The Association of Corporate Treasurers

Comments in response to
H M Treasury request for views:
EXTENDING THE SCOPE OF THE STATUTORY DAMAGES REGIME FOR DISCLOSURES REQUIRED UNDER THE TRANSPARENCY DIRECTIVE
9 August 2006

General

The ACT welcomes the opportunity to comment on this matter. Contact details are provided at the end of this document.

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In the ACT's June 2006 response to the FSA's March 2006 consultation *CP 06/4 Implementation of the Transparency Directive*, we expressed our belief that there was no absolute requirement in the Transparency Directive to create a liability regime to compensate investors and that liability for any non compliance to a regulatory body and system of fines would be sufficient.[1] We were aware that this view was held by a minority of the legal practices.

Given that the Companies Bill ended up creating a statutory liability to compensate investors we welcomed the fact that there were to be limitations in the circumstances when compensation is due. The end result will be helpful in limiting the number of vexatious claims that might arise, and in encouraging companies to be open in their disclosures rather than drafting them defensively.

Request for views

32. We would welcome stakeholder views on the desirability of putting on a statutory footing the regime for liability in damages in respect of loss flowing from disclosures made under the FSA's disclosure rules (including the obligations to disclose price sensitive information), and, if so, the appropriate scope of such a regime (including

[1] The FMLC (Financial Markets Law Committee) letter of 23 March 2006 expressed concerns that the EU was seeking to create new duties and liabilities to investors, although the response of 3 May 2006 from Mr A Schaub, DG Internal Markets implied that this was not the case.

whether this should be by extension of the liability regime for transparency disclosures).

Your discussion paper explains very well the various pros and cons around an extension of the liability regime to disclosures made under the FSA's disclosure rules. We agree with the points made in your para 24 and that it is on balance justifiable and appropriate that there should be a requirement to provide restitution where the behaviour was highly culpable, but with suitable protections against having to compensate too distant claimants.

In your para 25 you go on to debate whether there is a need to create stronger incentives for timely and accurate disclosures. We do not see any need to encompass timeliness since all this is adequately covered by the FSA's rules and available sanctions.

33. Respondents may also wish to consider:
(a) would simple extension of the Transparency Directive liability regime as in clause 1234 at present be adequate?

Yes. It would provide the right balance of forcing responsibility for highly culpable actions but with sufficient limitations to reduce the scope for vexatious claims. (As a point of detail, clause 1234 refers to "a person discharging managerial responsibilities within the issuer" having the requisite knowledge to crystallise liability. For this purpose, we would have thought that it is the knowledge of the directors, and not others, that should be relevant).

(b) Should there be liability for failure to make disclosures promptly?

No. Issuers recognise that timely disclosures are important and they are already obliged to make announcements 'as soon as possible' with sanctions available to the FSA to enforce this. Disclosures made that contain statements or omissions that were knowingly untrue or misleading is a relatively clear cut test to determine, as compared to deciding the exact point in time to make a disclosure about an event that may be evolving and in negotiation right up to the last minute. Companies would be very uncomfortable to find themselves arguing over liability to an investor who suffered loss through buying shares one hour, one minute or just one second before an important announcement.

(c) if so, should this be qualified by a requirement to show bad faith or recklessness on the part of the issuer (or relevant responsible person within the issuer)?

As explained above we do not regard it as appropriate to create a liability to compensate over timings. However if that is where the regime ends up then it would be essential to prove bad faith or recklessness as in the transparency liability set up.

(d) should existing shareholders be able to sue in respect of losses arising from sales in reliance upon the incorrect information?

No. It might be argued that there is little difference between making a decision to buy or a decision to sell based on certain disclosures, but we believe that issuers would be distinctly uncomfortable with a right of compensation around sales. The accounting convention of prudence and general caution mean that companies have to recognise bad news and provide for its implications whereas in the case of good news that same mentality means that there is a nervousness in recognising good news too soon. We feel that for investors to be able to get recompense for losing out on subsequent share price gains is too indeterminate and open ended. We believe it will be difficult to determine the trigger for that liability. Would one be able to look back on missed profit opportunities one month, one year or more from the deficient disclosure? The scope for opportunistic hindsight is too high.

(e) should there be different levels of duty of care owed to different classes of market participant, and in particular retail investors?

No. Unless different classes of shares exist all shareholders have equal rights per share. This is not the place to be introducing any special protections for retail investors.

38. We would welcome stakeholder views on the desirability of extending the statutory liability regime for transparency disclosures to preliminary announcements of results (whether mandatory or voluntary).

The ACT is of the view that preliminary results announcements perform an essential route for getting important information disclosed as soon as possible so that even if no longer mandatory most companies would want to continue the practice or indeed would need to under the FSA disclosure rules. To the extent that disclosures are being made that would subsequently be repeated within the periodic reporting required under the transparency directive, it is logical to make the disclosures subject to the same liability rules with the same limitations. If this is not done then there could be a disincentive on making prelim results disclosures and holding back of information until the full report and accounts are issued.

There then remains the question as to the status of any additional statements made at the time of a prelim announcement such as a Chairman's statement and trading updates. For clarity and simplicity it would be easier to make all disclosures included as part of any prelim announcement subject to the same liability regime as for transparency disclosures and with the same limitations.

In the past it was clear that there would be no liability on the company save where the other party was relying on the information and a duty of care existed. With the shifting balance of responsibility for certain disclosures under a statutory regime issuers might be nervous of the status of additional information and exercise undue caution in what they were prepared to say, holding back on giving updates useful to investors. We therefore conclude that all the information within a preliminary statement be brought into the new style regime.

42. We would welcome stakeholder views on the desirability of putting on a statutory footing the regime for liability in damages in respect of loss flowing from disclosures by companies with securities quoted on the AIM market and, if so, the appropriate scope of such a regime (including whether this should be by extension of the liability regime for transparency disclosures).

43. Further, is your position affected by the decision on possible extension of the Transparency Directive liability regime to disclosures required under the FSA's disclosure rules by issuers on a regulated market?

We consider that the short consultation period does not allow proper consideration of this question and it should be subject to further consideration and specific consultation.

If a decision is needed now, however, we agree with your arguments that it would be anomalous to have a statutory liability regime over non statutory disclosures, given that in the case of AIM listed companies the disclosure obligations arise under the contractual relationship for the exchange listing.

50, We would welcome stakeholder views on the desirability of ensuring the statutory liability regime covers all issuers subject to UK transparency rules, including issuers for which the UK is the home or host Member State, and other situations in which UK law is applicable.

Other will have a better locus to comment on this matter. However it would appear that a statutory liability regime should apply to all issuers subject to UK transparency rules i.e. for whom the UK is the home or host Member State.

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 3,600 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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