

MACFARLANES

CORPORATE AND M&A

BRIEFING

EXTENDING THE SCOPE OF ISSUER LIABILITY

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (LIABILITY OF ISSUERS) REGULATIONS 2010

The Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010, which will come into force on 1 October 2010, extend the scope of investors' rights to claim compensation from issuers of securities for losses caused by untrue or misleading statements in certain published information and create a new right to compensation for losses caused by dishonest delay in publishing such information.

These regulations (the "New Regime") will amend section 90A of the Financial Services and Markets Act 2000 ("FSMA") and introduce a new Schedule 10A to that Act, in relation to information published on or after 1 October 2010. The current section 90A (the "Existing Regime") will continue to apply to information first published before that date.

SCOPE OF POTENTIAL LIABILITY WIDENED

The New Regime widens the scope of potential liability in the following respects:

The securities to which the New Regime will apply

The Existing Regime applies to securities traded on a regulated market situated or operating: (i) in the United Kingdom (e.g., the Official List of the Financial Services Authority, but not AIM); or (ii) elsewhere if the United Kingdom is the issuer's home "Member State" for the purposes of the EU Transparency Directive.

The New Regime will apply to issuers which have "transferable securities" (a slightly wider definition than "securities") that are, with the consent of the issuer, admitted to trading on any "securities market" situated or operating: (i) in the United Kingdom; or (ii) elsewhere if the United Kingdom is the issuer's "home State" (meaning either the home Member State, in the case of securities to which the Transparency Directive applies, or in any other case the place where the issuer has its registered office or, if it does not have a registered office, its head office).

For example, an issuer with securities traded on AIM and an issuer with a registered office in the United Kingdom which has its securities traded only on the New York Stock Exchange would be brought within the scope of the New Regime.

The information covered by the New Regime

The Existing Regime only covers reports and statements required to be produced by the Transparency Directive (i.e. annual and half-yearly financial reports, interim management statements and certain related statements). The New Regime will apply to all information published to the market by means of a recognised information service or by other means of communicating with the market when a recognised information service is unavailable, whether publication was required or voluntary.

An issuer will not be liable under the New Regime to pay compensation if: (i) the published information is contained in a prospectus (or listing particulars); and (ii) it is liable to pay compensation under section 90 of FSMA (compensation for statements in listing particulars or prospectus) to the same person in respect of the statement or omission.

The class of person to whom compensation is payable under the New Regime

Under the Existing Regime, an issuer is liable to pay compensation to persons who have acquired securities and suffered loss as a result of an untrue or misleading statement in a relevant publication, or where that publication omits any matter required to be included in it. The New Regime extends the class of persons to whom compensation is payable by including those who continue to hold or dispose of securities, as well as those acquiring them.

At first sight, those who continue to hold would seem to include everyone on the register. However, the New Regime provides that loss is not to be regarded as suffered as a result of a statement or omission unless the person suffering it acquired, continued to hold or disposed of the securities: (i) in reliance on the information in question; and (ii) at a time when, and in circumstances in which, it was reasonable for him to rely on it.

Issuers should also take some comfort from the Government's clarification that "there must be some reliance on information published by the issuer in deciding to continue to hold securities. There is a clear difference between an active holder and a passive holder – the latter will not be entitled to bring an action as they would not be able to show reliance on the statement in making their investment decision."

“KNOWING OR RECKLESS” ELEMENT RETAINED

An issuer will only be liable (i) in respect of an untrue or misleading statement, if a “person discharging managerial responsibilities” within the issuer (“PDMR”) knew, or was reckless as to whether, the statement was untrue or misleading; and (ii) in respect of an omission of any matter required to be included in the published information, if a PDMR knew the omission to be a dishonest concealment of a material fact.

“Dishonest” is not currently defined, but the New Regime provides that a person’s conduct is regarded as dishonest if (and only if): (i) it is regarded as dishonest by persons who regularly trade on the securities market in question; and (ii) the person was aware (or must be taken to have been aware) that it was so regarded. Accordingly, the dishonesty test has an objective and a subjective limb.

“Person discharging managerial responsibilities” is defined more narrowly for purposes of the New Regime than under Disclosure and Transparency Rule (“DTR”) 3 and will usually include only directors of the issuer.

THE NEW HEAD OF LIABILITY: DISHONEST DELAY

The New Regime provides for liability for loss as a result of dishonest delay by the issuer in publishing certain information and covers the same securities, information and class of person to whom compensation is payable as the head of liability for losses caused by untrue or misleading statements (outlined above). The issuer will only be liable if a PDMR acted dishonestly in delaying the publication of the information. Dishonesty has the same meaning as set out above.

PRACTICAL ADVICE FOR ISSUERS

Although the scope of issuer liability under Section 90A of FSMA has been considerably widened by the New Regime, the responsibilities of issuers in relation to the publication of information remain unchanged. There are already a number of other bases for similar liability, including misrepresentation (both at common law and under the Misrepresentation Act 1967) and sections 90 and 397 of FSMA. Issuers should continue to consider whether an obligation has arisen under the DTRs, the Listing/AIM Rules, the Takeover Code, or other relevant legislation or regulations. In respect of all regulatory announcements and publications, an issuer should take steps to ensure that the information in them is true (verifying important/sensitive statements) and not misleading and that it does not omit any material information.

Issuers can be reassured that they should not face liability under Section 90A unless a director acts knowingly, recklessly or dishonestly.

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This note is intended to provide general information about some recent and anticipated developments which may be of interest.

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