

Section 90 or 90A FSMA? What a difference an "A" makes

Sections 90 and 90A (Schedule 10A) of the Financial Services and Markets Act 2000 ("FSMA") provide investors with a useful route to compensation for untrue or misleading statements or omissions by listed companies. Whilst there are some similarities between the two regimes, there are some crucial differences. Section 90 claims are generally considered to be easier and more straightforward, but section 90A has its own advantages, as will be seen below.

	Section 90	Section 90A/Schedule 10A
What type of information is covered?	Listing particulars, supplementary listing particulars, prospectuses and supplementary prospectuses (which we refer to collectively in this article as "listing particulars").	Information published on a recognised information service or by other means when a recognised information service is unavailable. This includes regular reporting documents such as annual reports, financial statements and ad hoc announcements, but does not include listing particulars.
What needs to be proved?	An untrue or misleading statement in, or omission from, the listing particulars.	A misleading statement or dishonest omission, or a dishonest delay in publishing such information.
Who can bring a claim?	A person who acquired the securities (shares or an interest in shares). This acquisition could be during the initial offer or potentially in the aftermarket.	A person who acquired, continues to hold or disposed of the securities (shares or an interest in shares) in reliance on the published information.
Who can be sued?	Any person responsible for the listing particulars. This includes the issuer and may extend to directors, advisers and others.	The issuer.
Is there a requirement to establish dishonesty?	No, but there is a "reasonable belief" defence if the responsible person reasonably believed that the statement was true and not misleading, or the omission was properly omitted.	Yes, a person discharging managerial responsibilities within the issuer (who is typically, but not always, a director) must (i) know the statement to be untrue or misleading or be reckless as to whether it is untrue or misleading; (ii) know the omission to be a dishonest concealment of a material fact; or (iii) have acted dishonestly in delaying the publication of the information.
Is there a requirement to demonstrate reliance on the statement / omission?	No.	Yes, the investor needs to have acquired, continued to hold or disposed of the securities in reliance on the information

There are other potential avenues open to investors to recover losses, which will be the subject of separate articles, but section 90 and 90A FSMA claims are on the rise and the trend looks set to continue.