These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Schedule 13: Supplementary provisions with respect to delegation order

Part 43: Transparency Obligations and Related Matters

Section 1270: Liability for false or misleading statements in certain publications

1636. Section 1270 inserts *sections 90A and 90B* into FSMA and establishes a regime for civil liability to third parties by issuers admitted to trading on a regulated market in respect of disclosures made public in response to provisions implementing obligations imposed by the Transparency Directive.

1637. Although no issuer has been found liable in damages under English law in respect of statements made in narrative reports or financial statements, the law relating to financial markets and to the obligations of issuers to investors on those markets has been developing, in the light of increased regulation of both domestic and European origin. The Transparency Directive has continued that process and increased the level of uncertainty as to whether any actionable duty is owed by an issuer and its directors to investors.

1638. The Transparency Directive sets out the periodic financial disclosures that must be made by issuers admitted to trading on a regulated market. Articles 4 and 5 of the Transparency Directive provide for annual and half-yearly reports, including management statements, to be made public, and requires statements made by persons responsible within the issuer for these disclosures (the directors in the case of a public company) that these give a true and fair view, and that the management report includes a fair review of certain matters. Article 6 requires the disclosure of interim management statements.

1639. The Transparency Directive also sets out the minimum requirements for a liability regime that must be adopted by the UK at Article 7, and recital (17) states "Member States should remain free to determine the extent of the liability".

1640. These provisions give considerable flexibility to Member States in the liability regime they choose to adopt in respect of disclosures under the Directive. The Government has established an exhaustive regime in relation to ensuring the delivery and accuracy of these reports including criminal offences, administrative penalties and actions for civil damages. The provisions in this section relate only to the position in respect of the civil liability of issuers on regulated markets to investors in their securities. The liability regime does not cover issuers on exchange-regulated markets. Their position remains unchanged by implementation of the Transparency Directive.

1641. While it is intended that there be no additional liability under the Directive in respect of the disclosures to which it relates, the regime leaves undisturbed any other liability owed by directors to the issuer and to members of the company under UK and other national law, and any liability under other FSA rules. It also leaves undisturbed any liability of the issuer in respect of any loss or damage arising otherwise than as a result of acquiring securities in reliance on the relevant statement or report.

1642. The primary liability of directors and issuers for the accuracy of the required disclosures comprises criminal offences and administrative penalties under the provisions of Part 15 of this Act and Part 6 of FSMA. The provisions in Part 6 require compliance with FSA rules giving effect to the obligations in the Directive and provide for penalties in respect of failure to comply with the rules. In addition, restitution can potentially be ordered by the court, on application of the Authority or Secretary of State, under section 382 of FSMA or by the Authority directly under section 384 of FSMA.

1643. The Government's intention in developing a civil liability regime has been to provide certainty in an uncertain area and to ensure that the potential scope of liability is reasonable, in relation both to expectations and the likely state of the law after the implementation of the Transparency Directive. In particular, the Government was anxious not to extend unnecessarily the scope of any duties which might be owed to investors or wider classes of third parties, in order to protect the interests of company members, employees and creditors. However, as the state of the law after the implementation of the Transparency Directive is not certain, the Government has taken a power, at new*section 90B*, that will enable the provision introduced by section 1270 to be added to or amended if a wider or narrower civil liability regime is deemed appropriate.

New section 90A: Compensation for statements in certain publications

1644. *Subsection (1)(a)* of new *section 90A* provides that the civil liability regime set out in that section applies to those reports and statements required by provisions implementing Articles 4 to 6 of the Transparency Directive. Depending on transparency rules, we would expect this to include annual and half yearly financial statements and management reports, the sign-off by directors or other responsible parties, as well as interim management statements.

1645. *Subsection (1)(b)* adds to the scope of the regime the information included in preliminary announcements of results made in advance of the reports and statements required by provision implementing Article 4 of the Transparency Directive, but only to the extent that it is intended that the information will appear in the final report or statement and be presented in substantially the same form as that in which it is presented in the preliminary announcement.

1646. *Subsection (2)* sets the scope of the civil liability regime to cover securities of all issuers for which the UK is the home Member State (whether the regulated market on which they are traded is situated in or outside the UK), as well as to cover those issuers whose securities are traded on a regulated market situated in the UK and for whom the UK is the host Member State. UK holders of securities of other issuers (i.e. those for whom the UK is neither a host nor a home State) will not be able to rely on the rights of action set out.

1647. *Subsection (3)* provides that issuers of such securities are liable to pay compensation to a person who has acquired those securities and has suffered loss in respect of them as a result of any untrue or misleading statement in a publication to which this section applies, or an omission of a required statement from such a statement. *Subsection (4)* however limits the liability of the issuer to circumstances where a "person discharging managerial responsibilities" in relation to the publication within the issuer (see *subsection (9)*) knows the statement to be untrue or misleading, or is reckless as to whether the statement is untrue or misleading, or, in the case of omissions, where it is known to be a dishonest concealment of a material fact.

1648. *Subsection (5)* provides that loss will not be regarded as having been suffered for the purposes of *subsection (3)* unless the person suffering it acquired the relevant securities in reliance on the information in the publication and at a time when and in circumstances where it was reasonable to rely on that publication.

1649. *Subsection (6)* limits the liability with regard to untrue or misleading statements, or omissions, in documents to which the section applies. It sets out that issuers are not liable for any liability other than that provided for by the section and that any person who is not the issuer is not liable, other than to the issuer.

1650. *Subsection (8)* clarifies that the section does not affect Part 6 of FSMA conferring liability for a civil penalty, liability for a criminal offence or the right to seek restitution.

1651. *Subsection (9)* sets out the persons who are to be considered as discharging managerial responsibilities for the purposes of the section. This is any director of the issuer, or where the issuer's affairs are managed by the members, a member of the issuer. In the case where the issuer does not have directors, or members, any senior executive with responsibilities in relation to the publication is considered as discharging managerial responsibilities.

New section 90B: Power to make further provision about liability for published information

1652. *Subsection (1)* of new *section 90B* establishes a power to make further provision about liability for published information. The new section allows the Treasury by regulations to amend any primary or subordinate legislation relating to the liability of issuers and others in respect of information, including the regime set out in new *section 90A* of FSMA. The exercise of the proposed power could, for example, result in that regime or some other appropriate regime applying to other classes of information, such as information that is required to be disclosed by issuers to shareholders or markets under the Market Abuse Directive (MAD).

1653. Regulations made under the section would be made using the affirmative procedure (see the amendment to section 429(2) of FSMA made by paragraph 12 of Schedule 15).