



# The Association of Corporate Treasurers

**Comments in response to  
*Accelerated consultation on Company Law  
Reform Bill draft liability clauses*  
Published by the DTI, 3<sup>rd</sup> May 2006**

12 May 2006

We have included a note about the ACT and contact details at the end of this response.

We are pleased to have the opportunity to comment on the draft amendments. This document is on the record and may be freely quoted or reproduced with acknowledgement.

## **General**

Generally the ACT welcomes the overall tone and direction of the package of measures announced by the DTI on 3 May 2006.

Our Association has been a long standing supporter of good narrative reporting as a means to provide shareholders with a balanced explanation of the company's business, its development and prospects. In particular the new encouragement of a forward looking element giving the management's perspective is most valuable. Our concern has been that any willingness to be open on thoughts about the future was bound to be constrained by the greater risk of being held culpable for statements that turned out to be wrong with the benefit of hindsight.

Indeed, widespread comments on the risks of future looking statements have drawn attention to risks in narrative reporting generally. This means that without some specific encouragement, from clarification of the limited nature of liability for narrative statements, even current/backward looking discussion is likely to be subject to more conservative review.



We have been concerned that the mandatory or voluntary OFR , and now the Business Review may

- become bland or
- be reduced merely to boilerplate statements or
- be set about with dense legal disclaimers and warnings – which set the authors in a defensive rather than an open (“transparent”) frame of mind.

Accordingly we have been very keen to have some form of protection granted to directors for statements honestly made, in good faith and not recklessly.

### **The Business Review requirements**

We note that a mandatory OFR is not being reintroduced and that instead the Business Review requirement for listed companies is to be extended to include “the main trends and factors likely to affect the future development, performance and position of the company’s business.” The Business Review for non listed companies rather looks back over the past year.

We very much welcome the explicit forward looking element for listed companies.

### **Liability of directors for false or misleading reports – new clause after clause 447**

This clause seems to maintain the principle that a director is liable only to the company and not to any other persons. The amendment limits the liability of a director to the company for any loss suffered by it, through any untrue or misleading statement or omission, to circumstances where the director was (paraphrasing) acting knowingly, recklessly or dishonestly and the surely unusual circumstance that the company was relying on the report.

We very much welcome the intention of these provisions. However the limitations in liability only apply to the three categories of report mentioned, namely the directors’ report, the directors’ remuneration report and a summary financial statement derived from those reports.

The Government and the ASB are keen to encourage good quality narrative reporting and disclosure of the extensive material recommended for inclusion in the OFR, on a voluntary basis. Unless dealt with elsewhere, the new clauses should be suitably amended to bring voluntary OFRs and narrative reporting outside the directors’ report into the same protections being established for the directors’ report. The absence of such additional protection would have a serious and negative impact on the promotion of good narrative reporting. Likewise it should be clarified that cross references to material in the directors’ report and any voluntary narrative reporting should not create additional exposure.

Indeed, after all the widespread public discussion the position now is that without clear protection such as offered by the proposed insertion, narrative reporting will be set back as directors write in an atmosphere of concern over liability rather than a desire to communicate more openly. The provisions proposed are now, accordingly, very important.

### **Liability of directors for false or misleading statements in reports required by virtue of the Transparency Directive – new clause after clause 859**

Our members find this proposed amendment and the circumstances surrounding it very troublesome.

We know that the TD and the recitals refer variously to the objective of periodic financial reporting as

- allowing investors to make an informed assessment and
- increasing investor protection.

We note the recital that appropriate liability rules should be applicable to the issuer, its administrative, management, or supervisory bodies, or persons responsible within the issuer, as laid down by each Member State under its national law or regulations and that Member States should remain free to determine the extent of the liability.

As the aim of the Transparency Directive is to promote transparency, it would be counterproductive for it, or its implementation into national legislation, to make the directors frightened to report in that spirit of openness.

The House of Lords European Union Committee (15<sup>th</sup> Report, Session 20033-4, HL Paper 89) noted legitimate uncertainty as to the effects of the Directive. We note also that different firms of solicitors in the City of London take notably different views on the effects as regards liability.

TD Article 7 does require that responsibility and liability for information rests with the issuer or its directors, but this is not necessarily to say that liability must be by way of compensation to holders of securities rather than to sanction by regulators or the Court.

The general rule in England has been that the directors are liable to the company for their actions and a company can be held accountable by various external authorities. Particularly, a listed company may be subject to administrative penalty from the FSA (UKLA) or subject to certain directions from the Financial Reporting Review Panel and there are reserve provisions for direction of restitution by the company under ss. 382 and 384 FSMA.

With this background, the new amendment, not affecting ss. 382/4 restitution, introduces a new liability and then confines it within certain bounds (notably to those who have purchased securities in reasonable reliance on the misstatements or omissions, with a

director having knowledge or reckless as to the position, and excluding any other liabilities except criminal/administrative sanctions.

If this new liability, to investors, is indeed required under the TD, such confinement is appropriate and welcome – and indeed essential if other than the most conservative narrative is to be forthcoming.

We incline to the view that the TD does not require the introduction of new liabilities and constitutes what has become known as “gold plating”. Accordingly we view the introduction of new liability as inappropriate and we would regard the proposed amendment as both unnecessary and undesirable. The amendment to insert the new wording after c. 859 should therefore be withdrawn.

However if the Government takes the view that the new liability is actually required under the TD (and we reluctantly accept that this risk exists), then with some misgiving we conclude that the amendment to insert the new wording after c. 859 would indeed be necessary and the wording would be appropriate.

### **The Association of Corporate Treasurers (ACT)**

Established in the UK in 1979, The Association of Corporate Treasurers is a centre of excellence for professionals in treasury, including risk and corporate finance, operating in the international marketplace. It has over 3,500 members from both the corporate and financial sectors, mainly in the UK, its membership working in companies of all sizes.

The ACT has 1,500 students in more than 40 countries. Its examinations are recognised by both practitioners and bankers as the global standard setters for treasury education and it is the leading provider of professional treasury education. The ACT promotes study and best practice in finance and treasury management. It represents the interests of non-financial sector corporations in financial markets to governments, regulators, standards setters and trade bodies.

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| <p><b>Contacts:</b><br/>Richard Raeburn, Chief Executive<br/>(020 7213 0734; <a href="mailto:raeburn@treasurers.org">raeburn@treasurers.org</a>)<br/>John Grout, Technical Director<br/>(020 7213 0712; <a href="mailto:jgrout@treasurers.org">jgrout@treasurers.org</a>)<br/>Martin O’Donovan, Technical Officer<br/>(020 7213 0715; <a href="mailto:modonovan@treasurers.org">modonovan@treasurers.org</a>)</p> | <p>The Association of Corporate Treasurers<br/>Ocean House<br/>10/12 Little Trinity Lane<br/>London EC4V 2DJ<br/><br/>Telephone: 020 7213 9728<br/>Fax: 020 7248 2591<br/>Website: <a href="http://www.treasurers.org">http://www.treasurers.org</a></p> |
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*The Association of Corporate Treasurers is a company limited by guarantee in England under No. 1445322 at the above address*

