**Liability for the prospectus - FSMA**

This element outlines the potential liability for the prospectus under FSMA

**Introduction**

A prospectus contains detailed statements about the issuing company and its performance. The ultimate aim of these statements is to attract investors to acquire the securities being listed.

It is vital to have a comprehensive understanding of the potential range of liabilities which could arise in connection with a prospectus (including any related standalone registration document and any supplementary prospectus which is published). All relevant parties will need to be advised fully on the extent of their potential liability.

As part of the preparation process for listing, the company's lawyers produce a memorandum for directors which explains to them the nature and extent of their potential liabilities.

Two important sources of potential liability are statutory liability under FSMA and the UK Prospectus Regulation/PRRs. Those are the focus of this element.

**Persons Responsible**

Under s. 90 FSMA, any 'person responsible' may be liable to pay compensation to investors in relation to false or misleading statements or omissions from a prospectus. It is therefore important to establish whether your client is a 'person responsible' for the prospectus.

PRR 5.3.2(2) sets out those persons who may be responsible for an equity prospectus. They include:

a) the **issuer**;

b) all **directors** of the issuer at the time the prospectus is published;

c) all **future directors**, to be appointed immediately or at a future time, who are **named in the prospectus**;

d) **each person who accepts**, and is stated in the prospectus as accepting, **responsibility** for the prospectus;

e) in the case of a prospectus for an offer to the public, the offeror, if this is not the issuer (e.g. an existing shareholder who is selling shares – although note the potential exemption in PRR 5.3.8), as well as the directors, if any, of the offeror;

f) in the case of a prospectus for an admission to trading, the person requesting admission, if this is not the issuer, together with the directors, if any, of the person requesting admission (unlikely to apply to an equity prospectus); and

g) each person (not otherwise covered) who has authorised the contents of the prospectus.

**Responsibility Statements**

Each of item 1.2 of Annex 1 UK PR Regulation and item 1.2 of Annex 11 UK PR Regulation requires a prospectus to contain a declaration of responsibility by those persons who are deemed to be responsible for the prospectus by virtue of PRR 5.3. Pursuant to PRR 5.3.2(2)(a) and (b), both the company and its directors are deemed to be 'persons responsible' for the whole of an equity prospectus.

**Example:** The standard responsibility statement used in a prospectus is as follows:

'The Company and the Directors [, whose names are set out in [ ],] ... accept responsibility for the information contained in this Prospectus. To the best of the knowledge of the Company and the Directors, having taken all reasonable care to ensure that this is the case, the information contained in this Prospectus is in accordance with the facts and this Prospectus contains no omission likely to affect its import.'

**Director's knowledge or consent (PRR 5.3.7R)**

In practice, the wording of the responsibility statement means that each director accepts personal responsibility for all of the contents of the prospectus, whether or not they have been involved in drafting it. This means that they cannot escape liability for a prospectus by delegating the drafting to subordinates or to the company’s advisers. Each director signs a document addressed to the company and the sponsor (also known as a “responsibility statement”) which confirms this.

A person is not responsible for a prospectus under PRR 5.3.2R(2)(b)(i) if it is published without their knowledge or consent and, on becoming aware of its publication they, as soon as practicable, give reasonable public notice that it was published without their knowledge or consent. In practice, this is very unlikely to happen.

**Other parties accepting responsibility or authorising contents**

PRR 5.3.2R(2)(f) envisages that anyone authorising the contents of a prospectus will be a 'person responsible'.

**Example:** the reporting accountants will be required by both Item 1.3 of Annex 1 UK PR Regulation and Item 1.3 of Annex 11 UK PR Regulation to authorise the contents of the financial information section of the prospectus. They will therefore be 'persons responsible' for those parts only under PRR 5.3.2R(2)(f).

It is therefore possible, in limited circumstances, to be liable for part or parts only of the prospectus. For example, if the financial information contained in a prospectus is incorrect or misleading, on the basis of their responsibility statement, the reporting accountants could potentially be held liable to investors, alongside the issuer and directors for loss suffered by investors as a result of that incorrect or misleading information.  
Note that it would be very unusual for a sponsor to be a 'person responsible' for a prospectus.

**Limitations to authorisation (PRR 5.3.9R)**

Except for the issuer or the directors, any person who either accepts responsibility for or authorises the contents of a prospectus may state that they do so only in relation to specified parts of the prospectus. Set out below is an illustration of this principle in prospectus wording used by reporting accountants:

**Example:** 'Save for any responsibility which we may have to those persons to whom this report is expressly addressed and for any responsibility arising under item PRR 5.3.2R(2)(f) to any person as and to the extent there provided, to the fullest extent permitted by law we do not assume any responsibility and will not accept any liability to any other person for any loss suffered by any such other person as a result of, arising out of, or in connection with this report or our statement, required by and given solely for the purposes of complying with Annex 1 Item 1.3, consenting to its inclusion in the Prospectus.'

There is no way for the issuer or the directors to avoid taking responsibility for the whole prospectus, including information sourced from third parties.

**Can a solicitor be a person responsible? (PRR 5.3.10)**

A person who gives advice in relation to the contents of a prospectus in a professional capacity will not be deemed to be a person responsible. In practice, a firm of solicitors will be advising the company or investment bank and its liability is owed to its client, not investors in general.

A law firm (alongside the other advisers on the transaction) may, however, suffer reputational damage if it is associated with a prospectus which is found to be deficient.

**S. 90 FSMA - introduction**

There is a wide range of potential civil remedies open to investors who have suffered loss due to false or misleading statements and/or omissions in a prospectus. S. 90 FSMA is potentially a powerful and effective remedy for an aggrieved investor.

S.90 FSMA – Compensation for false or misleading statements or omissions.

'….any person responsible for [a prospectus] is liable to pay compensation to a person who has:

(a) acquired securities to which the particulars apply; and

(b) suffered loss in respect of them as a result of;

(i) any untrue or misleading statement in the particulars; or

(ii) the omission from the particulars of any matter required to be included by…….'

S.90(11) FSMA extends the remit of s.90 FSMA to prospectuses. In this context, 'prospectus' includes both any supplementary prospectus and any pricing statement published in order to confirm the final price following a price range prospectus (ss. 90(10), (11) and (11A) FSMA).

**S. 90 FSMA – advantages**

The advantages to an investor of bringing a claim under s 90 are:

· There is no need for the injured party to show reliance (which would be necessary to prove negligent misstatement). A claimant only needs to prove a causal connection between the misstatement and the loss suffered.

· There is no need for a claimant to show that there has been an inducement (which would be necessary to prove misrepresentation).

· S.90 is available to subsequent purchasers of securities, not just the original investors; but a purchaser's ability to invoke s.90 will become more difficult as the time interval between the misstatement and the date of the claim becomes longer.

**S. 90(4) FSMA – failure to publish supplementary prospectus**

S. 90(4) FSMA extends s. 90 to loss resulting from a failure to publish a supplementary prospectus when required pursuant to the UK Prospectus Regulation. This will be particularly relevant where the original prospectus was accurate and complete at the time it was published, but a significant new matter has since arisen.

**S. 90 FSMA– exemptions**

Directors may be able to avoid liability under s.90(1) or (4) if they can satisfy the court that one of the exemptions applicable to the relevant section in Schedule 10 FSMA applies.

**Reasonable belief**

**Correction**

**Knowledge of party acquiring**

**Belief that supplementary prospectus not required**

Each of these potential exemptions is examined on the following pages.

**S. 90 FSMA– exemptions – reasonable belief**

Paragraph 1(2) of Schedule 10 FSMA, provides that a 'responsible person' may be exempt from liability under s.90(1) if they held a reasonable belief (having made such enquiries, if any, as were reasonable) that:

a) the omission/incorrect/misleading statement was true and not misleading; or

b) the matter whose omission caused the loss was properly omitted

and that one or more of the conditions in paragraph 1(3) is satisfied.

Verification (see later element) is essential in demonstrating directors’ reasonable belief that a particular statement is correct.

The paragraph 1(3) conditions are that:

a) they continued in this belief until the time when the securities in question were acquired;

b) they were acquired before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them;

c) before the securities were acquired, they had taken all such steps as it was reasonable for them to have taken to secure that a correction was brought to the attention of those persons; and/or

d) they continued in their belief until after the commencement of dealings in the securities following their admission to the official list and they were acquired after such a lapse of time they ought reasonably to be excused.

**S. 90 FSMA– exemptions – correction**

A defence is also available under paragraph 3 of Schedule 10 FSMA. This provides that a person may be exempt from liability under s.90(1) if, before the relevant securities are acquired, either (a) a correction has been published in a manner calculated to bring it to the attention of persons likely to acquire the securities, or (b) the person concerned has taken all such steps as are reasonable to secure such publication and reasonably believed that publication had taken place.

If a mistake or inaccuracy comes to light before the securities are admitted to trading, then the publication of a supplementary prospectus is likely to provide a Schedule 10 defence to the directors. If it comes to light after the securities have been admitted to trading, the directors may face liability in relation to the original prospectus if they knew about the matter at the time of publication and have not since published a correction. However, if they have corrected such matter before the acquisition of the securities (e.g. through an RIS announcement), Schedule 10 FSMA will again protect them.

**S. 90 FSMA– exemptions – knowledge on part of person acquiring / belief that supplementary prospectus not required**

Pursuant to paragraph 6 of Schedule 10 FSMA, a director may also be able to avoid liability under s.90(1) or (4) if they satisfy the court that the person acquiring the relevant securities:

a) knew that the statement was false or misleading; or

b) knew of the omitted matter; or

c) knew of the change or new matter.

A director may be able to avoid liability for failure to publish a supplementary prospectus under s. 90(4) if they satisfy the court that they reasonably believed that a supplementary prospectus was not required (FSMA Schedule 10, paragraph 7).

**S. 90A FSMA**

Companies (but not the directors) may also be obliged to pay compensation to a person who suffers loss as a result of an untrue or misleading statement in, or dishonest omission from, information published by the company or a dishonest delay in publishing such information under s.90A and Schedule 10A FSMA.

However, this only applies to an issuer of securities that have been admitted to trading, and so will generally only be relevant to information included in post-admission announcements made in the context of a primary or secondary issue of shares, rather than to information included in the prospectus itself. Although prospectuses issued on secondary issues could potentially fall within the scope of the s.90A regime, a company is also not liable to pay compensation under s.90A for misleading statements or omissions in the prospectus if it is liable to pay compensation under s.90 FSMA (see paragraph 4, Schedule 10A FSMA).

**Liability for breach of the Listing, Prospectus, Disclosure Guidance and Transparency Rules ('LPDT Rules')**

Under ss.91(1), 91(1A), 91(1B) and 91(2)FSMA, the FCA can impose penalties for breaches of the LPDT Rules and also of the UK Prospectus Regulation. This could include, for example, a breach by the applicant company of its obligation:

a) under PRR 3.1.4 to take all reasonable care to ensure that its prospectus contains all of the necessary information required by Art. 6 UK Prospectus Regulation and all of the information items required in the relevant Annexes of the UK PR Regulation; or

b) under PRR 3.1.5R to take all reasonable care to ensure that any prospectus submitted for approval for which it is responsible is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

Note that the FCA is entitled to impose penalties under s.91 FSMA even if the relevant breach did not cause loss to any investor (this contrasts with the position under s. 90 FSMA). The FCA has a period of three years from the date on which it became aware of the breach to bring an action in this way.

**Liability for the prospectus – FSMA summary**

• Any 'person responsible' may be liable to pay compensation to investors in relation to false or misleading statements or omissions from a prospectus.

• Those persons who may be responsible include the issuer, directors, future directors and others accepting responsibility.

• It is possible for some of those people responsible to be responsible for part or parts only of the prospectus.

• It is very unlikely a solicitor advising the company / investment bank would be a ‘person responsible’.

• Parties may be able to avoid liability if they had a reasonable belief in the truth of the prospectus, the mistake was corrected in time or the person acquiring the securities knew of the inaccuracy.

• In addition, the FCA can impose penalties for breaches of the LPDT Rules and also of the UK Prospectus Regulation.