Section 9.
[452] Act on Accountants (Sw: *Lag (1995:528) om revisorer*) Section 3.
[453] Penal Code (Sw: *Brottsbalken (1962:700))* Chapter 9, Sections 1 – 3 and Chapter 23, Section 7.
[454] Penal Code Chapter 9, Section 9, 1st paragraph.
[455] Penal Code Chapter 9, Section 9, 2nd paragraph.
[456] Penal Code Chapter 15, Section 10.

5. A person who gives untrue information in a certificate or other document, if the act jeopardizes proof.[457]

The judiciary may prohibit a person who has committed a crime in professional services business from rendering professional advice henceforth.[458] The judiciary may also, under the Marketing Act, issue injunctions against the continuation of marketing which is contrary to generally accepted marketing practices, or which in some other manner is unfair towards consumers or undertakings, and may order an undertaking which, in the course of marketing, neglects to provide information which is of particular importance, to provide such information.[459] Further, an undertaking whose marketing practices violates the Marketing Act may have to pay a fine for disruptive marketing practices.[460] In the legal literature it has been argued that the Marketing Act may be applied in the context of the distribution of prospectuses.[461]

As mentioned above (see 3.1), the judiciary may impose various sanctions against auditors. The sanctions involve, depending on the circumstances, withdrawal of authorization, fines and ultimately imprisonment if criminal acts such as swindle have been committed. The judiciary also has the power to prohibit the auditors from rendering professional advice for a certain period of time. Even if not specifically stated, the sanctions referred to may apply also in situations where the auditor have examined a prospectus.

3.3 Stock exchange sanctions

A stock exchange shall (unless it is generally inappropriate) delist a security if the issuer has materially failed to fulfill its obligations under law or other regulations (including prospectus requirements).[462] Similarly, in the event of a failure by a company listed on the Stockholm Exchange to comply with the law, other regulations, the Listing Agreement, or the Stockholm Exchange's regulations in general, the Stockholm Exchange may, where such violation is serious, resolve to delist the company's traded securities, or in other cases, impose on the company a fine.[463] The Stockholm Exchange may also impose a fine on a securities institution, which is a member of the Stockholm Exchange, where it breaches the member rules, Swedish law, other statutes governing the members' operations on the exchange, or generally accepted practice on the securities market.[464] Where the Stockholm Exchange finds that a securities institution, which is a member of the exchange, no longer satisfies the conditions for membership, the exchange may terminate the membership with immediate effect.[465]

Part 4. Investor's right of restitution for losses

Investors may pursue a civil action to obtain restitution for losses incurred by reason of a defective prospectus. Class actions are not available under Swedish law.[466] If investors' losses are caused by a

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[457] Penal Code Chapter 15, Section 11.
[458] Act on Prohibition of Professional Advice in Certain Cases etc (Sw: *Lag (1985:354) om förbud mot yrkesmässig rådgivning i vissa fall m.m.*) Section 2 (The current name of the act is the Act on Prohibition of Legal or Financial Assistance in Certain Cases (*Sw: Lag (1985:354) om förbud mot juridiskt eller ekonomiskt biträde i vissa fall*).
[459] Marketing Act (Sw: *Marknadsföringslag (1995:450))* Sections 14 – 15.
[460] Marketing Act Section 22.
[461] Fredrik Lindqvist, JT 1996-97, s. 371.
[462] LBC Chapter 5, Section 4.
[463] Stockholm Exchange's listing agreement Section 5.
[464] NOREX Member Rules 4.11.3.
[465] NOREX Member Rules 4.2.10.
[466] An investor (or anyone else) may represent and pursue the claims of any other investor if the former has obtained power of attorney from the latter. As from January 1st, 2003, class actions are available under Swedish law.

criminal offense, the injured party may request the prosecutor to pursue such party's civil claim with the prosecution of the criminal case. Both civil and criminal suits are adjudged by courts of general jurisdiction, (i.e., the district courts, the courts of appeal, and the Supreme Court). Thus, there is no distinction between, on the one hand, civil or commercial judges and, on the other hand, criminal judges, although different sets of procedural rules apply in civil and criminal cases.

The position of Swedish law on the question of liability for damages caused by information contained in a prospectus is uncertain in several respects. First, there is no law or regulation directly addressing restitution in connection with prospectus liability. Currently, the statutory basis for prospectus liability is primarily general corporate law and tort law, rather than securities regulations. Second, there are no Supreme Court cases which directly address prospectus liability. As a result, the various grounds for liability discussed herein, although plausible, are an uncertain basis for liability because they have not been invoked in court.

It is useful to classify prospectus liability cases in the following five groups: (1) non-contractual civil liability (tort law); (2) liability derived from implied contractual or quasi-contractual relationship; (3) liability derived from the Companies Act; (4) liability derived from the Marketing Act; and (5) liability derived from the Sales of Goods Act.

1) Non-contractual civil liability (tort law)

Civil liability under Swedish tort law (i.e., non-contractual liability) requires that the investor be able to prove that: (i) the defendant acted willfully or with negligence, (ii) that the investor suffered losses, (iii) that such losses were caused by the action or omission of the defendant (e.g., the omitted information in the prospectus), and (iv) that there is a proximate cause between the negligent act of the defendant and the losses suffered.

Furthermore, the general rule in non-contractual situations as regards pure economic loss (as opposed to injury to persons or damage to property) is that liability requires that the damage be caused by a criminal act (e.g., by fraud or swindle). Chapter 2, Section 4 of the Tort Liability Act[467] provides that any person who causes financial loss by an act or omission punishable under criminal law shall be liable to compensate such loss. Furthermore, Chapter 3 Section 1 of the Tort Liability Act makes a person liable for the financial loss caused by a criminal act or omission of her employees. Accordingly, to be successful in a claim for restitution based on Chapter 2, Section 4 and Chapter 3, Section 1 of the Tort Liability Act, the investor must prove that the defendant or any of its employees committed a criminal act.

In order for the investor to obtain restitution, it is not necessary to establish that the information omitted from the prospectus was material. However, liability for damages presupposes proximate cause between the negligent act (e.g., the omission of information) and the losses suffered by the investor. If the information omitted was not material, it might perhaps be somewhat difficult to argue that there was a proximate cause between the omission of information and the losses suffered. Nor is it necessary to establish that the investor relied on the prospectus to invest. However, it must be established that the investor's losses were caused by the omitted information. Such casual relation seems to imply that the investor actually did rely on the prospectus.

2) Liability derived from implied contractual or quasi-contractual relationship

Although there is no case law from the Supreme Court specifically regarding prospectus liability, courts may find liability for pure economic loss inflicted on the investors by defective information or omission of information in a prospectus. Depending on the circumstances, it may be possible to argue a contractual

[467] The Tort Liability Act (Sw*: Skadeståndslagen 1972:207))*. It should be noted that, as from January 1st, 2002, the provision in Chapter 2, Section has been moved and is now found in Chapter 2, Section 4.

or quasi-contractual relationship between, on the one hand, the investors and, on the other hand, the distributor or the accountants, on which liability for negligence could be based.[468]

3) Liability derived from the Companies Act
Chapter 15, Section 1 of the Companies Act states that an incorporator, a member of the board of directors, or a managing director who in the performance of her duties, intentionally or negligently, causes damages to a shareholder or a third party, shall be liable for such damage. Chapter 15, Section 2 of the Companies Act extends this liability to the auditors. However, a prerequisite for liability under these provisions is that the damage be caused by a breach of the Companies Act, the applicable annual reports legislation, or the articles of association.

The Companies Act stipulates that a prospectus shall be prepared by the board of directors in connection with the offering of securities to an extended group of persons, and also contains some provisions on what information such prospectus shall include.[469] The Companies Act further prescribes that the information disclosed in the prospectus shall be reviewed by the issuer's auditor. If the board members or the auditor, intentionally or negligently, violates these provisions of the Companies Act, they may be held liable for losses suffered by the investors. It should however be noted that the number of provisions on prospectuses in the Companies Act are fairly limited. Most such rules are found in other legislative acts and regulations.

4) Liability derived from the Marketing Act
According to Section 29 of the Marketing Act, a person who, intentionally or negligently, breaches the general prohibition on misleading marketing in Section 6[470] shall compensate any consumer or undertaking for any damages suffered as a consequence of the breach. The applicability of Section 29 of the Marketing Act with respect to prospectus has been argued in the legal literature (see 3.2 above), but has not, to our knowledge, been confirmed by any court ruling.

5) Liability derived from the Sales of Goods Act
The Sales of Goods Act[471] may give grounds to liability when a sales contract has been entered into with the investor. According to this Act, goods are considered to be defective when they do not conform to marketing information provided by the seller that influenced the sale. If the goods sold are defective, the buyer has the right to demand a reduction in the price, or demand the termination of the contract and claim damages. See further below.

Civil liability under the grounds described above may apply to the following five parties:

1) Members of the Board of Directors

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[468] Cf. the Supreme Court cases NJA 1987 page 692 and NJA 2001 page 878.
[469] The Companies Act prescribes that the prospectus shall *inter alia* contain balance sheets, profit and loss accounts, a summary of the management reports, and statements of changes of financial position for the three most recent financial years. The prospectus shall further contain information, for the evaluation of the issuer's operations, regarding any circumstances or events of material significance to the issuer which relates to the time period subsequent to the expiry of the most recent financial year, and, in case the prospectus is presented later than eight months as from the end of the most recent financial year, information equivalent to interim reports. Finally, the prospectus shall contain a brief summary of the history of the issuer and its operations, a report regarding the issuer's operations, access of raw materials, products, facilities and relative position in the industry, information on the board members, accountants and senior management, and a report on the ownership and voting structure of the issuer.
[470] Pursuant to Section 6 of the Marketing Act it is prohibited in the marketing of products or services to use statements or other representations which are misleading.
[471] See Sections 18 and 30 of Sales of Goods Act (Sw: *Köplag (1990:931)).*

An investor may claim restitution from a director if it can be established that the director acted with negligence when the prospectus was prepared and in connection therewith violated a provision of the Companies Act, such as provisions therein regarding prospectuses. However, as noted above, the Companies Act contains only a fairly limited number of provisions regarding prospectuses. If the information set out in the prospectus according to these provisions in the Companies Act is incomplete or false by reason of negligence of a director, such director may be held liable for losses inflicted on the investors by reason of the omission of information or misstatement. Finally, investors may also obtain restitution for damages if the issuer's directors committed fraud through the issuance of the prospectus.

2) Issuing company

Based on a Supreme Court ruling, it is generally held that the issuer may not be held liable to pay damages to any investor subscribing for its shares by reason of misleading information or omissions of material information in the prospectus.[472] It is further generally held that a subscription of shares may not be rescinded after the issue of shares has been registered by the registration authority.[473]

Yet, it may be possible to argue that the issuer could be held liable under Chapter 3, Section 1 of the Tort Liability Act, that establishes the obligation to pay compensation when a person in her employment causes loss to another by a criminal act or omission. This provision may be applicable only in case where an issuer's officer (i.e. managing director) or any other employee of the issuer has committed a criminal act in connection with the preparation of the prospectus (e.g., fraud, swindle, or market manipulation).

Finally, in the legal literature it has been argued that the issuer could be held liable to pay damages to the investor if it has breached certain rules in the Swedish Marketing Act, such as the general prohibition against misleading marketing. See above.

3) Distributor

Securities laws do not make the distributor civilly responsible for the accuracy and completeness of the information in the prospectus. Therefore, it is unclear to what extent the distributor may be held liable for false statements or omitted information from the prospectus. If there is a contractual relationship between the distributor and the investor (e.g., if the shares were subscribed by the distributor and thereafter transferred by way of a sale to the investors), the distributor may possibly be liable under Section 30 of the Sales of Goods Act and/or Section 9 of the Promissory Note Act. Pursuant to the latter provision, the transferor of an instrument is only responsible for its validity.

Alternatively, if there is no contractual relationship between the distributor and the investor, it is not clear to what extent the distributor may be held liable to pay damage. There are three different grounds which might be argued in support of such liability, i.e. (i) the distributor has breached certain rules in the

[472] The Supreme Court case NJA 1935 page 270. According to enactments recently proposed by a legislative committee, the issuer may be held directly liable for misleading information and material omissions in the offering document to the extent it has been prepared pursuant to the Financial Instruments Trading Act or the Securities Exchange and Clearing Operations Act. The proposal further entails that the Companies Act should not contain any rules regarding prospectuses. Instead the legislative provisions on prospectuses will be found in the Financial Instruments Trading Act and the Securities Exchange and Clearing Operations Act. The proposed enactments will enter into force at the earliest year 2005. Currently, the Companies Act regulates prospectuses prepared in connection with offers directed to so-called extended groups of investors (i.e. more than 200 investors), while the Financial Instruments Trading Act regulates offers to open-ended (unidentified) groups of investors. One and the same offer may of course be directed to both an extended and open-ended group of investors, in which case the prospectus needs to be prepared under both legislative acts. If the offered securities will be listed on a stock exchange, the provisions of the Securities Exchange and Clearing Operations Act will apply instead of the Financial Instruments Trading Act.

[473] Cf. ABL Chapter 2, Section 5, and Legislative Bill from the Government 1975:103 page 298.

Marketing Act, such as the general prohibition against misleading marketing; (ii) the distributor's officers have committed a criminal act in connection with the preparation of the prospectus; or (iii) if there is a quasi-contractual relationship between the distributor and the investor which justifies relying on the prospectus.

4) Issuer's auditors or accountants

The issuer's auditors may be held liable, under Chapter 15, Section 2 of the Companies Act, for intentionally or negligently causing damages to the extent the prospectus has been prepared pursuant to the Companies Act[474]. Auditors could possibly also be held liable towards the investor on the theory that there is a quasi-contractual relationship between them, and that the investor had justified grounds to rely on the statements made by auditors with respect to the prospectus. In such case, it must be established that the defendant acted with negligence. Finally, auditors may be civilly liable if convicted of a criminal act committed in connection with their review of the prospectus.

5) Controlling shareholder

As a general principle, a shareholder of a Swedish limited liability company is not liable for the debts, obligations, or liabilities of the company. There are a few exemptions to this principle of which perhaps two might be worth mentioning.

Firstly, under Chapter 15, Section 3 of the Companies Act, a shareholder may be held liable to pay compensation for damage which she willfully or by gross negligence has inflicted on the company, other shareholders, or other persons, by acting or taking part in actions or decisions in breach of provisions in the Companies Act, the applicable annual reports legislation, or the articles of association of the company.

Secondly, in case law, courts have pierced the corporate veil when exempting shareholders from personal liability would have unjust and unacceptable consequences. The relevant court rulings are few and none of them pertains to prospectus liabilities. It is unclear what preconditions are required to pierce the corporate veil. It has been suggested in a white paper from a law review committee appointed by the Government that the concept be only applied in exceptional circumstances where a shareholder has used her influence over a company to the detriment of the creditors in an unfair manner. In the legal literature, conditions such as absence of an independent business interest, absence of independent decision making and, most important, undercapitalization in relation to the nature and scope of a company's operations have been identified to, at least combined and probably also in conjunction with an improper purpose, be of relevance. However, it should be emphasized that Swedish courts only in a very limited number of cases have applied the concept of lifting the corporate veil.

In principle, the controlling shareholder cannot be held liable for the acts or omissions of directors and officers of a company. However, the controlling shareholder may be held liable as an aider or abettor if the defective prospectus is linked to a criminal offence (e.g., fraud, swindle, or market manipulation) even if she does not offer shares to the public or participates directly in the preparation of the prospectus. The controlling shareholder may presumably even be held directly liable for such a criminal offence provided that she was sufficiently involved in committing the crime and, in the case of fraud, profited from it.[475] Finally, the controlling shareholder may be held civilly liable under Chapter 2, Section 4 or Chapter 3, Section 1 of the Tort Liability Act if she, or any of her employees, has committed a crime.

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[474] According to enactments recently proposed by a legislative committee, the scope of liability of the auditors will cover the offering document to the extent it has been prepared pursuant to the Financial Instruments Trading Act or the Securities Exchange and Clearing Operations Act.

[475] Legal entities such as companies may not be convicted for crimes under Swedish penal law. However, a company may be liable to pay so-called company fines if crimes have been committed in the operation of its business. Further, the representatives of a legal entity may be held criminal liable for criminal acts committed in its operations.

The judicial proceeding in a case for restitution for losses incurred by reason of information in a prospectus may take one year to be resolved in the district court, and one additional year in the court of appeal. The right to appeal the first-instance judgement is available as a matter of law (save for disputes regarding minor amounts in which case a dispensation is required). However, for a case to be tried at the Supreme Court, a dispensation is required, and the Supreme Court would only grant it if it considers that there is merit, or that the case is materially significant.

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SECURITIES LAW OF SWITZERLAND

Part 1. The regulator and its supervisory and regulatory powers

The official authority in charge of the supervision and regulation of the Swiss banking and securities market is the Federal Banking Commission (FBC)[476]. Insurance companies are subject to the supervision of the Federal Office of Private Insurance.

FBC members are appointed by the Federal Council, which is the Swiss Confederation executive body. This appointment is not subject to the approval or confirmation of any other authority. The members of the FBC serve for a period of 4 years. They cannot be discharged at the will of the appointing authority before the expiration of their term.

Generally, both the regulation and supervision of the Swiss securities market is assigned to the FBC. The regulations issued by the FBC are not subject to the approval of other governmental authorities. The regulation of stock exchanges is left to self-regulation. However, the enactment of the stock exchanges' regulations is itself subject to the FBC approval[477].

Under the Federal Act on Stock Exchanges and Securities Trading of 1995 (SESTA) and the Federal Banking Act of 1934 (BA), persons and companies which are subject to supervision, as well as their auditors, are under the obligation to provide the FBC with all information and documents which the latter may request in order to carry out its duties[478]. This means banking institutions, exchanges, securities dealers, significant shareholders in exchanges or securities dealers, approved auditors, shareholders of listed Swiss companies subject to a disclosure obligation, offerors in tender offers, and target companies. Issuers and their directors are not subject to a specific disclosure obligation towards the FBC, unless they fall under one of the above categories. In contrast, the FBC is not allowed to command the testimony of witnesses when investigating a violation of securities laws.

Part 2. The duty to disclose material information

2.1 Obligation to prepare a prospectus

Under Swiss law, a prospectus must be prepared in the event new equity or debt instruments are to be publicly offered[479]. Public solicitation is defined as any solicitation which is not exclusively directed to a narrow and objectively limited circle of persons. The criteria are of both a qualitative and quantitative nature. As a rule of thumb, it is considered that an offering is not made to the public if it is made to 20 offerees or less. It is also considered that any publication of advertising materials for a subscription offer triggers a prospectus requirement.

The prospectus required for the public issue of securities does not have to be reviewed by and/or filed with any regulatory authority, unless the relevant securities are to be listed on a Swiss exchange. Also, there is no formal waiting period established by law wherein shares may be offered but not sold.

The requirements imposed by Swiss law as regards the contents of a prospectus are limited. However, any information included therein (even voluntarily) is subject to the same legal treatment as any information

[476] Article 23 *et seq.* BA and 34 *et seq.* SESTA.
[477] Articles 4 §2 SESTA and 13 OSESTA.
[478] Articles 23bis BA and 35 §2 SESTA.
[479] Articles 652a and 1156 of the Swiss Code of Obligations of 1911 (SCO).

required by law. Accordingly, in the event this information is shown to be inappropriate, false or misleading, then a prospectus liability may be triggered.

That being said, the listing of securities on the SWX Swiss Exchange presupposes that a "listing" prospectus be prepared and approved by the exchange. It is to be noted that the information requirements of the "listing" prospectus exceed the requirements set out in the Swiss Code of Obligations. Moreover, by contrast to the "legal" prospectus, formal compliance of the "listing" prospectus with the Listing Rules of the SWX Swiss Exchange is reviewed by the Swiss Listing Agency before the securities can be listed.

In practice, only one document is prepared which constitutes both the legal and listing prospectus.

2.2 Prospectus liability

Any information disclosed in the prospectus (voluntarily or on the basis of the Listing Rules) may give rise to prospectus liability and is subject to the same legal treatment as that of information required by law.

SWX Scheme A contains the requirements for information disclosure applicable to the "listing" prospectus, including the following:

1. Any kind of remuneration paid and non-cash benefits provided to members of the board of directors, the management or the supervisory body for the last completed financial year, booked as general overheads or share in annual profits, with these amounts to be stated globally for each corporate governing body. Also, a global statement of remuneration and non-cash benefits paid and provided by all companies dependent on the issuer, and with which the latter forms a group, to all members of the issuer's board of directors, management or supervisory body (Section 1.2.3, SWX Scheme A).
2. Details pertaining to major shareholders and their respective participation, insofar as they are known to the issuer (Section 1.5.9, SWX Scheme A). A major shareholder is an individual or a group of shareholders who controls more than 5% of the voting rights in the company. Should a lower limit be set by the articles of association of the company for the recognition of voting rights to shareholders controlling registered shares, this lower limit will be used for the definition of a major shareholder (Article 663c §2, SCO). Swiss issuers must disclose ownership information in accordance with Article 20 SESTA, which provides for a disclosure to the company and to the exchange of the identity of any shareholder or group of shareholders whose share in the voting rights of the issuer attains, exceeds or falls below certain thresholds. The lowest threshold triggering the latter obligation to disclose is 5%. Moreover, the identity of such major shareholders must be disclosed in the annex to the balance sheet of the company (Article 663c SCO).
3. Percentage amount of voting rights of the issuer held by members of the board of directors and management, as well as the rights and privileges that said voting rights confer on those individuals (Section 1.2.2, SWX Scheme A).
4. The prospectus must provide sufficient information for knowledgeable investors to reach an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer, as well as the rights attached to the securities. Any special risks must be mentioned (Article 32, Listing Rules). Implicitly, this requires disclosure of each and every material transaction. In fact, listed firms must disclose on an ongoing basis each and every price sensitive fact (Article 72, Listing Rules). Price-sensitive facts are new facts which, because of their considerable effect on the issuer's assets or liabilities, financial condition or general course of business, can result in a substantial movement in price of the securities. In this respect, should such material transactions be price-sensitive, a disclosure thereof will be required.
5. For the current and prior accounting year, the type and magnitude of interests held by members of the board of directors and management in transactions that are outside of the normal business

activities of the issuer, or in other transactions which by their form or essence can be deemed to be out of the ordinary or of material importance to the issuer (Section 1.2.3, SWX Scheme A). Where such unusual transactions were concluded in the course of an earlier financial year and remain in any respect outstanding or unperformed, information on those transactions must be given. Implicitly, disclosure covers transactions in which directors, officers or controlling shareholders have an indirect interest.

The publication of the prospectus is a statutory obligation of the issuer only.

Prospectus liability is a tort under Swiss law that may give rise to a cause of action against the various persons who were involved in the preparation or distribution of a prospectus[480], such as the issuer itself, the signatories of a prospectus, the directors and senior officers of the issuer, the underwriters, and the advisors of any of these persons. That being said, they can incur prospectus liability only if they are found to have acted with intent or negligence (fault). By contrast, prospectus liability is not applicable to a person or entity that was not involved in the preparation of the prospectus, such as the controlling shareholder for example.

The distributor is not required to perform a due diligence review of the information included in the prospectus. If not involved in the preparation of the prospectus, a distributor does not assume legal liability for information in the prospectus, unless it is aware that the prospectus is erroneous, misleading or incomplete on a material aspect. However, in practice the main distributor is usually involved in the preparation of the prospectus and thus performs a due diligence review of its contents. Further, the distributor could be liable if she made additional representations connected to the sale of shares, but not included in the prospectus, which turned out to be incorrect, incomplete or misleading. In this case, the distributor would violate a contractual relationship (i.e. sale agreement) with the investors. In this respect, any representation or statement made by the distributor to investors within the context of the sale of the shares, which is false or misleading, could trigger distributor's liability for breach of contract.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

Those entities and individuals whose activity is subject to regulatory authorization (e.g. banks, securities dealers, etc.) could lose their license if they intentionally included false statements or omitted material information from the prospectus. In this respect, the issuer or the distributor will not incur such administrative sanctions, unless they are subject to the supervision of the FBC or any other regulatory authority.

In case of false or incomplete information in a prospectus caused by negligence only, no administrative sanctions would be in principle imposed on the various parties involved.

3.2 Judicial sanctions

There are no specific provisions of the Swiss Criminal Code repressing prospectus-related infringements. That being said, depending on the particulars of the case, general provisions repressing dissemination of false information on commercial undertakings (Article 152 SCC) and/or forgery (Article 251 SCC) may be applicable.

[480] Article 752 SCO.

False statements or omissions of material information from the prospectus may thus trigger criminal liability for the corporate directors and officers who were involved in the preparation thereof (Article 152 SCC). Specifically, the members of the board, of the management and/or of the auditor of a company who, in statements addressed to the public, have provided false, incomplete or misleading information of a material nature capable to induce another to dispose of its assets and incur losses, shall be punished by imprisonment or fine**.**

In addition, all those who participated in the preparation of a prospectus containing false statements could incur criminal liability for forgery (Article 251 SCC). This provision provides that whoever has forged a document or used such a forged document with a view to cause loss and damage to another or to gain for himself or another any illicit advantage, shall be punished by imprisonment for up to 5 years. The notion of forgery encompasses the issuance of a document deliberately containing false or misleading statements of fact. In this respect, in accordance with case law, a prospectus containing false statements is to be considered a forgery, even if the publication of the same is not required by law.

In view of the above, any entity or person involved in the distribution of the securities, which was not involved in the preparation of the prospectus, but was aware of the false statements contained therein, may also incur criminal liability for forgery for having used the prospectus in question.

Omission of material information in the prospectus does not in and of itself trigger criminal liability on the ground of forgery for the persons and/entities involved in the preparation and/or the distribution thereof.

A judicial order commanding the publication of the relevant material information could be imposed on the issuer by the judiciary. However, to our knowledge, such an order has never been issued by a Swiss court to date.

3.3 Stock exchange sanctions

If information included in the "listing" prospectus is found to be false or misleading, in particular because of omissions of material facts, the SWX can impose a broad range of sanctions on the issuer whose shares are listed on the SWX Swiss Exchange. Such sanctions include a reprimand, the order to publish the information required, a fine, the publication of the sanctions imposed, the suspension of trading, and the exclusion of the issuer from any further listing on the SWX Swiss Exchange (Listing Rules, Article 82).

Similarly, the auditors of the issuer's financial statements can also be sanctioned by the SWX Swiss Exchange with reprimand, a fine, the revocation of their registration with the SWX Swiss Exchange, the request of replacement of the responsible accountants, and the publication of the sanctions under Article 82a of the Listing Rules.

That being said, the SWX Swiss Exchange has no authority to impose sanctions on any other entity or individual involved in the preparation of the prospectus, such as the distributor.

Part 4. Investor's right of restitution for losses

Investor may seek restitution for losses incurred by reason of false or misleading information in a prospectus through a judicial proceeding before a civil court. In addition, damages may be awarded as the result of a criminal conviction. In Switzerland, a criminal judge can rule on civil liability and award damages when convicting a defendant. If the issue is too complex and would require extensive evidence

proceedings, the criminal judge would typically rule only on the principle of the civil liability and leave the exact determination of damages to a civil or commercial judge.

According to Article 752 SCO, all those who intentionally or negligently have included in a prospectus for the public offer of shares inaccurate or misleading information, or information not in conformance with the legal requirements, or who have disseminated such information or participated in those actions, shall be liable for the damages caused to the persons who acquired the shares. Therefore, any person who has contributed to the preparation of the prospectus may be liable under the Swiss rules on prospectus liability.

Potential defendants under Article 752 SCO are the issuer itself, the signatories of the prospectus, the directors and senior officers of the issuer, the underwriters, the auditors of the issuer and the advisors of any of these persons, including the lawyers counseling in the issuance of the securities.

In order to establish a cause of action for prospectus liability under Article 752 SCO, the plaintiff must prove the following four elements:

(1) A breach of the legal provisions relating to the requirement or the contents of the prospectus (Articles 652a, 752 and 1156 § 3 SCO). This breach may consist in the absence of a prospectus, where required by law, in the existence of untrue or misleading statements in the prospectus or in the omission of material information where required by law or the Listing Rules of the SWX, in case of listed securities. Indeed, in view of the practice of the Swiss Supreme Court, there is a substantial risk of liability under Article 752 SCO if the prospectus conforms with the statutory requirements but violates the Listing Rules of the SWX, in particular the disclosure requirements.

(2) The defendants are responsible for such statements, i.e. the defendants were involved in the preparation of the prospectus and acted with intent or negligence (fault). The responsibility of all those who were involved in the preparation of a prospectus containing false or misleading statements is presumed. A defendant may rebut this presumption by showing that she acted with the due care required under the circumstances.

(3) The plaintiff (typically an investor) suffered prejudice; and

(4) The existence of a causation link between (1) and (3), i.e. that the prejudice was caused by the false or misleading statements in the prospectus. No liability exists if the prospectus was correct and accurate at the time of the offering, so that the loss suffered by the plaintiff (investor) is attributable to other factors.

Once the above requirements of Article 752 SCO are fulfilled, all persons responsible for the defective prospectus are jointly and severally liable for all damages caused. However, the judge may differentiate among various defendants depending on their degree of culpability and other circumstances, such as the degree of involvement in the preparation of the prospectus.

Prospectus liability is not applicable to a person who was not involved in the preparation of the prospectus, such as a controlling shareholder who does not take any action in the same.

The distributor is not required by law to perform a due diligence review of the information contained in the prospectus. Accordingly, the distributor can only be held civilly liable for the prospectus either (a) when she was involved in its preparation or (b) when she knew that it contained false or misleading information without having taken part in its preparation. However, in practice the main distributor is involved in the preparation of the prospectus and performs a due diligence review of its contents. This is

the case, in particular, when the distributor subscribes all of the newly issued securities and then places them with the public.

In addition, the distributor could be liable for breach of contract if she made specific representations to investors regarding the accuracy and completeness of the information contained in the prospectus. The distributor could also have a contractual relationship (i.e., sale of shares agreement) with the investor, and in this respect, any representation or statement made by her within the context of the sale which is false or misleading could trigger the distributor's liability for breach of contract (Article 97 SCO).

The existence of a contractual relationship varies depending on the particulars of an offering. In situations where the distributor underwrites all of the newly issued securities and then resells the same, a subscription agreement will be entered into between the issuer and the distributor and a sale agreement between the distributor and the investor. However, distributors may also act as representatives of the issuer, acting in its name and for its account. Under such a setup, the share subscription will be effected directly between the issuer and the investor, whereby the distributor will only act as a placing agent.

In view of the above, under certain circumstances, investors will have to resort to general civil law provision governing liability for tort or breach of contract (Articles 41 and 97 SCO). In particular, such a situation occurs if a distributor made independent representations to investors, whether in the context of a sale sale and purchase agreement or when acting as agent for the issuer, regarding the accuracy and completeness of the information contained in the prospectus although it was not involved in its preparation**.** Under Articles 41 and 97 SCO, whoever causes damage/prejudice, either intentionally or by negligence, in case of tort (Article 41 SCO) or breach of contract (Article 97 SCO) is liable to the party having suffered such damage/prejudice. In order for the plaintiff to establish a cause of action the following conditions must be met:

(1) A negligent or willful breach of contract or a tort. In the context of prospectus liability, this encompasses the breach of representations given by the distributor in respect of the prospectus. The responsibility of the defendant in case of breach of contract is presumed (Article 97 SCO), where it is to be established by the plaintiff in case of an action in tort (Article 41 SCO).

(2) Prejudice caused to the plaintiff (typically an investor); and

(3) The existence of a causation link between (1) and (2).

The burden of proof of the above conditions rests on the plaintiff, except as regards the fault of the defendant in case of breach of contract (Article 97 SCO) and, according to the opinion of the majority of legal scholars, prospectus liability (Art. 752 SCO), where it is presumed.

It is difficult to estimate the duration of a judicial procedure, as rules governing civil proceedings for actions based on Article 752 SCO and their application vary significantly from one canton to another. In addition, the duration of the proceedings until first-instance judgement will depend on the particulars of the case, especially the need for evidence proceedings. With this in mind, reaching a first-instance decision may take between one and half to three years. The first-instance judgement may be appealed to a superior cantonal court, which reviews the case with complete cognizance of facts and law. The appeal proceedings could take an additional one to two years, depending on the specifics of the case. Finally, judgement of a superior cantonal court can be brought before the Swiss Supreme Court if the amount in dispute is greater than CHF 8,000. Although the Swiss Supreme Court only reviews the lower courts' judgements on matters of law, it may take another one and a half years, or even longer, before a final and binding judgement is entered against defendant.

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SECURITIES LAW OF TAIWAN

Part 1. The regulator and its supervisory and regulatory powers

The Ministry of Finance ("MOF") is the highest government agency under the Administrative Yuan for the regulation and supervision of financial activities, including but no limited to securities, insurance, and banking. The regulatory power of financial activities is further delegated to lower level departments, such as the Department of Insurance for the regulation of insurance business, the Bureau of Monetary Affairs for the regulation of banking business, and the Securities and Futures Committee (SFC) for the regulation of the securities market.

The SFC is composed of 9 to 11 commissioners, meeting once every two weeks. Among them, one is appointed by the MOF as Chairman and two others are appointed as Vice-chairmen. The Chairman is responsible for the entire operation of the Commission with the assistance of the vice-chairmen. In addition, two or three commissioners serve on a full-time basis with five ex-officio commissioners, namely: (1) the Director General of the Bureau of Monetary Affairs, of the MOF; (2) the Director of the Department of Commerce, of the Ministry of Economic Affairs; (3) the Director of the Department of Prosecution Affairs, of the Ministry of Justice; (4) the Director of the Department of Bank Examination, of the Central Bank of China; and (5) the Controller of the Department of Finance, of the Council for Economic Planning and Development. Under the Organization Law of the SFC, all the commissioners are professional government officers and do not have a prescribed term for their service.

Generally, both the regulation and supervision of securities market is the responsibility of the SFC. For example, the SFC issues rules regulating the approval and the registration procedures of the securities offering and issuance (Article 22, SEL). However, as explained below, other regulators share with the SFC specific areas of regulation. First, the Securities and Exchange Law ("SEL") specifically provides that certain regulatory power over the securities market shall be delegated to the Ministry of Administration, or the MOF, depending on the relatively importance of the matters related. For example, the Administrative Yuan regulates the establishment and administration of any securities investment trust enterprise, securities finance enterprise, securities investment consulting enterprise, securities depository enterprise, or any other enterprise which operates securities related services (Article 18, SEL). Second, there are also a number of self-regulatory organizations registered under the SEL to which the SFC has delegated certain authority, subject to SFC oversight. These include registered national securities exchanges, including the Taiwan Securities Exchange (TSE), and the R.O.C. Over-the-Counter Securities Exchange (OTC), the Chinese Securities Association (CSA), registered centralized securities depository enterprises, and the Accounting Research and Development Foundation of the ROC. In this regard, a stock exchange shall adopt rules regarding requirements for public listing of securities, the examination of application for public listing and the contract for public listing and file such rules with the Competent Authority for its approval (Articles 138 and 140, SFC).

As a general principle, the regulations issued by the SFC are not subject to approval by other government authorities. Since SFC is a committee under the MOF, the SEL provides that a limited number of regulations issued by SFC are subject to the approval of the MOF, such as the establishment criteria for stock exchanges (Article 95, SEL).

The SFC can command the delivery of documents from securities firms and the stock exchange (Articles 64 and 162, SEL). Under the ROC Criminal Procedure Law, only officers of the judiciary branch (i.e. court judges or prosecutors) may command the testimony of witness. According to the "separation of power" principle under the ROC Constitutional Law, SFC is under the Ministry of Finance, of the

Administrative Yuan (Branch), and is not authorized to exercise the judicial power by any delegation of laws.

Part 2. The duty to disclose material information

An issuer must submit a prospectus with its application for approval to offer and issue shares to the public (Articles 30 and 31, SEL). The prospectus is to be delivered to the purchasers of the shares before final sales may be made. The SFC may reject an application because of insufficient information, or when it deems it necessary to protect the public interest.[481] The Criteria Governing Information to be Published in Public Offering and Issuance Prospectuses ("Prospectuses Rules") promulgated by SFC, describes the information that must be disclosed in the prospectus, including the following:

1. Remuneration and transportation allowance paid to each director and supervisor for the most recent fiscal year and the total sum of the compensation, rewards, special allowance and bonus paid to the president and vice president for the most recent fiscal year.
2. Number of shares held by Directors, Supervisors, President, Vice-President, and Manager of each department, and the ownership of a director's and an executive officer's spouse, minor children and nominees. There is no specific provision under the Prospectuses Rules requiring the disclosure of the indirect share ownership of directors and officers through corporate entities.
3. Names, number of owned shares and the shareholding percentage of those who own 5% or more of the total issued shares or whose shareholding percentage is among the top ten of all the shareholders.
4. Description of parties, major contract terms, and duration, of "important contracts", including outstanding and recently expired supply and sales agreements, long-term loans, technology and construction contracts, and those which are likely to impact investor's rights. The issuer is also required to disclose the terms and counter-parties of certain material transactions (such as transactions involving the disposal of material assets, any borrowing or guarantee). Finally, the issuer is required to disclose any transaction with a related person in its annual report, which constitutes a part of the IPO prospectus (Article 6 and 22, Prospectuses Rules). Under ROC Generally Accepted Accounting Principles, the definition of related person includes any individual or entity which is controlled, controls, or is under common control of said enterprise (i.e. having material influence on such enterprise's management, financial policy).

The prospectus shall be signed or sealed by the issuer's responsible person (if the issuer has more than one director, more than half of the all directors' signatures are required). The underwriter shall sign on the prospectus and be responsible for the information contained therein (Article 5, Prospectus Rules). Specifically, under the TSE IPO Rules, the underwriter is required to issue a comprehensive evaluation report, which shall be incorporated as part of the IPO Prospectus. In the event the prospectus contains any material false information or omission to state any material fact, the underwriter/distributor shall be held jointly and severally liable with the issuer to any *bona fide* counterpart for damages resulted therefrom (Article 32, SEL). Finally, an attorney's legal opinion and a collective opinion written by the issuer and reviewed by the certified public accountant, shall be included in the registration statement as a special item (Article 26, Prospectus Rules).

[481] Articles 3 and 8 (22), Criteria Governing the Offering and Issuance of Securities by Issuers.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

The issuer is prohibited from making false statements or omissions regarding the material content of the prospectus (Articles 30, 32 and 174 (3), SEL). By intentionally including false statements or omitting material information from the prospectus, the issuer may have violated those provisions. In the event that a issuer of listed securities is found to have violated the SEL or rules and regulations promulgated thereunder, the SFC has the authority to order the stock exchange to suspend the trading or terminate the listing of said securities in order to protect the public interest or the interest of the investors (Article 148, SEL).

Similarly, the distributor must ensure that the evaluation report and relevant information provided in the prospectus do not contain: (1) false statement or omissions which would mislead others, or (2) material omission or obvious errors which would affect investment judgment (Article 25, Rules Governing the Securities Firm). Thus, if the prospectus includes false statements or omits material information, the distributor and its directors and officers may have violated securities laws. If the distributor is found to have intentionally committed an act which violates the SEL or other related laws and regulations, the SFC may impose on her any of the following sanctions (Article 66, SEL): (1) warning; (2) ordering the distributor to remove its directors, supervisors, or managers from their office; (3) suspending the business, in whole or in part, of the distributor or its branch for a period of not more than six months; or (4) revoking the business license of the distributor or its branch. In addition, if a director, supervisor, or employee of the distributor is found to have committed any act which violates the SEL or other related laws and regulations, and if such violation may affect the normal operation of the distributor, the SFC, in addition to the punishment imposed on the distributor, may order the distributor to suspend the business operation of such person for not more than one year or discharge such person at any time (Article 56, SEL). A person who was so discharged from a position as director, supervisor, or employee of a securities firm, will be prohibited from serving as the director, supervisor or manager of another securities firm for a period of 3 years (Article 53).

Finally, depending upon the seriousness of the mistake or omission committed by a certified public accountant in the auditing of financial reports, the SFC may impose any of the following sanctions: (1) warning; (2) suspension from proving audit services for a period of two years; (3) revocation of her practicing license (Article 37, SEL). In addition, the SFC may suspend a CPA's auditing license if the offering documents contain untrue information audited by the CPA (Article 174 (7) and 174II, SEL).

3.2 Judicial sanctions

Article 20I of the SEL provides a general prohibition against misrepresentation, fraud, or any misleading act in connection with the public offering, issuing or trading of securities. Violation of Article 20 is a crime and the violators (including but not limited to the issuer, the distributor, their directors and responsible officers and the accountant) may be punished with imprisonment for not more than seven years, and in addition thereto, a fine of not more than NT$3 million (Article 171, SEL).

Under Article 174 of the SEL, any person who made false statements on the prospectus or who disseminated false information regarding a public offering of securities may be subject to criminal punishment including imprisonment for not more than five years, detention, and/or a fine of not more than NT$2,400,000. If the same act violates both Articles 20 and 174, the court would impose the higher penalty. According to a basic principle under the ROC Criminal Code, unless it is otherwise expressly provided by the laws, the criminal sanction can only be imposed if the violation is committed with

criminal intention (i.e. knowing the information it disseminated is false, fraudulent or misleading). As a result, negligent conduct would generally not be subject to criminal liability.

Note that Articles 20 and 174 of SEL punish any dissemination of false information in relation to the securities offering, trade, issuance or the disclosure requirements under the SEL, not limiting to the dissemination of false information through the distribution of offering documents. Therefore, the distributor may be criminally liable if she disseminates false information outside of the offering documents, but in an occasion where the public would be able to access it (for example, in the management presentation meeting or press release).

A certified public accountant or attorney commits a criminal offense under Article 174 (7) if they make a inaccurate certification in their auditing of contracts, reports, or any other evidentiary documents related to securities transactions and may be sanctioned with imprisonment for not more than five years and a fine of not more than NT$2,400,000. Before this legal provision was amended in 1998, accountants could avoid liability if they had no actual knowledge that the information was false. However, this defense was deleted in 1988. As such, it is possible that accountants and attorneys may be subject to criminal punishment even if they were solely negligent. However, due to the limited case law, it is unclear whether the court may impose the criminal sanction under Article 174(7) upon the accountants or attorneys if they were solely negligent.

3.3 Stock Exchange Sanctions

The TSE has the authority to terminate the listing of securities of an issuer if a judicial authority confirms that its listing application contained false information and concealed items, and upon discounting such false information and concealed items, its profitability does not conform to listing requirements (provided that less than five years have passed between the listing date and the date of confirmation by the judicial authority). This sanction may be applicable if the issuer intentionally omits material information from the prospectus, and such material information must be disclosed in the financial reports and accounting books submitted to the TSE for listing requirements.

Part 4. Investor's right of restitution for losses

In case of losses due to material misstatements or omission in a prospectus for a public offering of shares, investors may obtain restitution through a judicial proceeding before a civil judge. To this effect, a class action is available.[482]

Restitution may be sought against the issuing company, its responsible persons (including issuer's directors and main officers) and employees that have certified to the accuracy of the prospectus, any distributor, and any accountant, attorney, or any other professional that has certified, in whole or in part, to the correctness of the prospectus.

As a general principle, the plaintiff in a civil claim has the burden of proof of establishing the misconduct of defendant, the damages incurred, and the causation between the misconduct and the damages. In a prospectus liability case, Article 32 of the SEL establishes that the plaintiff must prove that: (1) the prospectus contains false statements or omissions; (2) the false statement or omission relates to a material aspect; (3) the plaintiff is a *bona fide* third party (i.e. plaintiff bought the shares in reliance upon the offering document); (4) the plaintiff suffered losses; and (5) the damage was caused by the misconduct.

[482] Under Article 41 of the ROC Civil Procedure Law, a group of the individual plaintiff with common interest may select among themselves, one or more representatives to file the complaint on behalf of the whole group.

Article 32 of the SEL provides no defenses for the issuer in a case for false information or omissions in the prospectus. In contrast, the issuer's responsible persons and the distributor would not be held liable for any information in the offering document which was not certified by lawyers or auditors or other professionals if it can be established that they exercised due diligence and had reasonable grounds to believe the information contained no false statements or omissions. Similarly, the issuer's responsible persons and the distributor would not be held liable for any information in the offering document which was certified by lawyers or auditors or other professionals if it can be established that they exercised due diligence and had reasonable grounds to believe that the opinion expressed by lawyers, auditors or other professionals, was accurate. Finally, accountants and expert professionals would not be held liable for having certified false information or omissions in the prospectus if it can be established that they exercised due diligence and had reasonable grounds to believe that their opinions rendered therein were accurate.

Restitution under Article 32 of the SEL is limited to the parties mentioned therein. Investors must resort to general tort law under the ROC Civil Code to obtain restitution if they can prove that a person who is not listed in Article 32 of the SEL (e.g., the issuer's controlling shareholder) caused, or had substantial influence over, the decisions of the issuer regarding the false statements or omissions in the prospectus. Nevertheless, in the absence of court precedent, it is unclear whether such claim may be sustained in court.

There is no provision under the ROC securities law imposing civil liability on the controlling shareholder for the issuer's liabilities, or for acts or omissions of the issuer's directors or officers. However, investors may claim damages under the general tort provisions and the ROC Civil Code if the controlling shareholders caused or influenced the acts or omissions of the corporation. Nevertheless, due to the limited precedent in this regard, it is unclear whether such claim may be sustained in court.

A first-instance judgement in a prospectus liability case may take between eight and eighteen months. Appeal to the High Court is highly likely to be granted and is available on matters of law and fact. In contrast, an appealing party to the Supreme Court may only argue a matter of law or that the High Court judgement was not supported by evidence. Appeal to the High Court may take between 1 and 2 years, while appeal to the Supreme Court may take between 1 and 2 years. Thus, if the case is appealed to the Supreme Court it could take between 3 and 5 years for the judgement to become final, from the moment it was filed.

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SECURITIES LAW OF THAILAND

Part 1. The regulator and its supervisory and regulatory powers

The Securities and Exchange Commission ("SEC") is the sole agency with authority to regulate and supervise the capital markets. Banks are regulated by the Bank of Thailand while insurance companies are regulated by the Ministry of Commerce.

The members of the SEC are the Minister of Finance as Chairman, the Governor of the Bank of Thailand, the Permanent Secretary of the Ministry of Finance, the Permanent Secretary of the Ministry of Commerce and not fewer than four but not exceeding six experts appointed as commission members by the Cabinet upon the recommendation of the Minister of Finance. The appointees are not subject to any further approval or confirmation and serve six-year terms. The Cabinet can discharge any Commissioner member appointed by the Cabinet only on the ground of gross incompetence in the performance of duty. However, no Commissioner has ever been discharged since the establishment of the SEC in 1992.

The Minister of Finance shall be in charge of the enforcement of the securities law (SEA[483]) and shall have the power to issue ministerial regulations (Article 7, SEA). Such ministerial regulations shall come into force upon publication in the Government Gazette. The SEC shall have the power and duty to formulate policies to promote and develop matters concerning securities, securities business, the Securities Exchange, over-the-counter centers, and related businesses, organizations related to securities business, issue of offer of securities for sale to the public, acquisition of securities for business takeovers, and prevention of unfair securities trading practices (Article 14, SEA). Such power shall include the issuance of rules, regulation, notifications, orders, or directions. All SEC rules, regulations, notifications, orders, or directions that are generally applicable shall come into force upon publication in the Government Gazette.

A "competent officer" appointed by the Minister of Finance and with approval of the Office of the SEC can order any person to testify, deliver, or present documents or evidence as required when investigating a violation of the securities laws and regulations (Section 264, SEA).

Part 2. The duty to disclose material information

The offer to sell shares to the public can be made only when the offering document[484] is filed and has become effective and the prospectus has been delivered or distributed (Section 79, SEA). Neither offers nor sales can be conducted during the period prior to the prospectus becoming effective (Section 65, SEA). However, a distribution of the draft prospectus and a book building can be made prior to the effective date (Section 77, SEA).

If the SEC is of the opinion that the contents of the offering document are incomplete, it has the power to order a filing of additional information or amendment of the offering document. Failure to comply with such order will delay the effective date of the registration statement and draft prospectus. The SEC is not authorised to oppose an offering document based solely on its own determination on the quality of the investment.

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[483] The Securities and Exchange Act B.E. 2535 (A.D. 1992). The full text of the Act can be obtained from www.sec.or.th.

[484] The registration statement and the draft prospectus.

Details of the offering document are prescribed in the SEC Notification No. Kor. Jor. 44/2543 dated October 15, 2000. According to these regulations, the prospectus must include, among other information, the following:

1. Salaries and compensation of directors and officers as an aggregate amount.
2. Name of the top ten shareholders and percentage of shares that each of them hold. The top ten shareholders are required to disclose their indirect shareholdings in accordance with Section 258 and have to include shareholders under the same controlling block in such disclosure as well**.** Furthermore, any increase of shareholding above any multiple of 5% of the total outstanding shares may need to be reported to the SEC by the shareholder (Section 246, SEA) and made public.
3. Number of shares that each of the directors and officers hold. The directors and officers are required to disclose the (direct) shareholding of themselves, their spouses, and minor children. However, if these people are also the top ten shareholders of the company, they are required to disclose their indirect shareholdings too (as prescribed in SEA Section 258).
4. Description and details of important contracts with suppliers which have a value that exceeds 30% of all other contracts.
5. Description of material contracts not made in the ordinary course of business.
6. Description of transactions in which directors, officers, or the controlling shareholder have or will have a direct or indirect material interest. It is required to disclose transactions with family or companies under their control. The disclosure shall include the identities of the conflicting persons, details of the transactions, and the rationale and reasonableness of the transactions.

The prospectus must be signed by the issuer's directors. The distributor must provide a certification statement in the prospectus declaring that it has performed a due-diligence review of the information provided therein. Note that the distributor may be liable for breach of contract (but not for a violation of the law) if she negligently makes false representations in connection with the sale of securities that were not included in the prospectus. In addition to the issuer's directors and the underwriters, the auditors, financial advisors, and appraisers of assets who signed their names certifying the information in the registration statement and the prospectus may also be responsible for its content (Section 82 and 83, SEA). In particular, the auditor shall adhere to the ethical code of auditors, perform the audit work and declare her opinion according to the provisions of the law relating to auditors and additional provisions as specified in the notification of the SEC (Section 107, SEA).

Part 3. Sanctioning the failure to disclose

3.1 Administrative sanctions

In case of false statements or omissions of material information in the offering document, the SEC may order the suspension of the effectiveness of the offering document or the withdrawal of its previous approval, order a temporary suspension until corrections are made, or order the issuer to make corrections (Section 76, SEA). However, the SEC is not authorized to impose a fine on these cases. Instead, it has to bring the case to Court and the Court may impose a fine (Section 278, SEA). Similarly, the SEC is not authorized to sanction the issuer's directors or officers but may bring the case to Court (Section 278 and 301, SEA). However, the SEC may take administrative actions against the persons regulated by it, such as the distributors. For example, the SEC may suspend the license of the distributor if she failed to carry on the business in a professional manner. Similarly, the SEC may revoke the approval of the accounting firm if it finds that it failed to perform its duty up to professional standards (Section 89, SEA). Finally, if there is evidence that the operations of a securities company may damage investors, the SEC may order the company to take the necessary measures to rectify its management or to take any other action as specified

by the SEC, including the removal of its directors, managers or other responsible persons (Sections 142 to 144, SEA).[485]

Note also that the SEC may impose fines on the distributor and the accounting firm as a result of an administrative settlement of criminal offenses. In this case a settlement committee appointed by the Finance Minister can determine a fine to be paid by the alleged offender (Section 317, SEA).

3.2 Judicial sanctions

Criminal sanctions may only be imposed on a person who intentionally commits an act that is considered an offense, except where the law provides sanctions for negligent actions (Section 59 of the Penal Code). In this regard, any person who intentionally makes a false statement or conceals a material fact from an offering document shall be liable to imprisonment and fines under Section 278 of the SEA.[486]

There is no specific provision on the criminal liability of distributors in connection with negligent omissions of material information in a prospectus. However, distributors are criminally liable if they certify having performed a due diligence review of the prospectus and they are aware that the prospectus contains false statements or omits material information. In contrast, the issuer's auditors are subject to criminal liability if they make false reports or perform audit work that does not comply with applicable provisions of the law, even if the violation is the result of negligence (Section 287, SEA). Imprisonment and/or fines may apply in this case.

3.3 Stock Exchange sanctions

The Stock Exchange may delist the issuer in accordance with the listing rules issued by the board of directors of the Stock Exchange. Specifically, ordinary shares may be delisted if the listed company discloses false information or fails to disclose material information, which may seriously and adversely affect the rights, interests or decision of the investors, or the price of the securities.[487]

Part 4. Investor's right of restitution for losses

An investor may obtain restitution for losses suffered as a consequence of false statements or omissions of material information in a prospectus through a civil lawsuit. In addition, under the Criminal Procedure Code, a civil case in connection with an offense may be filed in the Court where the criminal case is being tried. Specifically, an investor who files a criminal case against a person for making a false statement or concealing a material fact from an offering document (SEA Section 278), may file a civil case in the same Court. After deciding on the criminal case, the Court will begin the trial of the civil case and render a judgment for compensation.

Investors may file a civil case under SEA Section 82 or 83. SEA Section 82 states that if an offering document contains false statements or fails to disclose material facts, the purchaser of the securities who suffers damages has the right to be compensated by the company. Therefore, to obtain compensation, the investor must prove that there is a false statement or material omission in the prospectus and that she

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[485] Failure to comply with such orders is an offense punishable with imprisonment and/or fines (Section 282 or 283, SEA).

[486] If the offender is a legal entity, the director, manager, or person responsible for the operation, whose action or instruction (or the failure to do so) resulted in the offense, shall be liable to the criminal penalties (Section 301, SEA).

[487] Section 9 (5) of the Regulations of the Stock Exchange of Thailand on Delisting of Securities, 1999 (Bor.Jor./Phor.01-00).

suffered losses from the purchase. According to SEA Section 83, the directors or promoters[488] who signed the registration statement, and the underwriters and auditors who intentionally or with gross negligence signed their names to certify the information in the offering document, are liable jointly with the company. Therefore, at least gross negligence must be established to obtain compensation from the underwriters or auditors, while it is not necessary to prove intent or negligence when seeking restitution from the directors or promoters.

All defendants may be released from liability if, as prescribed in SEA Section 84, they prove that the subscriber knew or should have known about the false statements or material omissions, or that the damage was not caused by the defective prospectus. In addition, directors, promoters, underwriters, and auditors may escape liability under SEA Section 83 if they "can prove that they are not aware of the facts or by their positions they could not have been aware of the truthfulness of the information or the failure to disclose the facts required to be stated." Thus, for example, a non-executive director would not be liable is she is not involved with the day-to-day business of the company and is not aware that a statement in the prospectus is false. Since there is no precedent, it is unclear whether this defense is available only if the defendant performed up to professional standards.

Investors must resort to tort law[489] to pursue a prospectus liability case against defendants that are not liable under the SEA provisions (e.g., the issuer's officers, or the lawyers that advised in the transaction). Section 420 of the Civil and Commercial Code provides that: "A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person, is said to commit a wrongful act and is bound to make compensation." In order to obtain restitution under Section 420, the plaintiff must be able to prove that such persons were involved in the preparation of the prospectus and intentionally or negligently made a false statement or omitted material information. Moreover, the plaintiff must prove that the damages she suffered were caused by the actions of the accused.

Under general contract law, a party may terminate the contract upon a breach by the other party or may declare a subscription of shares void on the ground that it is entered into by a mistake. However, there is no precedent case which will confirm that the general contract law will apply to this case.

Controlling shareholders are not civilly responsible for the company's liabilities or the acts or omissions of the company's directors or officers. The corporate veil may not be pierced either. However, the controlling shareholder may be liable under general tort law if the plaintiff proves that she was directly involved in the act or omission.

Normally, a civil case will take about 1 year to be decided by the Court. If appealed, it will take one year to obtain a decision by the Appeal Court and two years to obtain a decision by the Supreme Court. Appeals in a prospectus liability case would likely be granted since it is a mater of law whether the information is "material" or not, which entitles the defendant to appeal the case to the higher court.

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[488] "Promoters" are those who initiate the incorporation of a company by registering the memorandum of association and offering shares to interested investors. A public offering of shares by the promoters can be made prior to the incorporation of the company under Section 32 and 65 of the SEA. The promoters shall become shareholders of the company after the company is incorporated.

[489] Under Thai law "Tort" is called "Wrongful Act".

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SECURITIES LAWS OF THE REPUBLIC OF TURKEY

Part 1. The regulator and its supervisory and regulatory powers

The regulatory authority in the Republic of Turkey[490] for the securities markets is the Capital Markets Board (the "CMB"). Banks and insurance firms are mainly regulated under special laws. However, to the extent of their capital market activities, the Board supervises banks that sell their securities to the public and perform activities regulated in the Capital Markets Law (the "CML"[491]).

The CMB is composed of seven members who are appointed by resolution of the Council of Ministers, two from four candidates proposed by the relevant State Ministry, and one each from among two candidates proposed by the Ministry of Finance, the Ministry of Industry and Commerce, the Banking Regulation and Supervision Board, the Union of Chambers and Commodity Exchanges of Turkey, and the Association of Capital Market Intermediary Institutions of Turkey.

The duties of the Board Chairman and members cannot be terminated prior to the completion of their terms. With the approval of the Prime Minister, members of the Board may be removed prior to the completion of their term if they lose the required qualifications for appointment, violate any of the prohibitions which they are subject to, or are under final sentence for crimes they have committed related to their duties.

The Board shall use its authority independently by establishing regulatory procedures and by making decisions in individual cases. Among the principal duties of the Capital Market Board is to regulate and control the conditions of the issuance, public offering and sale of capital market instruments with respect to the application of this Law and the public offerings and capital market activities and transactions (Article 22, CML). The regulations and *communiqués* issued pursuant to regulatory procedures shall enter into force by being published in the Official Gazette of the Republic of Turkey. Exchanges may be established upon the suggestion of the Board and proposal of the Related Minister and with the approval of the Council of Ministers. The establishment, organization, operations, supervision, membership rules and principles of these exchanges shall be determined by regulations promulgated by the related ministry (Article 40, CML).

The Board is authorized to request information (related to the relevant provisions in CML and the other laws applicable to the capital market) from the issuers, capital market institutions, their affiliates and institutions, and other real persons and legal entities, as well as to examine all their books, records and documents and other information sources, and to obtain copies of these. The Board can also request written and oral information (related to the relevant provisions in CML and the other laws applicable to the capital market) from any related persons, who are obliged to provide such information and sign the necessary minutes.

Part 2. The duty to disclose material information

The issuance and offering of shares by any real or legal entities to the general public are subject to prior registration with the Board. Within the context of registration process, a prospectus and a circular are required to be prepared. And upon review and approval of the Board, the prospectus shall be registered with the Trade Registry and the circular shall be announced to public. Under the CML, the Board's role is

[490] Hereinafter referred to as "Turkey".
[491] Capital Market Law No. 2499 (as amended).

to supervise the accuracy of the offering documents by demanding all the necessary information. But the CMB may not oppose an offering document solely based on its own determination that the investment is speculative or of inadequate quality. Furthermore, provided that the said offering documents are duly approved by and the shares are registered with the Board and announced to the public in the Trade Registry Gazette and other national newspapers, it is not prohibited by law to sell shares to the general public without actual delivery of the prospectus to potential investors in advance. It is only required that the issuer and the distributor have enough copies of the prospectus approved by the Board at the sale places, to be delivered to the persons who request it[492]. Finally, the law does not establish a "waiting" period during which securities may be offered but actual sales may not be irrevocably committed.

The prospectus shall include the information which is required to be disclosed in a public offering of shares. The Board shall determine the content of the prospectus (Article 6, CML). In accordance with the standards required by the Board, in addition to information about the shareholding structure, the method and timing of the sale and the financial position of the Company, the following information must be included in the prospectus[493]:

1. The total value of the benefits provided for the Board members and the key personnel in charge of management.
2. Name and ownership of main shareholders, shareholdings of real persons above 5% of the issuer's capital, foreign shareholders and legal entities owning shares of the Company regardless of the number of shares owned thereby. Beneficially ownership of large shareholders is not required to be included in the prospectus unless such beneficial ownership is known to the issuer. Note that substantial shareholders are subject to ownership reporting requirements. Specifically, disclosure to the public is required when a person or legal entity or persons or legal entities acting together acquire 10% or more of the total voting rights or of the total number of stock certificates issued or when the ownership of such persons changes by 1% or more of the total paid-in capital or when the ownership of the Chairman, Board members, general manager and the vice general managers increases by 1% or more of the total paid-in capital.
3. The relationship, if any, between the real persons owning more than 10% of the paid-in capital
4. Number of shares, directly or indirectly held by each director and officer, including the shares owned through corporate entities.
5. Brief description of material contracts not made in the ordinary course of business with their expected effects on the business. Disclosure is required only if such contracts have a significant effect on the business of the issuer and shall not include the details (i.e. relevant terms and conditions) of the contracts.
6. No disclosure is necessary regarding the terms of outstanding material contracts and transactions in which directors, officers, or large shareholders have a (direct or indirect) interest.

The offering document (prospectus) shall be jointly signed by the intermediary institution (the distributor) and the issuer. Thus, only the directors and officers with the capacity to represent the issuer and the distributor shall include their signatures on their behalf. The accounting firm shall not sign the entire offering documents, but only the financial statements it audited and approved[494].

The distributor can be liable for the truthfulness of the material information included in the offering document if she does not act with required due diligence, in which case she shall be responsible for the remaining losses which could not be indemnified by the issuer. Therefore, although not expressly required

[492] Article 23, Communiqué on Principles regarding the Registration with the Capital Markets Board and the Sale of Shares, Serial: I, No.26 ("Comunique I-26").
[493] As of December 2000.
[494] Article 23, Comunique I-26.

by law to perform a due diligence review of the prospectus, the distributor is likely to do so as a matter of commercial practice to avoid civil liabilities.

The announcements and explanations directed to the public may not include inaccurate, exaggerated or misleading information (CML 6/2, and 47/C). However, representations outside of the offering documents addressed to the public within the limits of its professional evaluation shall not cause the distributor to be held liable, even if they turn out to be incorrect.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

If the CMB decides that the information in the offering documents is insufficient and does not reflect the truth fairly, such that the public may be deceived, it may deny registration of the securities with the reason for the denial. Furthermore, the Board may prohibit advertisements related to the offering it considers misleading.

In case of false statements or omissions of material information in the prospectus, the CMA may impose fines against the issuer. Persons and legal entities who have acted in violation of the regulations or orders based on the law, may be subject to a pecuniary punishment by the Board (Article 47/C of the CML).

In addition, the CMB is authorized to take all kinds of required actions and to request precautionary injunctions regarding public offering transactions and sales made without registering with the Board (Article 46 of the CML). The Board can also publish the undisclosed information which should have been made public according to the law, collecting to this effect the expenses from the relevant corporations, persons, establishments, or capital market institutions. The Board may also take measures to prevent real persons, or legal entities, who have violated the legal provisions on insider trading, from engaging temporarily or permanently in transactions on exchanges and other organized markets. Notwithstanding the above, the Capital Market Law does not establish that, in case of a defective prospectus, the Board can instruct or order the issuer, the distributor, or the accountant, to refrain from, or to perform, specific actions. However, if the CMB determines that investors suffered losses as a result of defective information, it is authorized to take all legal actions against the relevant parties in order to compensate investors' losses and to punish the persons responsible for disclosing the inaccurate information.

The accounting firm may be eliminated by the Board from the list of authorized institutions in case of submission of deficient, misleading or false reports or information.[495]

In case where the omission is not the result of intentional actions of the relevant persons and the losses of the investors are duly covered by the liable parties, the administrative sanctions shall be applied directly by the CMB without other judiciary procedures. However, in case where the information is intentionally omitted by any of the relevant parties, the directors or officers of the issuer will be subject to penal sanctions in addition to the administrative sanctions against the relevant corporation.

3.2 Judicial sanctions

In case of false statements or omission of material information in a prospectus and the circular, the issuer, its directors or officers, the distributor, and the accounting firm, may be punished with a heavy pecuniary fine (Article 47/C of the CML). However, this sanction by the judiciary may be imposed only if the violation is the result of an intentional conduct.

[495] Article 46/j, Communiqué regarding the Independent Audit in Capital Markets, Serial: X, No.16.

Accountants who have knowingly prepared independent auditing reports contrary to the facts may be punished by a prison sentence and a heavy fine (Article 47(B)3 of the CML). It should be noted that imprisonment may not be imposed on the issuer's directors or officers.

3.3 Stock exchange sanctions

The Istanbul Stock Exchange (ISE) Rules and Regulations empower the ISE to issue a warning to any corporation under de-listing consideration in case of failure to disclose all required information or non-compliance with stock exchange rules and regulations. However, ISE is not authorized to order or direct the issuer to refrain from, or perform a specific action, in case of a defective prospectus. Instead, if the ISE is aware that the prospectus is defective, it would notify the CMB.

Part 4. Investor's right of restitution for losses

Investors may claim the restitution for losses caused by a defective prospectus through a judicial procedure before a civil judge.[496] In addition, the investors may either notify the CMB to take legal actions, including a criminal judgment against the officers or directors of the issuer or may directly file the suits against the same under 47/C of the CML. However, the criminal judgment aims to punish the relevant persons acting in breach of the laws and regulations, but not to compensate investor's losses caused by their intentional failure to disclose information required by law (Article 47/C of the CML).

According to Article 7 of the CML, the issuer is responsible for the fair description of the facts in the information provided in the prospectus and the circular. The distributor is also liable for the fairness of the information except the information provided by the accounting firm. If the distributor did not act with due diligence, she is liable for the part of the investors' losses that cannot be indemnified by the issuer. Finally, pursuant to Article 16 of the CML, the accounting firm is responsible for the losses caused by false or misleading information in its auditing report on the issuer's financial statements.

In order to obtain restitution for damages in case of a defective prospectus, the investor must prove in court that: (1) the prospectus contains false or misleading statements or omits material information; (2) she incurred losses; and (3) those damages were caused by the violation of the disclosure requirements. In addition, investors must prove negligence to obtain restitution from the issuer or the distributor or the accounting firm. If investors can prove these elements, a Civil Court would then order the party responsible for the inaccurate (omitted, misleading, or false) information to indemnify the investors.

In order to avoid liability from a defective prospectus, the issuer is required to prove that the omitted information was not material, or not known at the date of the offering document, or that the investor's loss did not arise from that cause. The distributor and the accounting firm must prove that they acted with due diligence, or that the investor's loss was not caused by the false, misleading or omitted information.

It should be noted that courts tend to rely on the investigation reports of the CMB. Thus, an investigation report prepared by the CMB as a result of an investor's complaint will grant that investor very reliable evidence to support her claim before the courts.

There are no legal provisions, other than the indemnification of the losses, that authorize the CMB or the Court or any Government body to recess the acquisition of the shares and the reimbursement of the price

[496] Securities laws provide for the restitution of losses through a civil action. In contrast, securities laws do not address directly the restitution of damages. However, investors may recover losses through the indemnification rules of general laws.

paid. However, the indemnification is determined on the basis of the actual loss of the investors that is also based on the investment.

The controlling shareholder cannot be held civilly liable for the obligations of the company or for the acts or omissions of its officers and directors.

In a prospectus liability case, a first instance court judgement may be issued within one year from the moment of filing the initial complaint. Defendants may appeal the first-instance decision even without a valid defense. Specifically, the defendant may move for a Supreme Court decision, and under specific cases, request the correction of the final resolution provided that a valid defense exists. The final resolution of the case may be reached in 2 years as appeal may require one year.

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SECURITIES LAW OF UNITED KINGDOM

Part 1. The regulator and its supervisory and regulatory powers

The Financial Services and Markets Act 2000 ('FSMA') came into force on 1st December 2001. It created a single regulator, the Financial Services Authority ('FSA') for the whole financial services industry (with some minor exceptions). Since 1st Dec 2001 (and in practice before that date), the FSA is also the main regulator of banks and insurance companies. Under the previous regime, governed by the Financial Services Act 1986, the FSA had been called the Securities and Investments Board ('SIB') and had been a 'regulator of regulators', its board appointed, and on terms determined, by the Department of Trade and Industry ('DTI') in conjunction with the Bank of England.

The SIB was responsible for recognising and overseeing Self-Regulating Organisations ('SRO's), responsible for the day-to-day regulation of the securities and investment industry, plus professional bodies, responsible for the ancillary financial services activities of accountants and lawyers. The relationship between the SROs and their members was contractual. The SIB also oversaw markets and clearing houses and directly regulated mutual finds, but had no responsibility, direct or indirect, for banking or general insurance activities. In 1998, the SIB was renamed the FSA and took over bank regulation from the Bank of England. The Bank of England no longer had any responsibility for appointing the FSA's board and government responsibility had passed from the DTI to Her Majesty's Treasury ('Treasury'). In 2000 the FSA took over responsibility for the listing rules from the London Stock Exchange. During 1999/2000, it also took on most of the staff of the SROs and the other financial services regulators to create a 'de facto' single regulator, even though it was still having to operate under a variety of pieces of legislation (including the Financial Services Act 1986) until FSMA came into force. FSMA then gave a unified statutory backing to financial services regulation and swept away most of the remnants of self- regulation in the UK system.

The board of the FSA, a majority of whom have to be non-executive, are still appointed by the Treasury with no confirmation hearings, although these appointments should follow the guidelines set out by the Nolan Committee on Standards in Public Life to ensure a degree of transparency. There are no statutory requirements as to the terms of office, which are at the will of the Treasury.

The regulations issued by FSA are not generally subject to the approval of other governmental authorities. The rules, guidance, and changes thereto only have to be lodged ex post facto with the Treasury. The Treasury does have power to limit financial promotion rules (advertising, etc). The Office of Fair Trading keeps the rules and practices of the FSA (including listing rules) under review and reports to the Competition Commission if dissatisfied with them. It in turn reports to the Treasury, which has the sole responsibility to intervene.

The FSA has its general responsibility through the requirement that all persons who carry on or promote almost any financial service (including securities business) be authorised and the FSA has a virtual monopoly on authorization. There are some exceptions: (1) EEA firms with home state authorizations under passported arrangements (insurance, credit institutions, investment firms, some mutuals); (2) Lloyd's insurance which continues as a closely monitored SRO; (3) Limited financial services offered by accountants, lawyers etc., which are still regulated by their professional bodies; (4) Certain specified exempt persons like European central banks; and (5) Selling agents controlled by an authorised firm.

The supervisory powers of the FSA are complex. They are principally aimed at those regulated by the FSA and their connected parties, but documents can be ordered from third parties. To enforce the demand the FSA can seek a court ruling of contempt. Also FSA can seek a magistrate's warrant against third

parties, in serious cases even pre-emptively. Although the FSA's general power is to obtain documents and other information, it may appoint investigators (who can and are expected to be employees of the FSA) who may order the person subject to the investigation to give personal testimony and for certain suspected violations even third parties if it is 'necessary or expedient'. If the investigation is of the breach of listing rules, then technically there is no power to order third parties to give testimony, FSMA s 97. But the broad definition of 'connected persons' combined with the possibility of launching a parallel investigation for something like 'misleading statements and practices' or 'market abuse', where there is the power to compel testimony from third parties, means that this restriction can be circumvented if the FSA really felt it necessary. In any case, these investigations are not confined to the activities of authorised firms but to others who may, for example, be conducting unauthorized business or be involved in market abuse. Investigations can also be conducted on behalf of overseas regulators. Failure to comply may be treated as contempt, but there is protection on admissibility of any compelled evidence in future criminal proceedings.

Part 2. The duty to disclose material information

There are two separate legal regimes in the UK. If the company is seeking to have its securities listed (necessary for trading on the main market of the London Stock Exchange ('LSE')), the process is subject to FSMA ss 72 to 103 and Schs 7 to 11, the FSA's Listing Rules ('LR's) and the LSE's Admission and Disclosure Standards ('ADS's). Listing particulars have to be approved by the FSA before publication. If some or all of the securities are being offered to the public, the listing particulars are technically called a prospectus, but as this does not alter the contents requirements, they will be referred to throughout as listing particulars. Securities may not be offered to the public before the listing particulars are published (FSMA s 85). The FSA can oppose listing particulars that meets a list of disclosure items or formal requirements, based solely on its own determination that the offering document fails to provide material information. In theory, the FSA can refuse 'if for any reason relating to the issuer, [the FSA] considers that granting it would be detrimental to the interests of investors'. When the responsibility lay with the LSE, there were a number of hurdles, like having a proper established business with at least three years of unqualified accounts, and no cash shells were allowed to retain a listing. The rules have become less absolute in recent years, but the discretion to refuse listing is there for the FSA to use.

Alternatively, if no listing is being sought, then the process is subject to the Public Offers of Securities Regulations 1995 ('POS Regs'). These documents require no prior approval. Under both regimes there are generous exemptions. Non-listed securities can still be traded on the LSE if they also comply with the LSE's own rules for its second tier Alternative Investment Market ('AIM').

There is no need to deliver the actual document to a purchaser, provided it has been published and made available at an advertised address. Indeed, an offer notice with an application form and only a reference to where the document may be obtained may be published in the newspapers, etc. The law does not create any formal waiting period when issuer's shares may be offered but actual sales may not be committed, agreed, or finalized. Officially the bar is on 'offering' to the public before listing particulars are published. This requires approval of the FSA (if listing is sought) and registration with the Registrar (who does not vet). Underwriters can underwrite before registration, and in practice 'red herrings' are circulated by authorized firms only on a limited basis (as these are financial promotions), but no formal offers should be made.

The listing particulars must contain all such information as investors and their professional advisers would reasonably require (FSMA s 80). The listing particulars must include, among others, the following information:

1. Detailed remuneration of each director (but not officer). Under normal UK governance arrangements, the FSA would expect the directors to include at least the Chief Executive Officer and the Chief Financial Officer. Any service contracts also have to be available for inspection.
2. Name and beneficial ownership of main shareholders. The general requirement is 3% or more of a voting class of share. Any options also have to be shown. The acquisition of an interest of 3% or more in the issued capital of a UK public company must be notified to the company within 2 business days (such percentage is 10% in the case of investment managers without voting discretion and operators of unit trusts). The definition of a notifiable interest is complex, but concentrates on who might have effective voting power. Changes that take an interest up or down through a whole percentage line above 3% must also be notified. UK companies suspicious of any shareholdings, whatever size, can demand to know the beneficial ownership (a 'section 212' notice) and if not satisfied within a reasonable period, suspend the rights attached to the shares. Listed companies must announce to the LSE all notifications about shareholdings that are received immediately. (Companies Act 1985, Pt VI).
3. Stock ownership by directors (not officers, although see 1. above). The requirement covers any (i.e., not just voting) security and options in a UK company, however small the director's holding. For this purpose, an interest is defined very widely to cover those of spouse, infant children, companies in which they hold one-third or more of the shares, or which are accustomed to act in accordance with their directions, etc. All changes have to be notified to the company within 5 business days (2 days if it is also notifiable as a change above 3%). Again changes must be announced to the LSE.
4. Although not formally a separate requirement, many material contracts made in the ordinary course of business would be caught by the requirements to reveal dependency on any particular contract of 'fundamental importance' and to give information on 'significant changes' since the reported period and the prospects 'for at least the current financial year'.
5. Any material contract not made in the ordinary course of business specifically has to be available for inspection.
6. Description of transactions in which directors have or will have a direct or indirect material interest. Although the specific obligation applies only to directors, there is a general requirement to explain and justify any commercial relations with a controlling shareholder and when dealing with directors and controlling shareholders, indirect interests count as well.

The listing particulars must be signed by the directors, including any proposed or contemplated directors. The listing particulars also have to carry a prominent declaration by the directors that 'to the best of their knowledge and belief,' the listing particulars are 'in accordance with the facts' and do not omit anything 'likely to affect the import of such information'. All directors also have to sign a letter to the FSA confirming that all material information in their knowledge has been disclosed.

If an Accountant's Report is included rather than just a table of comparative figures, the accountants will have to submit a consent letter agreeing to the inclusion 'in the form and context in which it appears'.

The distributor is not required expressly by law to perform a due diligence review of the information included in the listing particulars. However, the distributor would perform such review as a matter of commercial practice, in order to reduce the risk of civil liability for the content of the listing particulars, although the exact scope of such liability remains uncertain in the UK (see Part 4. below).

Although there is no equivalent to section 12 of the US Securities Act, a distributor could still be liable for negligent misstatement or even deceit, if reckless or intentional, at least to the original purchasers under a public offer. This is not a clear area of English law. For a recent similar case, see Smith New Court Securities Ltd. v Scrimgeour Vickers (Asset Management) Ltd. Also, if trading on the market has started, he may have committed 'market abuse' and the FSA could itself order a fine and restitution (and

unlike rule 10b-5, this may not need proof of intent). The FSA could also threaten the distributor's status as a sponsor in future.

Part 3. Sanctions for failure to disclose

3.1 Administrative sanctions

In a case of defective listing particulars, administrative sanctions may be available against the issuer, the directors, and the distributor. If any officers are not directors, they would only be liable if FSA decides to treat them as responsible for the listing particulars, in which case they would be treated as though directors.

The FSA may suspend and discontinue the listing of any particular security if special circumstances preclude normal trading (FSMA s 77). Also, the FSA may impose fines for breach of the listing rules on the issuer and its directors (FSMA s 92). In addition, behind any issue of the market being misinformed, there always lurks a possible 'market abuse' action (FSMA ss 118 and 123). Only the FSA can bring an administrative action for market abuse which covers 'misuse of information' (insider dealing), 'giving a false or misleading impression' (artificial transactions, disseminating inaccurate information and misleading conduct) and 'distorting the market' (abusive squeezes and price-positioning). In other words, it covers much the same ground as Rule 10b-5 in the US but it does not generally require proof of intent, (whereas the parallel UK criminal sanctions do). On the other hand it is not the basis for any private civil actions. Also market abuse can only arise in respect of securities already trading on a UK market, so it can only cover a continuing failure to correct information once trading in an IPO has started, though it could apply in respect of existing traded securities where there is a secondary issue.

There are general judicial powers to bar someone from being a director, but the FSA does not have any special right to bring such actions, and thus, it is not clear in practice how the case would be brought as they usually arise from liquidations or certain criminal charges. However, the FSA can threaten to suspend or cancel a listing if a director is not removed.

Sponsors (distributors) may be reprimanded by the FSA. Also the FSA has a specific power to stop sponsors from sponsoring in the future and a general power over all authorised firms (which sponsors must be). The FSA can prohibit or restrict senior employees of authorised firms from being involved in financial services. There is also a general power to fine authorised persons and their senior employees for unprofessional behaviour, but no specific power to fine sponsors.

The most likely sanction for accountants and auditors would be to refer the matter to the professional body of the accountants concerned, and also a possible market abuse action described above.

The FSA has a general discretion about enforcement, including the right to publish information itself if an issuer fails to do so.

3.2 Judicial sanctions

A person who makes a statement which he knows to be false or misleading, or dishonestly conceals material facts in connection with a statement made by him, commits an offense and is subject, upon conviction, to imprisonment or a fine (FSMA s 397). Therefore, the issuer, its directors (and officers if involved in the preparation of the document), the distributor, and the accountant, may be held criminally liable in the case of false statements or omissions of material information in listing particulars, as long as they were aware of the false statement or omission of information, and in the case of an omission, acted dishonestly.

The court may, on application of the FSA, make an order restraining a contravention that is likely to occur or to be continued or repeated, or make an order requiring a person to take such steps as it may direct to remedy the contravention (FSMA ss 380 and 381). Such orders may be directed against the issuer, the distributor, and the accountants and experts, in case of defective listing particulars. The court may also, on the application of the FSA, order a person who has violated a relevant requirement (and profited from it or if others suffered losses by reason of the contravention), to pay the FSA the amount of the profits or the losses, which shall be distributed among such parties as the court determines.

3.3 Stock Exchange sanctions

The LSE parallels some of the FSA's rules in its ADSs, including the right to publish information that an issuer has failed to publish. It has powers to suspend or cancel trading and publicly or privately to reprimand, but unlike the FSA, it can not fine.

Part 4. Investor's right of restitution for losses

If the listing particulars contain a misleading or untrue statement or an omission of material information, any person who suffers loss or damage because of that may obtain restitution through a judicial proceeding before a civil judge. Actions may be brought as private suits by both original purchasers and subsequent investors. A class action suit is available for this purpose.

According to FSMA s 90, any person responsible for the listing particulars is liable to pay compensation to a person who has acquired the securities and suffered damages as a result of any untrue or misleading statement included in the listing particulars or the omission therein of any matter required to be included by law. The persons responsible for the listing particulars are the issuer, each of the issuer's directors (including those who have authorized themselves to be named and are named as proposed directors in the particulars), each person who accepts responsibility for the particulars, and each person who has authorised the contents of the particulars.[497] Note that the issuer's officers, if they are not also directors, are not generally liable. However, if the FSA is convinced that a key senior executive was not on the board, it could require him to take public responsibility by adding her name to the responsibility declaration on the listing particulars, in effect deeming him to be a director.

There is a certain ambiguity under this statutory provision about the position of distributors. The distributor is clearly liable when offering securities as a principal (i.e., an offer for sale). In such a case, the distributor is an 'offeror' and even if acting only as an agent he may still be 'accepting responsibility' or 'authorizing' the document and therefore liable. For this reason (and to protect his position on the FSA's list of sponsors) although not specifically required by law, the distributor will almost certainly conduct a 'due diligence review' of the issuer so that he can claim the 'reasonable belief' defense in FSMA Sch 10. Although distributors generally assume that they may be civilly liable under the statutory provisions even when they are only acting as agents, the law in this area is far from clear. To be listed, an issuer must use a sponsor on the FSA's approved list who has been authorized by the FSA to conduct corporate finance business (LR 2.3). According to LR Chapter 2, the responsibilities of a sponsor include 'satisfying itself, to the best of its knowledge and belief, having made due and careful enquiry of the

[497] Regulation 6 of The Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001 (No. 2956).

issuer and its advisers, that the issuer has satisfied all applicable conditions for listing and other relevant requirements of the listing rules'. However, LR 2.7 does not specifically say that the distributor has to authorize the listing particulars. Indeed, unlike the directors, the distributor is not required to state that he is taking responsibility for the document. So there lingers a doubt as to whether the statutory civil claim for compensation (FSMA s 90) does arise against distributors who are not selling as principals. Negligence at common law (unless the distributor were acting as a principal) would be hard to prove as it would be difficult to show how the purchasers came to rely reasonably upon the distributor when he had made no statement to them other than that he was the distributor. Under the UK system, it is the directors and the issuer itself that are clearly in the front line, rather than the professional advisers whose liability remains less certain. Indeed, distributors usually have an indemnity clause in the underwriting agreement to load any liability they may face back on the directors, issuer and possibly selling shareholders, which would probably be upheld by the UK courts.

All experts, including accountants and real estate valuers, are responsible for what appears in their reports in listing particulars. Accountants' liability may depend on whether there is an accountants' report or merely a table of audited figures. If an accountants' report is included together with the consent letter agreeing to its inclusion, the accountants are 'accepting responsibility' for that specified part of the particulars. If only extracts of audited accounts appear, accountants may still be liable for 'authorizing' their use. Alternatively at common law they can be liable for negligent misstatement to parties that have sufficient proximity. However, auditors have only be held liable for mistakes in the audit to the company (where causation of loss is difficult to prove) or to a specific person or class of persons that the auditors knew at the time of the audit were going to rely on the audited figures for a specific purpose – see Caparo Industries v Dickman. In the case of IPOs, the auditors will usually know, at least at the time of the last audit, that the figures will appear in listing particulars, and so liability may be difficult to escape, but the case may be less clear for secondary issues.

It will be very difficult to show that the lawyers owe any direct duty to investors[498]. Although not 'accepting responsibility for' or 'authorizing' the issue of the listing particulars, lawyers may still be liable to the directors and others for professional negligence. However, it must be pointed out that in making inquiries about the company, the distributor will usually rely upon an accountants' background ('long form') report rather than one from the lawyers to meet 'due diligence'. Thus, it is the accountants that are more likely to face this indirect liability in the UK.

Finally, a controlling shareholder (or any other shareholder) will only be liable if he is selling shares in the offer and has taken a significant part in the drawing up of the listing particulars. The FSA could in theory add his name to the responsibility declaration on the listing particulars. There is a very strict corporate veil policy in the UK (Adams v Cape Industries plc) and the corporate veil cannot be pierced where a controlling shareholder is not selling shares, is not a director, or has not 'authorized' the documentation. A possible exception would be where the controlling shareholder has deliberately provided misleading information, when he could be liable at common law for deceit (see below). Also, under the concept of 'shadow directors', a controlling shareholder may be deemed a director if the directors of the company are accustomed to act in accordance with the shareholder's directions or instructions.

In order to obtain restitution for losses as a result of any untrue or misleading statement or the failure to disclose information in the listing particulars, the plaintiff must prove in court that on the balance of probabilities:

[498] Regulation 6(4) Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001 ecludes professional advice.

1. the securities acquired (in the offer or probably in the subsequent market dealings) were covered by the listing particulars (on an IPO that will be all the class, but in later issues only those being issued);
2. the statements or omissions were material, as the law requires the loss to be 'as a result of' the error and immaterial information could not cause the loss;
3. in case of omissions, that the material omitted was caught by the general duty to disclose or the duty to issue supplementary listing particulars (FSMA ss 80 and 81);
4. the investor suffered losses; and
5. the losses were 'as a result of' the untrue or misleading statement or the omission. Direct reliance (e.g., reading the listing particulars) does not seem necessary and so the 'fraud on the market' doctrine applies.

According to FSMA Schedule 10 paragraph 1, anyone (including the issuer) responsible for the listing particulars has a reasonable belief defense that 'the statement was true and not misleading' or that 'the matter whose omission caused the loss was properly omitted'. If before the acquisition, that belief became no longer reasonable, it can still be a defense if a correction was not reasonably practicable. The defendant has also a defense if he can prove that the plaintiff knew of the omitted matter.

If the statutory provisions cannot be used, investors are able to obtain restitution under common law through two possible actions. First, investors may seek the rescission of the contract for misrepresentation. This is the case, even if a false or misleading statement was entirely innocent and was only one of the reasons for entering into the contract. Investors would have to show that the party from whom the shares were bought is bound by the misrepresentation (this should be virtually automatic if the defendant sold shares under the listing particulars) and in the case of an omission, that it had the effect of making the statements in the listing particulars materially false or misleading. Unless negligence can be disproved, damages may also be awarded. The common law remedy, however, is not as attractive as the statutory one because direct reliance may have to be proved (ie no 'fraud on the market' doctrine) and only initial purchasers under the offer can rescind, not any subsequent market purchasers.

Second, investors may seek restitution through an action in tort, most likely for deceit if there is a deliberate (or reckless) misstatement or omission that makes the rest of the document misleading (Gluckstein v Barnes). Because a claim for deceit implies criminal liability as well, the claim is likely to be 'struck out' unless there is prima facie evidence of the necessary intent. If, however, intent can be shown by any party, then very generous causation rules apply and liability is almost automatic (see Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd). An action may also be possible for negligent misstatement, but unlike the statutory provisions, negligence has to be positively proven and a duty of care extending to the claimants established. As this is unlikely to extend beyond initial purchasers, this adds little to contractual misrepresentation above.

A case filed by the investor for restitution for losses caused by a misleading statement or omission of material information in the listing particulars could be settled in under a year by the new mediation procedure. If the defendant holds out for a full trial, it may take between 1 and 2 years to get the case into court because of the queue. However, since the loser picks up all the costs, obstructive tactics would be prohibitively expensive for a defendant without a valid defense. Furthermore, if there truly is no defense, the case will be thrown out in pre trial hearings, and any appeal would be on this striking out action. Judges are somewhat more reluctant than they used to be to do this without some substantial hearing, but 1 to 2 years delay from the filing of the complaint is the maximum delay the defendant will be able to achieve. In theory there is a right to appeal even with a pretty hopeless substantive case, but in practice the cost orders make that inconceivable.

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SECURITIES LAW OF THE UNITED STATES

Part 1. The regulator and its supervisory and regulatory powers

The Securities and Exchange Commission ("SEC") is the authority in charge of the supervision and regulation of the securities market in the United States. Banks are supervised by the Federal Reserve Bank and Insurance companies by State agencies.

The President of the United States appoints the commissioners of the SEC, and the appointments are subject to approval of the U.S. Senate. The five commissioners of the SEC serve for a five-year staggered term, with one expiring each year. And they cannot be discharged at the will of the President before the expiration of their terms.

Generally, both the regulation and supervision of the securities markets are assigned to the SEC by the Securities Act of 1933 ("SA"). However, certain specific areas of market regulation are shared with other regulators. For example, the Commodity Futures Trading Commission ("CFTC") shares jurisdiction with the SEC over the offer and sale of securities representing interests in commodity pools. And the U.S. Department of Justice has authority to prosecute any criminal violations of the federal securities laws or the rules or regulations thereunder. In addition, there are a number of self-regulatory organizations registered under the Securities Exchange Act of 1934 to which the SEC has delegated certain authority, subject to SEC oversight. These include registered national securities exchanges, the National Association of Securities Dealers ("NASD"), registered clearing agencies (which include securities depositories), and the Municipal Securities Rulemaking Board.

The SEC can generally issue regulations without the approval of other governmental authorities. However, a limited number of regulations issued by the SEC, such as regulation of banks and bank securities activities, and regulation of government securities, require consultation with other appropriate governmental authorities.

When investigating a violation of securities law, the SEC is empowered to issue a subpoena requiring testimony and the production of documents by any person.

Part 2. The duty to disclose material information

In order to make a public offer of shares, the issuer must file a registration statement, including a prospectus that meets the requirements set forth in the SA, with the SEC. The registration statement must be declared "effective" by the SEC and the prospectus delivered to potential investors before sales of shares can take place[499].

According to Section 10(b) of the Securities Exchange Act of 1934 ("SEA"), the prospectus must include any information that a reasonable investor may consider important to making an investment decision. Among other specific requirements, the prospectus must include the following:

- Salaries and compensation of each director and executive officer.
- Name and number of shares owned by each of the issuer's main shareholders (i.e., person or company who is the direct or indirect beneficial owner of, or exercises control or direction over, more than 5% of any class of voting securities).

[499] US Securities Law Book, p 33.

- Number and percentage of shares beneficially owned, directly or indirectly, or over which control or direction is exercised by each director and executive officer of the issuer.
- Description of every material contract not made in the ordinary course of business.
- Any material interest, direct or indirect of any director, executive officer, or controlling shareholder, in any transaction or proposed transaction since the beginning of the issuer's last fiscal year.

Pursuant to Section 6(a) of SA, the prospectus must be signed by the chief executive officer, the chief financial officer, and each director on behalf of the board.

The officers, directors, controlling shareholder, distributor, accountant and attorney are all held liable for the truthfulness and completeness of the material information included in the offering document.

There is no affirmative obligation of the distributor to exercise due diligence regarding the information included in the prospectus. However, if there is a materially false or misleading statement in the registration statement (including the prospectus) or an omission of a statement necessary to make the statements not misleading, a distributor may be held jointly and severally liable for damages to investors who purchased the securities, unless she can demonstrate as an affirmative defense that she made a reasonable investigation and, based on such investigation, could not reasonably have known or have been expected to know of the false or misleading statement or omission. As a result, the distributor is likely to perform a due diligence review of the contents of the prospectus as a matter of commercial practice.

The accountant is required to opine in writing, among other things, that the financial statements that she has audited have been audited in accordance with generally accepted auditing standards, and that such financial statements present fairly the financial condition and results of operations of the issuer in accordance with the generally accepted accounting standards.

According to Section 8(b) of SA, the SEC has authority to issue a "stop order" or a cease-and-desist order if, based only on its determination, the prospectus fails to provide material information. However, the SEC cannot oppose an offering document based solely on its determination that the investment is speculative, of inadequate quality, or not a good investment over all.

Section 8(a) of the SA establishes a "waiting period" after the filing of the registration statement with the SEC and before it becomes effective. During the waiting period, offers can be made through the use of a preliminary prospectus, but confirmations of sales are prohibited.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

If the registration statement includes any untrue statement of a material fact or omits material information, administrative sanctions may be available against the issuer, the directors and officers, the distributor, and the accountant. According to Section 8(d) of the SA, upon discovery of untrue statements or omissions in the registration statement, the SEC may issue a stop order suspending its effectiveness. According to Section 8A(e) of the SA, it may also impose fines and other monetary sanctions against the issuer, its directors and officers, as well as its distributor and accountant. In addition, pursuant to Section 8A(a) of the SA, the SEC is vested with power to enter an order requiring the issuer, its directors and officers, and its distributor and accountant to cease and desist from committing the violation and to take steps to comply with a rule or regulation specified in such order. Finally, the SEC may impose license suspension and ban from securities market on the distributor and accountant, subject to judiciary review.

3.2 Judicial sanctions

In cases of a violation in the registration statement, the SEC may, under Section 20(b) of the SA, bring an action for injunction in a district court of the United States against any person engaged in such violation. The court may also impose a civil penalty to be paid by any person who committed the violation pursuant to Section 20(d)(1) of the SA. Finally, any person who willfully makes untrue statement or omits material fact in the registration statement is subject to fine or imprisonment under Section 24 of the SA. **(Note to Author: Please confirm or correct)**

3.3 Stock exchange sanctions

According to Sections 19(d) of the SEA and New York Stock Exchange Rule 476, the exchange is obliged to suspend or cancel the issuer's listing following the regulator's suspension or cancellation of the issuer's registration. The exchange is also empowered to impose license suspension, fine and other orders on the distributor. **(Note to Author: Please confirm or correct)**

Part 4. Investor's right of restitution for losses[500]

In cases of losses incurred due to false statements or omissions of material fact in a prospectus during a public offering of shares, the injured investors may start a civil or a criminal proceeding to obtain the restitution of damages through the judicial system. A class action suit and derivative suit are also available for this effect.

In case of a defective prospectus, anyone[501] who acquires a security registered with the SEC may employ Section 11 to recover damages[502] (*i.e.*, purchasers in a primary distribution and, with proper proof, purchasers in the secondary market may use Section 11). The liable parties in a prospectus liability case are: (1) every person who signed the registration statement; (2) every person who was a director or partner in the issuer at the time the materially false portion of the registration statement was filed; (3) every person who, with his or her consent, was named in the registration statement as about to become a director or partner in the issuer; (4) every accountant, engineer, appraiser, or other similar professional who, with his or her consent, was named as preparing or certifying any part of the registration statement, if that part contains the materially false portion; and (5) every underwriter of the security involved (Section 11).

Section 11 imposes strict liability on defendants. In order to obtain restitution of damages incurred by reason of a defective prospectus, the plaintiff must prove that (1) the misstatement or omission was material, and (2) she suffered losses. In contrast, the plaintiff need not prove that he or she relied upon the material misrepresentations or omissions or that the defendants knew of them, although a plaintiff who knows of the material misstatement or omission may not sue for damages.

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[500] The material in this section draws heavily from the Chapter for the United States in "International Securities Regulation", General Editor: Robert C. Rosen, Rosen & Associates, Editor: Efrat Levy, Rosen & Associates, Editor Emeritus: Irving Pollack, Oceana Publishing.

[501] Securities Act Section 13 generally requires buyers of securities to bring suit for violations of Section 11 within one year of the date that they discovered the untrue statement, and in no event more than three years after the date of the public offering of the security.

[502] The damages payable by the defendants equal the difference between the amount paid for the security by the buyer (provided that this price does not exceed the price at which the issuer offered the security to the public) and the value of the security at the time the buyer filed the lawsuit or the price at which the buyer sold the security (Under Section 11(e))

Defendants may avoid liability under Section 11 in any of several ways. First, of course, they may prove that no material misstatement or omission existed or that the plaintiff knew of it. Second, under Securities Act Sections 11(b)(1) and 11(b)(2), anyone other than the issuer may avoid liability by proving that he or she resigned or tried to resign from every office, capacity, or relationship described in the registration statement in protest over the misstatement or omission and advised the SEC to that effect or that the registration statement took effect without his or her knowledge and that person promptly advised the SEC and the public to that effect. Third, Section 11(b)(3) allows all defendants other than the issuer to avoid liability by proving that they made a reasonable investigation (the "due diligence" defense) of the registration statement and believed that it contained no material misstatement or omission. Section 11(b)(3) also allows experts such as accountants, engineers, and appraisers to avoid liability by showing either that, after reasonable investigation, they believe that the materials they provided contain no material misstatement or omission or that the materials attributed to them do not fairly represent their statements as experts.

Moreover, under Section 12(a)(2) of the Securities Act,. aggrieved buyers of securities in a public offering may rescind the purchase of those securities and receive damages if the offeror or seller made any materially false or misleading statements in connection with the offer or sale and made some use of the mails or of another facility of interstate commerce in that regard. Underwriters are only liable under Section 12(a)(2) if they are sellers of the securities in question. The buyer need not prove that he or she relied upon the misrepresentation or omission. The defendant may avoid liability by showing that he or she did not know of and, in the exercise of reasonable care, could not have known of the false or misleading statement. Note that Section 12(2) establishes a lower standard of care defense ("reasonable care") than Section 11 ("reasonable investigation"). In addition, under Section 12(b) of the Securities Act, defendants involved in suits under Section 12(a)(2) can avoid all or save damages by showing that all or part of the security depreciation resulted from factors unrelated to the material misstatement or omission.

Under Securities Act Section 15, controlling persons of businesses liable under Section 11 also face the same liability as the company or other entity controlled unless the controlling person did not know and reasonably could not have known of the facts that caused liability to exist.

The judiciary may take approximately 5 years to resolve a case of restitution of losses due to a defective prospectus, from the moment of filing the complaint until first instance judgment. However, judgments are usually appealed. An appeal procedure would likely be granted as a matter of law.

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SECURITIES LAW OF URUGUAY

Part 1. The regulator and its supervisory and regulatory powers

The main regulator of securities in Uruguay is the Central Bank, which also regulates banks. Insurance companies are regulated by the Superintendency of Insurance and Reinsurance.

The Central Bank is an independent authority, although the Executive Power is entitled to monitor its acts. Members of the Central Bank are appointed by the President of the Republic, in accordance with its Ministers and with approval of the Senate Chamber. The Executive Power, also with approval of the Senate Chamber, can discharge the members previously appointed.

While the Central Bank controls the securities market, the Congress is in charge of passing the laws that regulate the securities market. The Executive Power can enact securities regulations, while the Central Bank can issue general norms and particular instructions regarding their implementation. These norms and instructions issued by the Central Bank are not generally subject to the approval of other governmental authorities. The Central Bank may for example issue norms regarding public offerings (Art 22 of Law 16,749) and the organization of stock exchanges (Art 15 of Law 16,749).

The Central Bank can command the delivery of information and documents from persons or entities that participate in the public offer of securities, but not the testimony of witnesses.

Part 2. The duty to disclose material information

The prospectus must be filed for authorization before the Central Bank (Article 15 of Decree No. 344/96). In addition, the public offering must be approved by the Central Bank before the prospectus is disseminated, and the validity of a public offer and of the sale depends on the Central Bank authorization. Shares may be sold without actual delivery of the prospectus to investors.

The Central Bank requires the following information to be included in the prospectus: information on the issuer (including a description of its economic, financial, and legal situation, together with future projections), characteristics of the securities, terms and conditions of the issuance, description of the investment project, and legal contingencies. In contrast, the prospectus need not disclose ownership by large shareholders, compensation and ownership of directors and officers, the terms of material contracts, or the terms of contracts with related parties. However, the issuer should be registered before the Central Bank (Art 3 Law 16,749). One of the requirements for such registration is to provide the Central Bank with a list of the principal partners or shareholders if the company is a corporation whose shares are in a nominative form (Art 6 of Central Bank Rules). As supplemental information, the name of controlling companies (indicating the % of the participation) must be provided as well (Art 6 of Central Bank Rules).

The prospectus must be signed by an authorized representative of the issuer. In practice, an officer of the issuer would likely sign the prospectus. Directors are also entitled to do so unless there is a specific prohibition in the by-laws of the company. Finally, an attorney may also sign the prospectus if duly and specifically empowered for such purpose.

The prospectus must state that the Board of Directors and its auditing officers are solely responsible for its truthfulness and that the auditors are responsible for the information in their reports attached thereto (Article 3 of the Central Bank rules). The distributor is not required by law to perform a due diligence

review of the information contained in the prospectus, nor is it established in the law that she assumes civil responsibility for its accuracy and completeness. However, the distributor must verify the authenticity of the securities offered[503] and is obliged to provide information about them[504]. In practice, a distributor is likely to review the contents of the prospectus, but not to perform a full "due diligence" examination. A distributor may be held liable under general civil law provisions for damages caused by incorrect forecasts if the distributor knew or should have known that those predictions were wrong.

According to Article 11 of Decree No. 344/96, once the Central Bank has established that the public offer and that the prospectus complies with legal and regulatory requirements, it must authorize the public offer and the distribution of the final prospectus.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

The Central Bank may impose the following sanctions on persons that violate regulations on public offerings: (1) suspension or cancellation of the issuer's listing or its authorization to conduct a public offer; (2) fine, suspension or cancellation of the activities of intermediaries or other market institutions; and (3) reprimand or warning of both the issuer and the intermediaries. Note that, in case of a misleading prospectus, administrative sanctions do not apply to directors, officers, or accounting firms.[505] The Central Bank may also order a person to cease activities related to the intermediation of securities if those activities have not been duly authorized.

3.2 Judicial sanctions

The Central Bank may apply to Court for general stop orders ("medidas de no innovar", Art 22 of Law 15.322). The directors or managers whose decisions alter the situation that should have been maintained can be prosecuted for contempt. In addition, Courts may order precautionary measures, prior to or during any civil action, when indispensable to protect a right from an imminent danger (Articles 311 to 317 of the General Procedure Code).

Finally, a person who damages others by using fraud to obtain illicit profits for herself or another party, may be punished with a prison term ranging from 6 months to 4 years (Article 347 of the Criminal Code). This provision is applicable to intentional false statements or omissions of material information in a prospectus.

3.3 *Stock exchange sanctions*

The Stock Exchange may establish a disciplinary regime applicable to issuers and intermediaries (Article 24 of Law 16.749). Sanctions include a reprimand or warning, suspending or canceling the license of a broker, or suspending or canceling the listing of an issuer. Once the suspension or the cancellation of the listing is applied, the Stock Exchange shall inform the Central Bank about the sanction applied and require the application of said sanction by the latter in the whole country.

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[503] Article 18 of Law 16.749

[504] Article 26 of Decree 344/996

[505] Generally, all persons that violate securities laws may be sanctioned with fines, management intervention, and suspension of activities (Article 20 of Law 15.322). However, these sanctions are not applicable to persons that violate regulations on public offerings (Article 25 of Law 16.749).

Part 4. Investor's right of restitution for losses

To obtain restitution for losses caused by a defective prospectus, an investor can start a judicial proceeding before a civil judge.

Securities law provides the rules regulating the public offer of securities, while civil law provides the means by which any breach to securities law, which causes damages to an investor, must be remedied. According to Article 1319 of the Civil Code, any willful or negligent illicit act or omission that causes damages to another person must be repaired. Similarly, Article 391 of Law 16.060 establishes that the responsible officers or directors of the issuer are jointly liable for the losses caused by their violation of the law or the poor performance to their duties, and by reason of scienter or gross negligence.

In a case of losses incurred by reason of false information or omissions of material information in the prospectus, those damages can be attributed to a party only if it was directly involved in the preparation of the prospectus or in the delivery of the information that caused the losses, or assumed that responsibility otherwise. Moreover, according to the statement included in the prospectus pursuant to Article 3 of the Central Bank rules, the issuer's board of directors must confirm under oath the completeness and truthfulness of the information included in the prospectus. Therefore, the issuer's directors are clearly liable for the information in the prospectus. The issuer's officers would be liable if they signed the prospectus as the issuer's representatives, or were involved in its preparation. The liable parties could also include the issuer itself and the professional involved.

The auditors are also mentioned in Article 3 of the Central Bank rules as responsible for the information in the audited financial statements attached thereat. **T**he auditors are responsible for what they sign (e.g., the audited financial statements). In addition, the auditors could be liable for false or omitted statements in the prospectus if the investor proves that the auditors knew or should have known that the prospectus contained false statements or omitted information.

On the other hand, if a defendant is not involved in the preparation of the prospectus, and does not have the legal duty to do so, and is not aware of the omission, and is not required by law to be aware, it is most unlikely that a court of law would grant restitution for investor's losses. Thus, since the distributor is not required to participate in the preparation of the prospectus, it may only be held liable if it knew of the omission, and nevertheless participated in the placing of the securities as an underwriter.

In order to obtain restitution for damages caused by reason of untrue or incomplete information in a prospectus, the investor must prove that: (i) material information was omitted from the prospectus or it included untrue material information; (ii) that such omission or untrue information caused her a loss; and (iii) that the defendant acted intentionally or negligently (the essential issue to be established by the court is if the party involved knew or should have known of the false or missing information in the prospectus). Defenses would mostly consist in showing that the liable party took all reasonable and normal measures in order to make this a safe investment and that the investors' losses cannot be attributed to their negligent or wrongful behavior.

An investor could also obtain rescission if she proves that she was misled by the information provided to her for the investment. Damages could be claimed as well.

According to Articles 189 and 190 of law 16.060, investors may only pierce the corporate veil if the status of juridical person was used to defraud the law, violate the public order, or cause damage to shareholders

or third parties. However, it must be established in court that the corporate body was effectively used for those purposes. Therefore, although available in the law, it is not easy to pierce the corporate veil.

Under general principles of law, a shareholder could be held liable for the acts or omissions of directors and officers only if she knew that those actions were illegal and she did not take the necessary measures to stop the illegal actions, and by not doing was involved as an accomplice of the illegal conduct. Note that shareholders do not have a duty to assure the correctness of the directors' and officers' actions. Nevertheless, under general principles of law (Art 1319 of the Civil Code being one of the basic provisions), if any person or legal entity –shareholder or not- is aware of illegal actions of such persons and does not take necessary actions to stop it, she could be held liable.

A civil case of restitution of losses may take approximately 2 years to reach to a first-instance judgement. An appeal is unlikely to be granted as a matter of law if the defendant does not have a valid defense. From the moment of filing the initial complaint until final resolution by the judiciary, the proceedings may take approximately 4 years. Finally, the enforcement of the judgement may require another year until payment.

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SECURITIES LAW OF VENEZUELA

Part 1. The regulator and its supervisory and regulatory powers

The Securities National Commission (CNV), dependant on the Ministry of Finance, regulates and supervises securities markets. The Superintendence of Banks regulates and supervises banks, while the Superintendence of Insurance regulates and supervises insurance and reinsurance companies.

The Board of Directors of the CNV is composed of a President and four Directors with their respective alternates. They are appointed by the President of the Republic for a four-year term and may be discharged at her will.

The CNV may issue regulations as established in the Capital Markets Law (LMC). The regulations of the CNV are published in the Official Gazette without prior approval of other governmental authorities. The Judiciary may examine the constitutionality of CNV's regulations.

The CNV may command any person to deliver documents and information that such person may have in connection with an administrative procedure or investigation (Articles 130 of LMC and 28 of the Organic Law of Administrative Procedures). Moreover, the CNV may resort to all the evidences permitted under the Civil Procedure Code and the Criminal Procedure Code, such as the testimony of witnesses (Art 58 of the Organic Law of Administrative Procedures). Any person who, having been duly summoned by the CNV, does not appear to testify, may be subject to the criminal sanctions (Art 143 of the LMC).

Part 2. The duty to disclose material information

The issuer must get an authorization from the regulator prior to offering the shares to potential investors (Art 2 of "Norms Relating to the Public Offering and Primary Placement of Securities and Public Offering Publicity", NROP). In order to obtain the authorization aforementioned, the issuer must prepare and file the prospectus with the CNV. Once approved by the CNV, the prospectus must be delivered to any person that requests it. However, the issuer is not expressly required to deliver the prospectus directly to all potential investors. Shares must be offered to the public no later than three months after their inscription before the Securities National Registry. This period may be extended for three additional months if the issuer demonstrates to the regulator the need for the extension.

The "Formulario General"[506] describes both the contents of the prospectus and additional information that the issuer must provide to the CNV. This additional information is only for the CNV´s internal use. Nonetheless, the CNV may require that part of the additional information be included in the prospectus to protect investors' interests.

The name of the major shareholders of the issuer, but not their percentage ownership, must be disclosed in the prospectus (Article 3.12). Major shareholders are defined as those who control more than 10% of the capital stock (Article 4.1.1). The name and ownership of major shareholders must be reported to the regulator. If holding companies jointly control more than 10% of the capital stock, it is necessary to disclose to the regulator each one of the holding companies and its respective major shareholders. The Formulario General does not specifically requires that the prospectus provides information on shares beneficially owned by large shareholders; however, article 122 of the LMC requires that any person, that

[506] "General Form to Request Authorization for the Public Offering of Securities and to Obtain the Inscription before the National Registry of Securities", enacted by the CNV

directly or indirectly acquires more that 10% of any class of shares of a company, shall disclose to the CNV such shareholding; therefore, the CNV, based on the broad powers conferred upon it by the LMC, may require in some cases the disclosure of such information (beneficial ownership) in the prospectus. The terms of material contracts ("contratos de importancia") and loans must be disclosed in the prospectus (Articles 3.4.10., 3.7.1., and 3.7.2.). As a result, the prospectus must disclose each material contract that creates outstanding obligations and each contract outside of the ordinary course of business.

The remuneration of directors and officers as well as transactions with insiders has to be furnished to the regulator, but does not have to be included in the final prospectus, unless the CNV requires it deliberately (Articles 4.2.1 and 4.2.2). In contrast, there is no express requirement to disclose the number of shares held by directors and officers of the company, except if such disclosure falls under the requirement to disclose major shareholders.

The prospectus must be signed by the person responsible for its preparation. Therefore, the law allows the issuer to appoint the person who signs the prospectus as the responsible person for preparing such document. In addition, an issuer's officer or director must sign the request to obtain the authorization for the public offer of shares (Article 5.1 of the "Formulario General"). Customarily, the person who signs this request is the same person that signs the prospectus.

The LMC does not require the distributor to perform a due diligence review of the information contained in the prospectus. Furthermore, the LMC does not assign to the distributor civil responsibility for the accuracy and completeness of the prospectus. (Moreover, Article 23 of the NROP implies that the issuer prepares the prospectus and gives it to the distributor). As a result, the distributor is not likely to perform a due diligence review of the prospectus as a matter of commercial practice.

The CNV should not oppose a prospectus if it contains all the information required and all of the additional information requested. Although the CNV may not oppose a prospectus based only in the regulator's own determination of the quality of the investment, it may request additional information before authorizing it. Legal scholars have argued that the CNV is granted discretion and may refuse to authorize a public offering because of economic or market conditions based on CNV's general power to authorize public offers.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

If the prospectus contains inaccurate information, the CNV may cancel or suspend the issuer's authorization to carry out the public offering of shares (Art. 9(13) of the LMC). In addition, under Art. 136(7) of the LMC, whoever furnishes false information that may affect the price of a security may be sanctioned with a fine ranging from 200 to 1,000 tributary units (Art. 136(7) of the LMC; a tributary unit is approximately $10 US dollars). Such fines would apply to the issuer if its directors or officers willfully or negligently made false statements or omitted material information from the prospectus.

Any independent public accountant that intentionally or negligently certifies false information or data in the Financial Statements or in any other document delivered to the CNV may be sanctioned with a fine ranging from 200 to 1,000 tributary units (Art. 136 (3) of the LMC). Omissions of material information would turn the information in the prospectus false and trigger such fines. In addition, the accountant's inscription before the Securities National Registry may be cancelled if the accountant violates the norms

enacted by the Regulator.[507] In this regard, an accountant violates the LMC if he, for example, is negligent in the preparation of the financial information included in the prospectus (Art. 136 (3) of the LMC). Although the LMC is not literally a "norm enacted by the Regulator", its violation would also cause the cancellation of the accountant's inscription, because if the law sanctions the violation of a norm enacted by the CNV, the law also sanctions the violation of a superior law.

Distributors are not required by law to participate in the preparation of the prospectus. Therefore, the law does not establish sanctions applicable to a distributor who is not involved in the preparation of the prospectus. However, if the issuer appoints the distributor as responsible for the elaboration of the prospectus, the fines described under Art. 136 of the LMC would be applicable to the distributor. Similarly, administrative sanctions apply to the controlling shareholder and the lawyer advising the transaction only when they were appointed by the issuer as responsible for the elaboration of the prospectus.

Finally, the CNV has the power to call general shareholders meetings of the corporations under its supervision, appoint an officer within the CNV to attend (without voting rights) the issuer's shareholders meetings, or advise the shareholders' meeting to remove the administrators. The CNV does not have explicit power to order those who violate securities laws to stop or perform actions. However, the CNV implicitly has such powers since it may adopt all the necessary measures to safeguard the interests of investors in securities (Art 9 (15) of LMC).

3.2 Judicial sanctions

Providing false information to the CNV in order to obtain authorization to offer shares to the public or to avoid the suspension/cancellation of the public offering registration, is sanctioned with 2 to 6 years of imprisonment (Article 138 (4) of the LMC). This sanction applies not only to intentionally providing false statements but also to intentional omissions of material information. The distributor may be held criminally and civilly liable if she assists the perpetrators in providing false information to the CNV to obtain authorization to offer shares to the public or to avoid the suspension/cancellation of the public offering registration (Article 84 of the Criminal Code). However, when the prospectus is prepared by the issuer, the distributor generally assumes no responsibility and may not be held liable for its accuracy and completeness. Similarly, the controlling shareholder and the lawyer advising the transaction may face criminal charges if they are accomplices to a crime.

Any independent public accountant who intentionally gives a false opinion or omits material information about the financial situation of a corporation may be convicted to serve from 2 to 6 years of prison (Article 138(2) of the LMC).

Finally, some employment restrictions may apply to directors or officers that are guilty of providing false information to the CNV to gain authorization for the public offer of shares or to avoid the suspension/cancellation of the public offering's registration. Specifically, persons guilty of such crime may not become: (a) directors of the CNV; (b) directors or officers of a brokerage firm; (c) brokers; or (d) investment advisors.

3.3 Stock Exchange sanctions

The Board of Directors of the Caracas Stock Exchange Board may suspend the quoting of certain securities if it believes that they are harmful to investors.

[507] Art 36 of "Norms for the Preparation of the Financial Statements of the Entities Supervised by the Regulator", enacted by the CNV.

Part 4. Investor's right of restitution for losses

In case of losses due to a defective prospectus, the investor can obtain restitution through a civil or criminal proceeding. In a civil case of losses resulting from a defective prospectus, each investor must pursue her claim individually since there is no legal provision in the LMC regarding "class action" suits.[508]

In Venezuela, investors can choose between civil or criminal proceeding to obtain restitution. In both cases, investors have to wait a final judicial decision which declares the defendant guilty and imposes a criminal sanction, in order to obtain restitution of losses caused by the crime. If investors choose the criminal proceeding, once obtained the final judicial decision imposing a criminal sanction, investors shall proceed to file a suit before the criminal judge, requesting the restitution of losses caused by the crime. The criminal procedure to obtain the restitution will be brief and investors could use this venue only to obtain restitution of losses caused directly by the crime. Investors could obtain restitution through the criminal venue only from those persons declared guilty of committing the crime. On the other hand if a person's behavior causes losses to investors but the same is not declared a crime by the competent court of law, investors could not obtain restitution through criminal venue, but through civil procedure.

The LMC does not specify who can be held liable for the truthfulness and completeness of the information included in the prospectus besides the signing person (i.e, the person designated by the issuer to be responsible for the preparation of the prospectus). Prospectus liability is governed by the civil rules of non-contractual liability, based upon Article 1,185 of the Civil Code, which establishes that the person who willfully or negligently causes damage to another is obliged to repair the damage. The issuer is the ultimate responsible for the information contained in the prospectus. For this reason, the issuer can be held liable for damages caused to investors as a result of false information or omissions of material information in the prospectus. Moreover, those persons appointed by the issuer to sign the prospectus may also be held civilly liable for the information contained therein. Note that directors and officers may be held civilly liable *in solidum* for noncompliance with legal duties if one of them signs a defective prospectus. In sum, investors could obtain restitution of losses caused by a defective prospectus from the issuing company or the persons appointed as responsible for the prospectus.

Accountant's civil liability toward investors for the information included in (or omitted from) the prospectus, derives from Article 1,185 of the Civil Code, Therefore, if the accountant acts with negligence or willful misconduct in the preparation of the financial information included in the prospectus, and as a result such action or omission causes a damage, investors could obtain restitution of losses from the accountant, in accordance with Article 1,185 of the Civil Code.

In a case of non-contractual liability under Article 1,185 of the Civil Code, investors seeking to recover losses caused by a defective prospectus must prove the following:

(1) That the information omitted, or the false information included, in the prospectus was material. Information is "material" if the investor would not have purchased the shares had she known about the false or omitted information;

[508] As of today, there has not been any judicial decision allowing or entitling a group of investors to bring a legal action suit on behalf of all the investors who suffered losses for the same cause and share similar rights against the defendant. Nonetheless, the Supreme Tribunal of Justice, based on art. 26 of the Constitution, admitted on August 22, 2001 a class action suit in a different kind of legal procedure ("amparo" filed by a group of mortgagees against the Superintendence of Banks and Other Financial Institutions).

(2) That the issuer, distributor or accountant acted with negligence or willful misconduct;

(3) That the investor suffered a loss (note that, in Venezuela, there is no civil liability for indirect losses); and,

(4) That the loss was caused by the false information or the omission of material information in the prospectus.

Neither the LMC nor the applicable securities regulations provide for specific defenses to the issuer, its directors and officers, the distributor, or the accountant, in a case of a defective prospectus.

The investors may obtain, in addition to the award of damages, the rescission of the acquisition of the shares and the refund of the price paid. Pursuant to Articles 1,142, 1,148 and 1,154 of the Civil Code, a contract may be declared null if there is a defective consent of a contracting party, produced by negligence or willful misconduct of the other party. If a contract is declared void, the same would be deemed as inexistent at law, as having no legal or binding effects. Therefore, whereas a defective prospectus could cause a defective consent from investors, the purchase agreement of shares could be declared null and void, producing, as a result, the rescission of purchase agreement and the refund of the purchase price paid along with payment/restitution (if and when applicable) of any additional damage. To this effect, investors must prove the following:

(1) The existence of the respective purchase agreement or document;

(2) The amount of the purchase price paid;

(3) If investors allege negligence in the preparation of the prospectus, they must also prove: a) That the information omitted, or the false information included in the prospectus was material and that the same cause the damage; and b) that the issuer, distributor or accountant acted with negligence;

(4) If investors allege willful misconduct in the preparation of the prospectus, they must also prove: a) That the information omitted, or the false information included, in the prospectus was material; and b) that the issuer, distributor or accountant acted with willful misconduct.

As a general rule of law, third parties cannot go against the company's shareholders for claims and actions they may have against the company itself. Thus, the law does not allow investors to "pierce the corporate veil" in order to go after the assets of the shareholders. However, a court of law may disregard the legal entity of the issuer, if the judge concludes that the controlling shareholder abused its right or committed fraud against the law through the issuer. Also, if a shareholder has not fully paid her shares, plaintiffs (investors seeking recovery against the issuer for a defective prospectus) could go after the shareholder's assets up to the unpaid value of the shares in order to obtain recovery. Finally, the controlling shareholder cannot be held responsible for the acts or omissions of the issuer's directors or officers.

A civil case for restitution of losses incurred by reason of defective information in a prospectus may take between 2 and 3 years to be resolved in first instance court. An appeal would generally be granted in a civil case, as a matter of law (Article 288 of the Civil Procedure Code) even if the defendant does not have a valid defense as declared or ruled out by the first instance court. In addition, an extraordinary appeal to the Supreme Court would likely be granted for claims exceeding five million Bolívares (equivalent to approximately $ 3,100 US dollars). Including all appeals, a case for the recovery of losses

resulting from a defective prospectus may take the judiciary, from the filing of the claim, five years to adjudicate.

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SECURITIES LAW OF ZIMBABWE

Part 1. The regulator and its supervisory and regulatory powers

The functions of a securities market regulator are undertaken by: (1) the Minister of Finance; (2) The Committee of the Zimbabwe Stock Exchange; and (3) The Registrar of the Zimbabwe Stock Exchange. The Zimbabwe Stock Exchange Act (Cap 24:18) of 1973 as amended ("ZSEA") provides for the establishment of the Zimbabwe Stock Exchange (the "Exchange") and a Committee of the Stock Exchange (the "Committee"), which manages and controls the affairs of Exchange related to business transactions, investment and handling of the funds of the Exchange. The Registrar of the Exchange is responsible for maintaining the Registry of members of the Exchange and hearing appeals noted by any person who is aggrieved by an action, decision or requirement of the Committee. Banks are regulated by the Registrar of Banks subject to approval of the Minister. The Commissioner of Insurance deals with matters related to insurance.

The Minister, the Committee and the Registrar each have responsibilities related to the regulation and supervision of the securities market. The Committee supervises the Stock Exchange while the Registrar maintains the registry and implements regulations and rules related to the application procedure and registration of stockbrokers. The Committee has disciplinary powers for registered Stockbrokers. The Committee and the Registrar cooperate in handling applications. Decisions of the Committee may be taken up on appeal to the Registrar or the Minister and either the Registrar or the Minister may appoint an Inspector. The Registrar of Companies is responsible for the provisions related to the Offering Document, i.e., the prospectus.

The Committee is comprised of two members, neither of whom are the Registrar, who are appointed by the Minister of Finance, and not less than five nor more than seven members elected by the members of the Exchange. The members of the Exchange are stockbrokers and /or persons who have been admitted to membership by the Committee as associate members or as non-brokering members. In terms of the ZSEA, a person may be disqualified for appointment if she is or has been declared bankrupt or has committed a criminal offence. The Minister also appoints the Registrar of the Exchange whose appointment is subject to the law relating to the Public Service. There are internal qualifiers in the Act, which have to be met for confirmation and approval of the appointment.

Members of the Committee may not be discharged at the will of the appointing authority before the expiration of their term. The Minister may, however, require a Committee member to vacate her office after consultation with the Committee, if the member has been found guilty of improper conduct or is mentally or physically incapable of fulfilling his duties. The Minister may also suspend a Committee member against whom criminal proceedings are instituted for an offence in which there is a term of imprisonment without the option of a fine.

The Committee's regulations are generally subject to the approval of other governmental authorities. The Minister may prescribe regulations after consultation with the Committee. The Committee is also permitted to make rules governing its procedures as well as the conduct and qualifications of the members of the Exchange. However, such rules are subject to approval by the Registrar. Where there is any conflict between the rules and the Act or regulations, the Act or the regulations shall prevail.

The Minister has the power to appoint an Investigator whose powers, rights and privileges are the same as those conferred upon a Commissioner under the Commissions of Inquiry Act, other than the powers to order a person to be detained in custody (ZSEA, Article 65). The Inspector appointed by the Minister investigates the affairs of the Exchange or registered Stockbrokers as the case may be and reports back to

the Minister on her findings (ZSEA, Article 64). Likewise, if a Registrar is in possession of any information required by the Minister which she thinks is material and which she believes relates to matters concerning affairs of the Exchange or a registered Stockbroker, she may request an Inspector to investigate.

Part 2. The duty to disclose material information

By law, it is prohibited to sell shares without first delivering an approved prospectus to potential customers (Companies Act, Section 54(3)). There is no waiting period established by law between when shares may be offered and when they may be sold. The Registrar of Companies is granted discretion when considering an application for public listing. Where a prospectus does not further public interest or if the information is incorrect, the Registrar can refuse to register the document. However, as a matter of practice, a prospectus is submitted to the Registrar of the Companies and is considered and reviewed for formalities only. In contrast, the Stock Exchange Committee examines the prospectus for substance. When the issuer applies for official listing on the Exchange, the Stock Exchange Committee may refuse an application from an issuer to be included on the official list for any cause.

Disclosure requirements for the prospectus are set forth in Section 54, 4th Schedule, Part 1 of the CA, and include, among other information, the following:

1. Remuneration of the directors whether for their services to the company as directors, managing directors or otherwise (Paragraph 2).
2. The number of shares fixed by the articles of the issuer as the qualification of a director (Paragraph 2). However, the stock ownership of directors and officers need not be disclosed.
3. The dates of, parties to and general nature of every contract not being a contract entered into the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus (Paragraph 14).
4. Full particulars of the nature and extent of the interest, if any, of every director or promoter in the promotion of, or in the property acquired within two years of the date of the prospectus or proposed to be acquired by, the company (Paragraph 15). Disclosure is also necessary where such interest of directors or promoters consists in being a member of a partnership, company, syndicate or other association of person.
5. Any amount or benefit paid or given within the two preceding years or intended to be paid or given to any promoter or to any partnership, syndicate or other association of which she is or was at any material time a member (Paragraph 13).
6. All information relevant to a reasonable investor. Furthermore, the Committee has the authority under Section 16 of the CA to require the issuer to produce "any information or documents... which it may consider necessary in the interests of the exchange and the public generally."

Note that the name and ownership of the main shareholders need not be disclosed.

Directors, officers, the distributor, as well as the accountant and attorney all sign the prospectus. (Sections 55 and 56, CA). Each of these parties may be held liable for the information in the prospectus up to professional standards (Sections 58 and 59, CA).

There is no statutory provision nor any case law that specifically imposes a duty upon the distributor to perform due diligence review of the information contained in the prospectus. However, in the event of misrepresentations or omissions of material facts that could have been avoided by such due diligence, an aggrieved person will have a cause of action against the distributor for negligence or breach of contract

under common law. As a result, distributors make reasonable inquiries as to the truthfulness of the information in the prospectus as a matter of commercial practice. Moreover, Section 73 (1)(c) of the ZSEA prohibits any person from making any statement, promise or forecast which she knows to be false or "does not know or believe to be true...". This implies that there is a duty to ascertain the facts as failure to do so may result in a criminal offence. However, the Companies Act at sections 58 and 341 appears to limit civil liability to knowingly making an untrue statement.

Part 3. Sanctions for the failure to disclose

3.1 Administrative sanctions

Should the Registrar consider that the prospectus submitted for registration does not comply with the requirements of the law, it may refuse to register a prospectus, and request that the document be amended as necessary (Section 347 of the CA). On the other hand, the Committee of the Zimbabwe Stock Exchange may grant, defer, or refuse an application from an issuer for listing. Moreover, the Committee may remove any securities from the official list or suspend dealings in any listed securities (ZSEA, Section 16).

If the Exchange or a registered stockbroker knowingly publishes any statement which is likely to mislead the public regarding: (1) the affairs of the Exchange or the registered stockbroker; or (2) the affairs or future performance of a company, the Registrar of the Stock Exchange may serve notice to the Exchange or the registered stockbroker to cease, or cause to be stopped, the publication and distribution of the statement (Section 71 of the ZSEA). Moreover, the Committee of the Zimbabwe Stock Exchange may take action against the stockbroker for "disgraceful conduct or negligence" and suspend or cancel a registered stockbroker from practice (Sections 35 and 36 of ZSEA).

The Committee of the Zimbabwe Stock Exchange cannot impose any sanctions on the auditors in a case of false statements or material omissions in a prospectus.

3.2 Judicial sanctions

Where a prospectus contains an untrue statement, any person who authorized the issue of the prospectus, such as an issuer's director (but not an expert, who are expressly excluded for this purpose), shall be criminally liable and sanctioned upon conviction with a fine or imprisonment, unless she proves that the statement was immaterial or that she had reasonable ground to believe and did believe that the statement was true (Section 59 of the CA).

Additionally, a person shall be guilty of an offence and liable to a fine or to imprisonment if such person:

(1) issues or distributes or causes to be issued or distributed any form of application for shares without attaching thereat a prospectus that complies with the legal requirements, unless that person proves that the she was not aware of the matter not disclosed, or that the violation was an honest mistake, or that the non-disclosure was immaterial or excusable in the opinion of the court (Section 54 of the CA).
(2) in a document required under any provision of the CA (as it would be the case of a prospectus) makes a false material statement knowing it to be false (Section 341 of the CA).
(3) acting as an officer or auditor of a company or employed or engaged by the company, makes, circulates, or publishes any written statement in relation to any property or affair of the company which is false in any material aspect (Section 343 of the CA).
(4) makes or permits to be made, in any document required under the ZSEA, any statement, promise or forecast which she knows to be false or "does not know or believe to be true" (ZSEA, Section 73 and 96).

In addition, the court may make an order prohibiting a person, convicted before the High Court for any of the offences described above, to become a director or be involved in the management of a company without leave of the court.

3.3 Stock exchange sanctions

As explained above, the Committee of the Zimbabwe Stock Exchange may impose the sanctions provided under the ZSEA, which include delisting of an issuer, and the suspension or cancellation of the registration of a stockbroker.

Part 4. Investor's right of restitution for losses

Investors can obtain restitution for losses caused by a defective prospectus through a judicial proceeding, either civil or criminal. A class action suit is also available in Zimbabwe[509], and investors could obtain under certain circumstances compensation from the Zimbabwe Stock Exchange Security Fund for losses incurred due to the dishonesty or default of a registered stockbroker.

According to Section 58 of the CA, a director, a promoter, and every person who has authorized the issue of the prospectus (e.g., issuer's responsible officers, and experts consenting to the issue of the prospectus in respect to their expert report, such as auditors) shall be liable to pay compensation to all persons who subscribed shares based on the prospectus for the loss or damage sustained by reason of any untrue statement contained therein. In order to obtain restitution, an investor has the burden of proof that the prospectus contains an untrue statement. To this effect, a statement shall be deemed to be untrue if it is misleading in the form and context in which it is included, or if any matter which ought to be included is omitted from the prospectus and the omission is calculated to mislead (Section 62 of the CA). The investor also needs to prove that she relied on the prospectus, and that her losses were caused by the untrue statement as defined. The director, promoter, or liable person under Section 58 of the CA for authorizing the issue of the prospectus, can escape liability by proving, with regards to every untrue statement not purporting to be made on the authority of an expert, that she had reasonable grounds to believe and, at the time of the allotment of the shares, did believe that the statement was true. A person who has authorized the issue of a prospectus with an untrue statement purporting to be made by her as an expert, shall be liable unless she proves that she was competent to make the statement, and that she had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the statement was true.

It is unclear if the distributor legally "authorizes" the issue of the prospectus, and is therefore liable under Section 58 of the CA. As explained in Part 2 above, there is no express statutory provision imposing upon the distributor a duty regarding the information in the prospectus. The distributor may be liable, though, under common law, in which case negligence must be established.

The issuing company is also omitted from Section 58 of the CA. However, there is little doubt that courts will hold the issuer liable for investors' losses under common law.

[509] Law Society of Zimbabwe & Others v Minister of Finance (Attorney-General Intervening) 1999 (2) ZLR 231 (S): This case did not involve securities law issues; however, it was stated that although the Class Actions Act had not yet come into force, it would not be right for the court to make any ruling which would hinder the development of such actions. The Court held that matters of such a nature should be disposed of with a broad view of *locus standi.*

The controlling shareholder is not liable for the content of the prospectus, unless it can be established that she assisted in its preparation. In order to hold a controlling shareholder of a corporation civilly liable for acts or omissions of the corporation, investors would have to establish that her conduct was fraudulent, in which case the corporate veil would be pierced.

A civil case for restitution for losses sustained by reason of an untrue statement in a prospectus will take approximately two years to be resolved by the judiciary, from the moment of filing the complaint till final judgment or resolution. However, this is only a very rough estimate because of the uncertainty of any court procedures. For example, the defendant can deny the facts and thereby overcome any motion for summary judgment. The defendant may also cross claim against others (e.g., the distributor) for negligence and/or breach of contract and seek indemnification. These may not be valid defenses but would have to go to trial, which would take time even on the "fast track" system. There is a right of appeal on matters of law, which includes application of the law to the facts presented or which the judge refused to consider. Appeal in a prospectus liability case may take an extra year.

This chapter was prepared with the help of:

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