The Association of Corporate Treasurers

Comments in response to

CP 06/4 Implementation of the Transparency Directive

An FSA consultation paper,

March 2006

June 2006

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.

General

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

In making the submission we have answered the specific questions raised and in addition have commented on other points. For ease of reference we have include in brackets the paragraph number within the CP to which our comment refers.

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Introduction

In implementing any European Directive there will always be a debate whether to incorporate into UK law the basic minimum specified in the Directive or whether to go beyond those core requirements. In our response to the recent Davidson review we agreed that it was a laudable aim to avoid over regulation, however there can often be times where UK regulation already goes further than a new Directive in which case one needs to take care that rules introduced for valid reasons are not automatically revoked. In attempting to avoid “gold plating” there is a risk of “throwing out the family silver”. Many of our comments in the following will be in relation to maintaining the good regulatory features of our existing disclosure and transparency regimes.

Periodic Financial Information

The TD requires that the issuer or its management takes responsibility for the periodic information published by virtue of the TD. We therefore accept that the Listing Rules will require the issuer to take responsibility, but do not see that this should be extended to the Directors as well. This goes beyond the basic TD obligation. (2.10)

There is a further TD requirement for member States to “ensure that their laws, regulations and administrative provisions on liability apply to the issuers…”.This is a contentious matter and one that you pointed out the FMLC has highlighted. In our submissions to the DTI and HM Treasury we have expressed the view that this liability could be to a regulatory body and does not necessarily need to create a liability to compensate investors, which if implemented would be a radical change in established UK law. We believe the changes to Company Law that are currently in train are misguided, but if the changes are to happen we recognise that the Government has been helpful in limiting the circumstances when compensation is due, which will help in limiting the number of vexatious claims that might arise. We believe that it will be all too easy for investors to say with hindsight that they relied on certain information in making their investment decision. (2.11)

Q1: Do you agree with our proposal not to add to the TD requirements for interim management statements? Do you feel that FSA guidance in this area at this stage would be helpful or unhelpful, and why?

A1: The TD will require interim management statements at the intervening quarters between the half year and full year. We note the FSA proposal not to add to the very basic requirements of the TD and agree that it is appropriate that for the moment the FSA does not create any specific guidance. We believe that a reasonable market practice will evolve. However a review by the FSA after two annual reporting seasons have passed under the new regime would be a sensible check.

The timetable for implementation is for the changes to apply to reporting periods starting after 20 January 2007. You explain that this may make it appear to have a long transition period for some issuers. We do not see this as an issue. (2.21)

Q2: Do you agree with our proposal to copy out the TD requirements on ongoing information to holders of securities and with our analysis of the implications for issuers of convertible securities?

A2: The TD appears not to specify that holders of convertible securities are covered by the need to ensure equal treatment. As a result you are proposing to exclude such holders from this

TD requirement. It is not a major point, but it would seem to be an anomaly were such securities to be excluded. Although convertible have some equity characteristics they tend to be treated as debt for accounting and credit rating purposes so we would suggest that they be treated the same as debt securities and included as such until they convert.

Q3: Do you agree that the Listing Rule requirement for listed issuers to either send half-yearly reports to holders of its securities or insert the report in a national newspaper should be removed?

A3: The half yearly report will be disseminated on a fast and pan European basis and, as you say, suitably stored. On the basis of this we agree with your proposal to remove the need for sending reports or for publishing them in the press. Companies who value their investor relations will no doubt introduce the option for investors to be sent accounts in some form on the basis of an opt in, with the default course of action that they will not be sent the information.

Q4: Do you agree with our proposal to retain the existing requirement for listed issuers of exclusively wholesale debt to produce annual reports? If not, is this because you believe that investors will be able to rely on other information provided to investors, such as that from credit rating agencies, to make investment decisions about such securities?

A4: Within developed professional markets investor protection is largely achieved by ensuring investors have good information from which they can take their own risk decisions, rather than regulating that a certain level of security features are built in. We think this is the preferable arrangement. It is therefore essential that issuers of only debt securities do still have to produce and publish an annual report. While the majority of issuers will comply in any case, for good order in the market we think it should be mandatory. We therefore support your proposal.

Q5: Do you agree that the approach taken in relation to issuers on the PSM should mirror that for wholesale debt issuers?

A5: Representing issuers our natural position is to resist mandatory requirements on issuers. However, although the intent is that the Professional Securities Market is more lightly regulated the provision of annual financial reports is so important, as explained above, that it must be a requirement for issuers on the PSM too.

Q6: Do you agree with our proposal to retain the Listing Rule requirement that issuers falling outside the scope of IAS34 should reflect in half-yearly reports any accounting policy changes that will be applicable in the annual report on the basis that this provides additional clarity to the TD requirement?

A6: For half yearly reports that fall outside IAS 34 you intend to retain the existing Rule that any changes to accounting policies expected to be made in the full year accounts be applied to the half year as well, rather then merely describing their effect. We support this proposal. (2.25)

Q7: Do you agree with our proposal to retain the Listing Rule requirement on the timeliness and content of dividend statements on the basis that this provides additional clarity to the TD requirement?

A7: We agree.

Q8: Do you agree with the proposed change of preliminary statements of annual results from a mandatory to permissive regime?

A8: The timescale for production of the full year report and accounts will be reduced to four months which will then coincide with the current time deadline for announcing Prelims. However in meeting the timetable for the full report it is inevitable that there will be a point some weeks earlier by which time the core numbers will have been prepared and audited and approved. There will then be the further stages to take place, of preparing the full report, completing the notes to the accounts, drafting the narrative reporting and non statutory information, finishing the styling and design and finally printing.

All this will take many weeks, during which companies will be in possession of important and possibly price sensitive information. The existence of a significant gap between the preparation and release of the information will create a grave risk of leaks and possible misuse of information. Even if the results are in line with expectations and not technically disclosable as inside information under market abuse rules it is still information all the market should know. It would presumably count as relevant information not generally available (RINGA) so that those in possession of it would be debarred from dealing. Relevant staff and directors will want to minimise the period when they can not deal.

To avoid false markets developing we consider it essential that preliminary announcements continue to be made. If prelims cease to be mandatory it is highly likely that responsible issuers will nonetheless continue the practice. However a permissive regime creates its own complications in respect of responsibility and protection from liability. As voluntary statements their status and the risks for issuers attached in making those statements will be ambiguous, which is not helpful. The status of voluntary prelims would need to be legislated for. By the time you have done this and defined what a voluntary prelim consists of we may as well have retained the existing arrangements. So, in the interests of supplying the market with the information it needs and in the interests of maintaining clarity on the issuer's own position we recommend retaining the existing rules over preliminary results statements. Making them non-mandatory will be an unnecessary complication of issuer's lives.

Q9: Do respondents agree with our proposed retention of LR9.8.4R(2)(3)(4), LR9.8.6R(3)(5)(6)(7), LR9.8.10R, LR9.8.11R and LR9.8.12R?

A9: These Rules specifying various items that must be included in the annual report are generally useful and not overly complicated to prepare. We support their continuation, in particular the requirement to make a going concern statement and the comply or explain statement on the Combined Code.

Q10: Do you believe LR9.8.4R(1)(5)(6)(9)(10)(11)(12)(13), LR9.8.5G, LR9.8.6R(1)(2)(4) and LR9.8.13R rules provide benefits? If you do, please explain how you use the information covered in each of these rules? If you were not able to access such information through annual reports, but could access it from other (possibly fragmented) sources, would you be disadvantaged?

A10: These rules largely require disclosures in the annual report of information that is disclosed elsewhere, possibly in a more timely manner, but piecemeal. It is not too onerous for issuers to consolidate this information into the annual report and in many cases the cumulative information is far more pertinent. However by the time the report is produced the information is inevitably dated and less relevant. We have no strong feelings on this matter but on balance favour retention of the existing rules since they are likely to be of benefit to retail investors who do not have the ability to follow live information as closely as the professional investor does.

Major Shareholding Notifications

Q11: Do you agree that we should apply major shareholding disclosure rules to holdings in issuers with shares admitted to trading on a regulated market, and to holdings of shares of UK companies traded on exchange-regulated markets such as AIM and OFEX?
Alternatively, do you think the scope of the shareholder notification requirements should be limited to the TD minimum: holdings in issuers with shares admitted to trading on a regulated market for which the UK is the home member state?

A11: For all companies it is important to know who their major shareholders are particularly if a share build up is a precursor to some predatory action. It can also aid their efforts at communication with investors. Likewise for investors themselves knowing who else is taking a significant stake in a company is itself useful trading information . We therefore favour making the scope of the shareholder notification rules as wide as possible. Even though going beyond the TD requirement, we agree with your proposal to require disclosure in respect of holdings in companies traded on exchange-regulated markets such as AIM and OFEX.

Q12: Are there any notifiable interests under the CA1985 that you consider are not covered by the TD but which you believe should be maintained? Do you agree that the partial exemption from notification for voting rights held in the trading book should be available to credit institutions and investment firms? Do you agree with either of the two alternative approaches to replicate, or make more stringent, respectively the effect of the CA1985 for stock lenders? Are there any side effects?

A12: We agree that the partial exemption from the UK notification regime for voting rights held in the trading book should be available.

On stock lending the Company Law treatment whereby the disposal of shares via a stock loan and the simultaneous right to call back the share can be netted off is a satisfactory arrangement which avoids an unnecessarily large number of irrelevant notifications is worth replicating under the new arrangements. Effectively the information arising from the loan is captured by the stock borrower acquiring an interest in the shares.

Investors may acquire an interest in share through many forms of instruments and therefore it is entirely proper that the TD definition of an interest takes in any entitlement to acquires shares such as via a financial instrument like options, futures, swaps. However there remain other forms of instrument which can give the holder an economic interest in the shares and which we believe is equally important for the issuer and the market to be aware of. We comment further on this below.

Q13: Which of the approaches (TD minimum or CA1985) to notification thresholds would you prefer? Depending on the thresholds adopted, do you agree with our proposed implications for disclosures by market makers?

A13: The TD has less rigorous thresholds for notification of interests than the 3% and 1% increments in UK Company Law. A 3% holding is regarded by issuers as a very significant and influential holding. In managing shareholder relations the issuer will want to be aware of such major holders (and indeed commonly have a communications programme aimed at holders of 0.5% or more) and communicate with them appropriately. Setting the minimum limit at 5% is not adequate. For investors too information at this level is significant. The knowledge that an influential investor or rival firm has built up a stake of 3% or over can itself be relevant and sensitive trading information. We therefore fully support your retention of the existing CA 1985 requirements.

Q14: Which of the notification deadlines (TD minimum or CA1985 and Listing Rules) would you prefer?

A14: The existing 2 day timetable is providing better information to the issuer and the market than would the longer allowed periods in the TD. It is clearly practical to stick with the current rules, the burden is not excessive so we agree your proposal to continue the current regime on this.

Dissemination of Regulated Information

Q15: Do you agree that the FSA should mandate the continued use of the PIP/SIP regime for issuers for whom the UK is the home Member State?

No comment

Q16: Do you have a preference for either of the storage models (commercial OAMs or FSA operated OAM) or suggestions for further alternative model(s)?

No comment

Contracts for Differences (CFDs)

We note that you wish to review the relevance and treatment of holders of economic interests but who do not have a voting interest, nothwithstanding that you have no plans to deal with this topic within the immediate implementation timetable for the TD.

This is an important subject for issuers and investors and we believe that you should continue to work on it and ideally introduce some form of notification and disclosure that will encompass economic interests, such as can exist through CFDs. Even though a CFD holder has no voting interest the existence of a large CFD holding can be important to issuers perhaps as a precursor to some other predatory action, or simply for investor relations purposes. CFD holders can be influential on a company's share price and as such the company will want to establish good communications with them and perhaps encourage a longer term investment in the company. For other market participants too the popularity of CFDs, long and short, is a potentially price sensitive piece of information where there should be transparency.

The volumes of CFDs traded or held are becoming more and more significant. Their existence can change the dynamics of the market. The absence of stamp duty means that the costs of buying and selling are much less which makes them an ideal instrument for taking short term positions. This short termism can create volatility in share prices which will ultimately adversely affect a company's cost of capital. In terms of governance and effective control and influence the creator of a CFD will often hold the underlying shares as a hedge. Given that the registered holder has no real economic interest in the company they may, quite properly, decide that it is inappropriate to vote the shares. By taking a large percentage of shares out of action for voting purposes those who do hold voting interests and who use their votes will have a disproportionate influence on the result. Perversely the CFD holder who has a very strong commercial interest in the company will have no say in the voting.

The importance of CFDs, particularly when a takeover is in the offing, is such that the Takeover Code does require the disclosure of long derivative interests. We believe that the importance of major CFD holdings is such that they should fall within the notifiable interests regime. We recognise that the mechanics of devising a suitable system that will produce meaningful information may be difficult. There can be the risk of double counting and perhaps short positions should be disclosed too. However the investors in CFDs must have devised suitable ways of monitoring their positions and risks so it should be perfectly practical to devise a method of notifying the issuer. We urge you to consider further the whole of this area.

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