Responsible Reporting - Legal Considerations for Directors Under FSMA

A guide for Directors to help manage the risk of Shareholder claims under Sections 90 and 90A of the Financial Services and Markets Act 2000.

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Introduction

If a public company publishes misleading information, and this causes loss to Shareholders, there are a number of causes of action a Shareholder can consider.

The traditional common law torts, such as negligent misstatement or deceit, have proved difficult for Shareholders to establish in practice. In recent years, there has been an increase in claims brought under the Financial Services and Markets Act 2000 ("FSMA"), under Section 90 (which addresses situations where a Shareholder has suffered loss due to untrue or misleading statements in listing particulars or prospectuses) and Section 90A (which deals with misleading statements in other published information)[1].

The increase in FSMA claims is expected to continue, particularly in relation to ESG disclosures. Environmental reporting obligations on large UK companies have increased in recent years following new legislation frameworks, including amendments to the Companies Act 2006, the Climate Change Act 2008, the Task Force on Climate-related Financial Disclosures and UK Sustainability Reporting Standards. As companies are required to publish more detailed information on their ESG performance, the volume and complexity of statements increases, alongside the potential for those statements to be challenged.

To help Directors understand and manage this risk, this guide provides:

- An overview of the key elements and defences of s90 claims
- An overview of the key elements and defences of s90A claims
- Key considerations to help Directors manage the risk of these claims

1. Section 90 FSMA

The primary legislation can be found here: Financial Services and Markets Act 2000

Section 90 states that if you are:

- An Issuer of a prospectus or listing particulars ("the Document");
- A Director responsible for the contents of the Document;
- Anyone who has authorised or is responsible for the Document.

[1] s90A is now incorporated within Schedule 10A FSMA, but we will still refer to this as "s90A"

You may potentially be required to compensate a shareholder for any untrue, misleading or omitted statements in the Document.

A Shareholder can seek compensation from you if:

- They have acquired relevant securities; and
- They have suffered loss in respect of those securities; and
- The loss was caused by the untrue, misleading or omitted particulars which are required under s80 and 81 FSMA.

Does it matter that I did not intend to mislead investors?

No – for claims brought under s90 FSMA, it does not matter whether or not you intended to mislead investors. The Shareholder only needs to show that the Document contained untrue, misleading or omitted statements which caused loss, and does not need to establish the intention behind making the statement.

Are there any Defences to FSMA s90?

There are a number of statutory defences to this section. You can defend yourself against a s90 claim by:

- Proving you had a reasonable belief that the statement was true, not misleading or was properly omitted. You must also satisfy one or more of a number of other conditions set out in Schedule 10 paragraph 1(3) of FSMA, such as that you continued in your belief until the securities were acquired, or that you had taken all reasonable steps to ensure a correction was brought to the attention of Shareholders.
  Example: A Company issues a prospectus stating it has secured a major contract. The contract later falls through due to unforeseen circumstances, but the Company had reasonable grounds to believe it was secured at the time of the publication.

- Establishing reasonable reliance on a statement made by an expert (whose statement was included in the listing particulars with their consent). This defence is also subject to conditions that can be found at Schedule 10 paragraph 2(3) of FSMA.
  Example: A Financial Director relies on external auditors to verify financial figures in a prospectus. The auditors provide incorrect data, but the Director was unaware of the error.

- Correcting a statement, which was published in a manner calculated to bring it to the attention of persons likely to acquire the securities, or taking all such steps as it was reasonable to take to secure the publication and reasonably believed it had taken place before the securities were required

Example: A Director acts promptly to publish a correction to its growth forecast after discovering an error, in an official market update. Investors have a fair chance to adjust their decisions based on the correction.

- Correcting a statement by an expert, which was published in a way calculated to bring it to the attention of persons likely to acquire the securities, or or taking all such steps as it was reasonable to take to secure the publication and reasonably believed it had taken place before the securities were required, or bringing it to the attention of potential investors the fact that the expert was not competent or had not consented..
  Example: On discovering an error on an asset valuation prepared by an independent expert, the company promptly issues a correction via the Regulatory News Service ("RNS").

- Proving that the incorrect or misleading information was known about by the Claimant.
  Example: A company states that a major project is progressing on schedule, but industry analysts and media reports have already widely covered the delays, and the potential Claimants had access to the correct information.

- Reasonable belief that supplementary listing particulars were not required.
  Example: a company issues a prospectus stating that its revenue is stable. Shortly after, it enters discussions about a minor restructuring of its supply chain, which management believes will have no material impact on financial performance. The company reasonably concludes that the supplementary listing particulars are not necessary.

2. Section 90A FSMA

The primary legislation can be found here: [Financial Services and Markets Act 2000]

This section applies to all other published information beyond the prospectus and listing particulars. It requires directors of public companies to compensate shareholders where they published misleading information to the market.

In summary, if you are:

- A person discharging management responsibility in a public company ("PDMR"), which means:
  - Any Director of the issuer;
  - Any person occupying the position of Director of the issuer, even if they are called something else; or
  - Where there is no one in the position of Director of the issuer, any senior executive of the issuer having responsibilities in relation to the information in question of its publication.

You may potentially be required to compensate a shareholder for any untrue or misleading published information.

A Shareholder could be entitled to seek compensation from you if:

- They have acquired relevant securities; and
- They relied on the misleading published information; and
- They have suffered loss in respect of those securities; and
- The loss was caused by the untrue, misleading or omitted statements, or a delay in providing information.

What published information is covered?

Generally, s90A refers to statements that are intended for the market as a whole, covering information published "*by recognised means*" and "*by other means where the availability of the information has been announced by recognised means*". This could include, but is not limited to:

- Regulatory announcements released via the RNS, including earnings reports, trading updates and market disclosures;
- Financial Reports;
- Corporate Announcements;
- Investor Presentations.

Does the Shareholder have to prove that you knew the statements were misleading?

Yes – under s90A, the Shareholder must show that you knew the statements were misleading, or were reckless as to whether or not they were misleading. This could potentially be difficult for a Shareholder to prove in practice, when their access to all the potentially relevant information could be limited, particularly at the stage of deciding whether or not to commence a claim.

What if the misleading information involves an omission of key information, or a delay in providing information?

Where an omission or delay is alleged, the Shareholder must show that you knew that the omission or delay was dishonest concealment of a material fact.

This means:

- The omission or delay would have been regarded as dishonest by persons who regularly trade on the securities market in question; and
- You were aware that it would have been regarded as dishonest by persons who regularly trade on the securities market in question.

This raises a number of questions. Who are "persons who regularly trade on the securities market"? There will inevitably be situations where various "persons who regularly trade on the securities market" would come to differing conclusions as to whether a particular omission was dishonest. Additionally, regarding the second limb of the test, Shareholders might find it difficult to prove that you were aware that an omission or delay would be regarded as dishonest, particularly where there is an explanation as to why the omission or delay occurred.

What Shareholders can bring a claim?

This is currently the topic of some discussion. In recent s90A cases, shareholders have been differentiated into the following groups:

- Shareholders who read and relied on the published information directly;
- Shareholders who relied on the published information indirectly, such as through transcripts of investor relations calls, or reviewing reports which relied on the published information;
- Shareholders who have not read the published information containing the misleading information or omission – often referred to as "passive" investors. These include shareholders whose investment decisions or processes are based on the assumption that the share price reflected the content of the published information, and investment decisions were made by taking into account the share price and movements.

As regards this third group of "passive" investors:

- The High Court in Allianz Funds Multi-Strategy Trust v Barclays plc [2024] found that they could not show they relied on the published misinformation. As such, the "passive investors" would not be able to bring a claim under S90A.
- However, in March 2025, the High Court did not follow this approach in a strike out application, and has deferred consideration of what "reliance" means until trial. Persons Identified in Schedule 1 v Standard Chartered PLC [2025]. This has opened up the possibility that passive investors might be able to proceed with a claim in certain circumstances.

As such, at the date of publication, the position remains that "passive investors" should not be able to claim, but there is a real prospect that this could be refined or overturned in the near future.

How does a Shareholder prove they relied on the statement?

Shareholders need to show they were directly influenced by the published information (unless the allegation concerns a dishonest delay in publication). They can do this by setting out:

- The specific statement they relied on. General reliance on a company's reputation or financial health is not enough. Shareholders must identify the specific statement that influenced their decision;
- Proof that they relied on that statement when dealing shares. The shareholder will be in a stronger position if they have well-documented investment decisions, in internal memos or meeting notes showing that the information was a key factor in the investment decision;
- That it was reasonable to rely on the statements. Courts may look at:
    - Whether the Shareholder had access to alternative sources of information;
    - Whether the statement was sufficiently clear;
    - Whether the information was credible and consistent with market norms.

Where the allegation concerns a dishonest delay in publication, shareholders do not need to prove reliance.

Defences

Unlike s90, there are no specific statutory defences to s90A FSMA claims. The defences will therefore focus on challenging whether or not the Claimant has successfully established the key elements of the claim. This could include arguments that there was:

- No misleading statement or omission – where the publisher can show that the information was accurate and complete.
  Example: a company issues a financial report stating that its revenue grew by 10% which is later challenged by investors. The company defends itself by proving the reported figures were accurate and based on audited financial statements.

- No reliance on the misleading information when making their investment decision.
  Example: A company published a financial report stating that its cash reserves are strong. Shareholders claim they relied on this when purchasing shares, but the Company is able to demonstrate that they had access to independent financial analysis and credit ratings which had highlighted concerns on liquidity risks.

- No loss caused by the misleading statement.
  Example: The Company's share price dropped due to industry-wide downturns and external factors, rather than the misstatement.

- Reasonable belief in the accuracy of the statement.

Example: A company publishes a statement about expected growth based on internal forecasts. When projections prove inaccurate, the company argues that, at the time of publication, it had reasonable grounds to believe that the forecasts were correct.

3. Key Risk Management Measures for Directors

There are a number of measures Directors can implement to reduce the risk of successful s90 and s90A claims being brought against them.

- **Ensure the Accuracy and Verifiability of Disclosures**. All public statements (especially those in annual reports, investor presentations, and ESG disclosures) must be factually accurate, clearly sourced, and capable of verification. Vague or aspirational language (e.g. "we are a green company") without evidence can be fertile ground for s90A claims, and claims should always be backed up by measurable data, and specific details on initiatives, timelines and outcomes.

- **Implement Robust Internal Controls Over Reporting.** Assess your governance frameworks in respect of legal and compliance review of all public disclosures. Regular internal audits can help to identify inconsistencies before they become liabilities.

- **Document Decision Making**. Maintain clear records of the rationale behind key disclosures, including the assumptions used in forward looking statements. This can be key to proving you had a reasonable and honest belief in their truth.

- **Obtain Independent Verification**. Third party assurance of ESG metrics or financial data can provide comfort – though if this information is to be included in a Prospectus or Listing Particulars, ensure you have the expert's consent.

- **Train the Board and Senior Executives** – Directors should receive regular training on their duties under FSMA, the risks of shareholder litigation and the evolving regulatory landscape, particularly in respect of their potential individual liability.

- **Monitor Litigation Trends and Regulatory Updates**. This is an evolving area of law, and a close eye should be kept on relevant Court decisions to keep ahead of the shifting landscape, particularly as claims volumes increase.

- **Engage Early with Insurers and Legal Advisors**. Check the terms and limits of your Management Liability policy as to whether or not claims of this type are covered. If they are, are you satisfied you have sufficient levels of cover? If a potential issue arises, early engagement with your D&O Insurers and legal advisors can help to mitigate exposure. Proactive risk dialogue from an early stage is key to managing claims defensibility.

Checklist

A generic Responsible Reporting Checklist is presented in Appendix 1 which can be tailored to your own organisation.

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Aviva Risk Management Solutions can offer access to a wide range of risk management products and services at preferential rates via our network of Specialist Partners.
For more information please visit:
Aviva Risk Management Solutions – Specialist Partners

Sources and Useful Links

- Financial Services and Markets Act 2000
- Allianz Funds Multi-Strategy Trust v Barclays plc [2024]
- Persons Identified in Schedule 1 v Standard Chartered PLC [2025]

Additional Information

Relevant Loss Prevention Standards include:

- Management Liability - Greenwashing
- Management Liability - Start Ups and Directors' Duties

To find out more, please visit Aviva Risk Management Solutions **or speak to one of our advisors.**

Email us at riskadvice@aviva.com or call 0345 366 6666.*

*The cost of calls to 03 prefixed numbers are charged at national call rates (charges may vary dependent on your network provider) and are usually included in inclusive minute plans from landlines and mobiles. For our joint protection telephone calls may be recorded and/or monitored.

Appendix 1 – Responsible Reporting Checklist

Location	
Date	
Completed by (name and signature)	

	Title	Y/N	Comments
1.	Do you have procedures in place to ensure that all public statements are factually accurate, clearly sourced and verifiable?		
2.	Do you have an established cross functional team to review and approve all market facing disclosures?		
3.	Do you have procedures to avoid aspirational language being used in publications without supporting evidence?		
4.	How do you ensure that all claims can be backed up with measurable data, specific initiatives, timelines and outcomes?		
5.	Do you ensure that pre-issuance legal vetting takes place before publication of all prospectuses, listing particulars and major announcements?		
6.	Do you conduct regular internal audits to identify and address inconsistencies?		
7.	Have you assigned clear accountabilities for disclosure accuracy across departments?		
8.	Do you maintain a Disclosure Log, tracking what was disclosed, when, by whom and under what assumptions?		
9.	Do your records include details of the rationale behind key disclosures?		
10.	Are all forward-looking statements supported by documented assumptions on which they are based?		
11.	Are all internal discussions and approvals relating to public statements fully documented and stored safely?		
12.	Do you have procedures in place to ensure that third party assurance is obtained for any statements requiring an expert view, such as ESG metrics and financial data?		

13.	How do you ensure that documentation of expert credentials and the scope of their review are retained?		
14.	Do you have a clear Disclosure Escalation Protocol for escalating concerns about potentially misleading or incomplete disclosures?		
15.	Do you review and monitor how your disclosures are being interpreted externally, to help identify and correct any misperceptions at an early point?		
16.	Do you conduct simulated shareholder claims responses, such as a tabletop exercise to test how your company would respond to a s90 or s90A claim?		
17.	Do you provide regular training on FSMA duties and shareholder litigation risks?		
18.	Do you provide regular training on regulatory changes and recent case law affecting Directors' liabilities?		
19.	How do you monitor and track relevant court decisions and evolving interpretations of s90 and s90A?		
20.	Do you subscribe to legal briefings or alerts on securities litigation and ESG regulation?		
21.	How do you benchmark against disclosures by your peers and industry best practices?		
22.	Have you reviewed your Management Liability policy to understand coverage for FSMA claims (or asked your broker to?)		

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