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LITIGATION ALERT
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NEW TYPE OF INVESTOR LITIGATION

Following the EU Transparency Directive, changes to section 90A of the English Financial Services and Markets Act 2000 ("FSMA") mean that, after 1 October 2010, investors in companies traded on certain public markets will have extended rights to compensation from the company if they suffer loss as a result of:

- relying on a statement,
- which is made by the company to, or for the benefit of, the market,
- and is misleading due to deliberate or reckless behaviour, or delayed due to dishonesty, by one or more of the company's directors,
- if it was reasonable in all the circumstances for the investor to rely on it in deciding whether to buy, sell, or hold on to, the company's securities.

What type of company is covered?

- All companies (wherever incorporated) with equity or debt securities, or depositary receipts ("DRs"), traded with their consent on either the UK Official List (Main Market), AIM or PLUS markets.
- UK-incorporated companies, and companies incorporated outside the EEA whose home member state is the UK, with equity, debt or DRs traded with their consent on a non-UK market that is similar to those UK markets – e.g. NASDAQ or the New York Stock Exchange.

What type of statements are potentially covered?

- All information published by a company via a recognised information service or whose publication, for example on the company's website, is announced via any recognised information service.
- Annual, preliminary, half-yearly and quarterly financial results.
- Voluntary announcements such as trading updates and announcements of contract wins.
- Documents published in connection with takeover bids.
- *Ad hoc* announcements about, for example, price-sensitive developments, transactions, dealings by directors and changes in major shareholdings.
- Shareholder circulars.

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Can investors bring claims against other parties, for example the company's directors, auditors, advisers?

The new statutory rights apply only as against the company itself, but it remains open *in principle* (even if difficult in practice) for an investor to bring a claim against other parties under the following heads:

- *Fraud.* This requires clear evidence of dishonesty.
- *Negligent misrepresentation.* This requires the existence of a special relationship between the representor and the representee giving rise to a duty of care. It has been held, for example, that a negligent auditor is not liable to a shareholder in respect of investment decisions, as the purpose of the audit is to assist the General Meeting of the company, rather than assist individual investment decisions.
- *Statutory misrepresentation.* This applies where the representation has induced the representee to enter into a contract with the representor.
- *Breach of contract.*

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