Association of Corporate Treasurers' comments on

TREASURY SHARES: A CONSULTATION ON THE PROPOSED CHANGES TO THE REGULATED ACTIVITIES ORDER *(HM Treasury, 2003)*

We have followed the intended comments on the Proposed Changes being submitted by the Law Society's Company Law Committee.

Rather than duplicate comments, we would like to record our support for the comments of the Society's Committee.

We would refer directly to only one point, concerning frequency of dealing likely under the new régime. The need for changes to recognize to recognise that this may increase significantly is fundamental to the consultation of course.

However it is possible that for some companies the frequency could in the long-run be very high. The reason for this is that most large companies are frequently approached by shareholders with very few shares for advice on how to dispose of them. Normally companies would direct enquirers to appropriate services - usually a broker who offers a low cost service dealing once or twice a week at a set time). Under the new régime they may offer to buy-in the shares directly. For large companies, especially for the former nationalised industries, the number of these transactions could be large (although the total volume from them would be small).

The Association

The Association of Corporate Treasurers was formed in 1979 to encourage and promote the study and practice of finance and treasury management and to educate those involved in the field.

Today, it is an organisation of professionals in corporate finance, risk and cash management operating internationally. It has over 3,000 fellows, members and associate members, mainly UK based. With more than 1,200 students in more than 40 countries, its education and examination syllabuses are recognised as the global standard setters for treasury education.

Members of the Association work in many fields and in companies of all sizes. A number of members are on the boards of major companies in both executive and non-executive capacities. Others are involved in entrepreneurial stage, business start-ups.

The majority of fellows, however, are professionals working as senior executives below the board level in large public companies, responsible for the treasury and corporate finance functions.

John Grout

Technical Director
Direct Line: 020 7213 0712

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TREASURY SHARES: PROPOSED CHANGES TO THE REGULATED ACTIVITIES ORDER

A memorandum by the Law Society's Company Law Committee

1. INTRODUCTION

1.1 We welcome the proposals set out in HM Treasury's Consultation Paper which should achieve a satisfactory exemption from the requirement for UK companies which deal in treasury shares to seek authorisation under the Financial Services and Markets Act 2000 for those activities.

1.2 We do however have a concern that non-UK companies, who may under their law of incorporation pursuant to provisions corresponding to those under section 162(C) of the Companies Act 1985 have the ability to deal in Treasury shares and whose shares may be listed on a UK or EEA exchange do not have the benefit of an exemption. These companies may have UK shareholders and a place of business in the UK and may therefore engage in the activities of buying and selling their own shares in the United Kingdom. We elaborate on this concern in our answers to the specific questions set out in the Consultation Paper below.

2. ANSWERS TO THE QUESTIONS SET OUT IN THE CONSULTATION PAPER

Q.1 Do you agree that, in practice, companies that buy back their shares and cancel them pursuant to s.160(4) and s.162(1) of the Companies Act 1985 carry out such transactions only infrequently and thus are not caught by the business test?

We agree. It is unlikely that such companies would lose the benefit of the dealing as principal exemption in paragraph 15 of the Regulated Activities Order (RAO).

Q.2 Do you agree that companies should not have to obtain authorisation from the FSA in order to buy back their own shares or sell treasury shares on a frequent basis?

We agree.

Q.3 Should companies that wish to buy back their own shares or sell treasury shares be required to use the services of a broker or other authorised person?

We agree with the view expressed in the Consultation Paper that a company should have a choice as to whether or not to use a broker when engaging in the activities in question.

Q.4 Do you agree that a new exclusion should be added to the Regulated Activities Order so that a company buying its own shares to hold in treasury or selling treasury shares pursuant to the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 is not carrying out a

regulated activity? The alternative of leaving the legislation as it is would require firms to rely on (i) not carrying out such transactions frequently; (ii) seeking FSA authorisation; or (iii) using an authorised person.

We agree that the exclusion should be added to the RAO.

Q.5 Do you agree that our proposed amendments to the Regulated Activities Order achieve the goals set out in this paper?

We are content with the proposed amendments as set out in the draft amendment order save in one respect. The proposed new paragraph 18A to the RAO is expressed to apply to a "*body corporate*" dealing in its own shares. A "*body corporate*" is a wider expression than "*company*" which connotes only a body incorporated under the Companies Act 1985, i.e. a company incorporated under that Act or predecessor companies legislation in Great Britain. The use of the phrase "*body corporate*" suggests HM Treasury were anticipating that non-UK companies could take advantage of the exclusion. However, as drafted this is not possible as the exclusion only applies where sections 162A or 162D of the Companies Act 1985 apply to the shares in question, which sections can only apply to companies incorporated in Great Britain.

We therefore urge HM Treasury to widen the exclusion to cover bodies corporate incorporated outside Great Britain who may also be carrying on the activities covered in the United Kingdom. The exclusion could be phased in such a way as it covered such corporations as long as their shares were listed on the London Stock Exchange, AIM or an EEA exchange (as it does with UK companies) who engaged in the activities of buying back their own shares or subsequently selling them out of treasury. It may be the case that such corporations could rely on the overseas persons exemption in Article 72 of the RAO but this will not always be the case as some may have a place of business in the UK from which the relevant activities were conducted, which would mean that the overseas persons exemption would not be available.

Q.6 Do you agree that a company wishing to buy back its own shares for holding in Treasury or selling its treasury shares should be able to take advantage of the article 43 exemption or the article 69 exemption? i.e. are there valid policy reasons for allowing a company to make such communications themselves or should they be required to make such communications through an authorised person?

We agree that the Article 43 and Article 69 exemption in the Financial Promotion Order should be available in circumstances where the proposed new exclusion in the RAO applies, subject to the point made in answer to Question 7 below.

Q.7 Do you agree that companies wishing to buy back their own shares for holding in Treasury or selling their Treasury shares will be able to bring themselves within the article 43 exemption as described in paragraph 34 or the article 69 exemption as described in paragraphs 35 -36?

We agree that in most cases the Article 43 exemption or the Article 69 exemption will be available. However, it should be noted that the Article 69 exemption is not available where the company issues a communication which amounts to an invitation as opposed to an inducement.

Q.8 Are there situations when a company dealing in its treasury shares pursuant to the regulations should be exempt from the financial promotion restriction but will not be able to bring itself within the article 43 exemption or the article 69 exemption? If so, what are these situations and why should there be a wider exemption to cover them?

The Article 43 exemption or Article 69 exemption would not be available if a company were to solicit the public directly with a view to selling shares out of treasury where the solicitation amounted to an invitation rather than an inducement. This situation is no different to where a company sought to make a new issue of its shares direct to the public. In those circumstances the document involving potential investors to subscribe for shares would either need to be a prospectus complying with the listing rules or Public Offers of Securities Regulations as the case may be or where the invitation did not amount to an offer to the public, the communication would have to be approved by an authorised person. We see no reason to treat shares offered in this way out of treasury different to shares offered by way of a new issue, so do not believe that a new exemption would be justified.

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