

The Association of Corporate Treasurers

Comments in response to
The Davies Review of Issuer Liability
Issued by the Savings and Investment Team, HM
Treasury,
March 2007

April 2007

The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance. In preparing this response we receive views and reactions from our members via our Committee structures. Further information is provided at the end of these comments and on our website www.treasurers.org.

Contact details are also at the end of these comments.

General

The ACT welcomes the opportunity to comment on this matter.

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The objective of the Review is to examine the law relating to liability for corporate misstatement and to consider whether the existing statutory regime should be extended to a wider set of circumstances of corporate communication and what would then be an appropriate extension of the right of injured parties to recover losses. We understand that if the Government should introduce further provisions following any recommendations made by this Review, there would be both a period of consultation and a full regulatory impact assessment prior to the introduction of any relevant legislation.

We have made both general remarks and have responded to the individual questions posed via an appendix to this letter. We intend to follow closely further developments in this process.

The ACT's position is broadly supportive of any attempt to clarify the areas in which individuals or companies have statutory responsibilities in respect of market statements. We do not believe however that there is an overall requirement to extend or 'gold-plate' the current liability regime for issuer misstatements. The intention of any disclosure regime should not be to place the regulatory requirements for senior markets on companies resourced to manage junior market disclosures, where they could be considered burdensome. It would be counter-productive if the alternative - of a reduction in information flow - becomes more appealing to those companies.

In the event that there is a move towards extension, we would argue strongly that any such extension for corporate statements should be appropriate to the market investors at whom they are directed such that a 'one size fits all' does not become the prevailing position. In the same way as there are clear differences in the general requirements for listing between regulated and un-regulated markets, we would hope to see proportionate treatment in respect of company disclosures

Appendix: List of questions for response

Question 1:

What should be the basis of liability? Should the basis of liability be simple negligence? Would gross negligence be available as a possible basis for liability in the British context? Is fraud an appropriate basis for liability?

We believe that fraud would be the appropriate basis of liability. By "fraud", as used in Prof. Davies's report and this reply, we mean intentional or reckless misstatement or dishonest omission.

Question 2:

Should the statutory regime be extended in principle to ad hoc statements?

Yes, we believe it should (based on the existing Sect 90A basis of liability), but only for those ad hoc statements made as a requirement of the Transparency Rules, the Market Abuse Rules or any other disclosure rules required by the market on which the securities are listed

Question 3:

Should a liability for dishonest delay be imposed in the narrow circumstances identified in the Review or should delay be sanctioned only through public enforcement via the FSA? We agree with the suggestion in Para 86 for a limited regime of liability for such a delay.

Question 4:

If the statutory regime were to be extended to ad hoc announcements, should it be (a) confined to disclosures of inside information (the most pressing case), (b) applied to all RIS announcements or (c) confined to announcements made under the FSA's Disclosure and Transparency Rules (i.e. excluding ad hoc announcements made under the Listing Rules)?

We favour strongly option (c) and agree that there is no good reason for extending the regime to announcements not required by the TD or MAD, or by other similar rules of the market concerned.

Question 5:

Should section 90A apply to non-regulated markets?

We think it should. There should be a private remedy for fraudulent misstatements or omissions regardless of the type of market affected.

Does your answer differ according to whether section 90A is extended to cover ad hoc statements?

No.

Question 6:

Should the claims of investors for damages under section 90A or any extension of it be subordinate to the claims of other unsecured creditors?

Yes

Question 7:

Should statutory liability for fraudulent misstatements be extended to those who make the statement on behalf of the company?

No. We believe that it suffices for any fraudulent directors, etc to continue under the section to be (i) liable to the company, if the company itself becomes obliged to compensate an investor, and (ii) susceptible to a civil penalty by the regulator in an extreme case.

Question 8:

Should statutory protection be extended to sellers and holders of securities as well as to buyers?

We believe there is a valid case to be made for extension of protection to sellers and potentially to holders

Question 9:

Should the deceit or the negligence measure of damages be adopted in the statutory regime?

In our view the negligence measure (that limits the claim to that portion that was directly due to the negligence) is adequate. Furthermore, the statutory modification (in section 90A) of the tortious test of deceit to make the remedy more accessible (in particular the absence of the need to prove intention on the part of the company that the recipient of the false information rely on it) tends to favour a measure which reflects the loss arising from the misstatement or omission itself, rather than one which is more akin to a reinstatement of the investor to his pre-investment position by compensating for the entire change in economic position, whether or not related to the misstatement/omission

The Association of Corporate Treasurers

The ACT is the international body for finance professionals working in treasury, risk and corporate finance. Through the ACT we come together as practitioners, technical experts and educators in a range of disciplines that underpin the financial security and prosperity of an organisation.

The ACT defines and promotes best practice in treasury and makes representations to government, regulators and standard setters.

We are also the world's leading examining body for treasury, providing benchmark qualifications and continuing development through training, conferences, publications, including *The Treasurer* magazine and the annual *Treasurer's Handbook*, and online.

Our 3,600 members work widely in companies of all sizes through industry, commerce professional service firms.

Further information is available on our website (below).

Our policy with regards to policy and technical matters is available at <http://www.treasurers.org/technical/resources/manifestosept2006.pdf>.

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