

Allen & Overy LLP

For the attention of Anthea Heffernan

Dear Sirs,

We set out below our comments on the draft liability clauses (for false or misleading statements in directors' reports, directors' remuneration reports, summary financial statements and reports published under the Transparency Obligations Directive) you issued on 3 May 2006 for inclusion in the Company Law Reform Bill. We should be grateful if you would acknowledge safe receipt of this email.

1. General

- We welcome the draft clauses in so far as they introduce safe harbours. In general, subject to our comments below, we welcome the safe harbour provisions as currently drafted.

2. Liability of directors for false or misleading statements in reports

- We consider that a framework, guidance and a safe harbour are needed in order to promote best practice in narrative reporting. In relation to the Business Review, companies would benefit from knowing what level of reporting is required to meet the statutory requirements (particularly as they have now been amended to include a statutory purpose test and, for quoted companies, to require more forward-looking information). Following the repeal of the statutory requirement for listed companies to produce OFRs, the Accounting Standards Board issued a new Reporting Statement setting out best practice guidance for companies to follow when producing voluntary OFRs. We consider that this is an appropriate framework which should be reflected in the Bill or at least endorsed by the DTI.
- We would welcome clarification as to the position regarding cross-referencing to a voluntary OFR in the Business Review. If it is decided that the safe harbour should not apply to a separate voluntary OFR, it should nevertheless be made clear that voluntary OFR sections that are cross-referred to in the Business Review are covered by the safe harbour. At present, this is not stated in the safe harbour.
- We note that, under the proposed draft clause, directors will be liable to compensate the company for any loss suffered by the company as a result of its relying on a report that is untrue/misleading or conceals material facts. We think that the concept of loss and reliance by the company is odd and it is not clear what the clause is intended to achieve. It would be helpful if this could be clarified.

- We have concerns in respect of the proposed purpose of the Business Review which refers to the concept of "promoting the success" of the company. Our views on the proposed general duty itself have been conveyed to you through the relevant Law Society Working Group, as part of the general debate on the codification of directors' duties. The latest development of linking the Business Review requirements to this general duty raises a number of concerns. In particular, although, under Clause 156, directors must have regard to a non-exhaustive list of factors when taking any decision, it is not clear as to how this translates into a reporting requirement to help members assess whether the directors have performed their duty. This is relevant to the safe harbour as there is a "carve out" for criminal offences. A director commits an offence if the directors' report does not comply with the Act and he knew or was reckless as to whether it complied and failed to take reasonable steps to secure compliance. The lack of clarity as to what satisfies compliance is not helpful.

3. Liability for false or misleading statements in reports published under the Transparency Obligations Directive

- We would welcome clarification as to which "reports" are proposed to be covered by this draft clause. We assume that annual and half-yearly financial reports would be covered. What about "interim management statements" published in accordance with Article 6 of the Transparency Obligations Directive - would they be excluded as they do not strictly constitute "reports"? Would voluntary quarterly financial reports (which exempt an issuer from producing an interim management statement) be covered? It would be helpful to clarify this.
- The Transparency Obligations Directive requires Member States to ensure that responsibility for compliance with the provisions of the Transparency Obligations Directive on periodic financial reporting lies with the issuer or its administrative, management or supervisory bodies. We understand that, under the proposed subsection (5) of the draft clause (which provides that subject to certain specified exceptions and to the fact that the safe harbour does not affect liability for criminal liability, a person other than the issuer will not be liable in respect of the contents of a report) it is proposed that responsibility for compliance with the rules on periodic financial reporting lies with the issuer. We welcome this proposal.
- However, we note that the FSA's consultation paper (CP06/04) on the implementation of the Transparency Directive at paragraph 2.10 states that, for listed UK issuers of shares, the FSA proposes to introduce a Listing Rule (proposed new Listing Rule LR9.7A.1) to the effect that responsibility lies with the directors as well. We think that such proposal is not appropriate as it goes beyond the minimum requirements of the Transparency Directive and is inconsistent with subclause (5) of the proposed draft clause. We will bring our views to the attention of the FSA.

- In addition, as you as you will be aware, pursuant to Articles 4(2)(c) and 5(2)(c) of the Transparency Obligations Directive, annual and half-yearly financial reports will have to contain a form of responsibility statement by the directors of the issuer that, to the best of their knowledge, the relevant financial statements have been prepared in accordance with applicable accounting standards and give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer or of the undertakings included in the consolidation. We assume that the proposed subsection (5) of the draft clause therefore takes precedence over such responsibility statement and that the latter is not intended to increase directors' existing liability in relation to financial reports. It would be helpful if this could be clarified.

Allen & Overy LLP welcomes the opportunity to participate in this consultation. We look forward to reviewing the outcome of your consultation.

Yours faithfully,

Allen & Overy LLP