

*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 1265: The transparency obligations directive

1605. **Section 1265** inserts a definition of the “transparency obligations directive” at the appropriate place in Part 6 of the Financial Services and Markets Act 2000 (“FSMA”).

Section 1266: Transparency rules

1606. **Section 1266** inserts seven new sections into Part 6 of FSMA: *sections 89A, 89B, 89C, 89D, 89E, 89F and 89G*. Part 6 of FSMA deals with certain aspects of the regulation of securities that are traded on regulated markets in the UK. These new sections make provision about rules that may be made by the “competent authority” (which is the Financial Services Authority (“the Authority”)) for the purposes of the Transparency Directive (2004/109/EC) “transparency rules”.

New Section 89A: Transparency rules

1607. *Subsection (1)* of new *section 89A* of FSMA enables the Authority to make transparency rules to implement the Transparency Directive in the UK. *Subsection (2)* enables the rules to include provision for any matter arising out of or related to the Directive provisions.

1608. The Transparency Directive itself covers issuers whose securities are traded on regulated markets and people who hold voting rights attached to shares in such issuers. The scope of the rule-making power allows the rules to address other matters arising from the Directive’s implementation, for example, to ensure that secondary legislation adopted by the Commission can be incorporated into the transparency rules, and that optional aspects of the Directive can be implemented, where the Authority considers this appropriate.

1609. It is expected that rules made under *section 89A(1)* will implement the Transparency Directive by-

- requiring holders of votes attached to shares in issuers to make disclosure about their holdings at certain thresholds (see new *section 89B*);
- requiring issuers to make public their annual accounts and reports, prepared in accordance with the EU International Accounts Standards Regulation (Regulation (EC) 1606/2002), and, where appropriate, half-yearly and interim management statements about their business (see new *section 89C*);
- requiring issuers to make notification about voting rights held by themselves in respect of their own voting shares (see new *section 89D*);

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- requiring issuers to notify the Authority and the market of any proposed change to their constitution (see new *section 89E*).
1610. *Subsection (3)(a)* enables the Authority to make rules about disclosures of voteholdings to UK markets that are not regulated markets (within the meaning of section 103(1) of FSMA) (such as the AIM). *Subsection (3)(b)* enables the Authority to make rules about disclosure in relation to certain comparable instruments in respect of voting shares. These are instruments that give the holder a level of economic, as opposed to legal, control over votes attached to shares. An example of the type of instrument that the rules could extend to cover is a contract for difference, known as a “CFD”.
1611. *Subsection (4)* specifies further matters that the rules may cover. These include: how the proportion of voting rights held by an issuer is to be determined; when voting rights held by one person may be regarded as being held by another; the nature, form, timing and presentation of any notification; and the circumstances in which any of the requirements of *section 89A* may not apply.

New Section 89B: Provision of voteholder information

1612. New *section 89B* sets out provisions for notifications by voteholders under transparency rules. *Subsection (1)* specifies that notification can be required to be made to the issuer or to the public or to both. Under *subsection (2)*, rules may provide for such information to be notified at the same time to the Authority.
1613. *Subsection (5)* sets out the circumstances in which voteholders may be required to notify of a change in the proportion of voting rights (i.e. when a proportion crosses above or below, or reaches, a proportion designated in the rules).

New Section 89C: Provision of information by issuers of transferable securities

1614. New *section 89C* sets out provisions for issuers of transferable securities to provide information under transparency rules. *Subsection (1)* clarifies that information can be required to be given to the public or the Authority or both.
1615. The rules cover annual financial reports (both financial statements and management reports) and, for certain issuers, half-yearly financial reports and interim management statements, as required by the Transparency Directive. The rules can also require issuers to disclose certain other information relating to voteholder information, information about the different classes of share they have issued and the total number of voting rights attached to each class, their own voteholdings, their capital, and information about new loan issues.

New Section 89D: Notification of voting rights held by issuer

1616. New *section 89D* enables the rules to provide for issuers to make notification of the proportion of voting rights they hold in respect of their own voting shares. *Subsection (1)(a)* permits rules to set the initial notification period in accordance with the requirements of the Transparency Directive at Article 30.2. *Subsections (1)(b), (2) and (3)* set out the circumstances under which issuers of transferable securities must notify of a change in the proportion of voting rights (i.e. when a proportion crosses above or below, or reaches, a proportion designated in the rules).

New Section 89E: Notification of proposed amendment of issuer’s constitution

1617. New *section 89E* enables the rules to provide that an issuer of transferable securities admitted to trading on a regulated market must notify a proposed amendment to its constitution to the Authority and the market.

New Section 89F: Transparency rules: interpretation etc

1618. New *section 89F* defines a number of terms used in the sections 89A to 89G.

New Section 89G: Transparency rules: other supplementary provisions

1619. New *section 89G* sets out further supplementary provisions relating to the transparency rules. *Subsection (1)* enables the Authority to make rules imposing the same obligations on a person who has applied for the admission of transferable securities to trading on a regulated market without the issuer's consent as they impose on an issuer of transferable securities. *Subsection (2)* enables the Authority to make rules to allow it to make public information that voteholders or issuers are required to make public, where they fail to do so themselves. *Subsection (3)* will enable the Authority to make public information notified to it in accordance with transparency rules.

1620. There is some overlap between notifications required by the Panel on Takeovers and Mergers in the rules made under Part 28, and notifications required by the Transparency Directive. *Subsection (4)* enables transparency rules to cross-refer to rules made by the Panel under Part 28, which will enable greater alignment between the two sets of rules.

Section 1267: Competent Authority's power to call for information

1621. **Section 1267** inserts three new sections into Part 6 of FSMA: *sections 89H to 89J*.

1622. New *section 89H* permits the Authority to call for information from specified persons, set out in *subsection (2)*, including issuers of shares and their auditors and directors, and voteholders and their auditors, directors and persons controlling or controlled by voteholders.

1623. *Subsection (3)* limits the Authority to requesting information and documents reasonably required in connection with the transparency rules. *Subsection (4)* enables the Authority to determine the timeframe for production and provision of information, and the location for the information to be provided. *Subsection (5)* makes it clear that the production of the material as required by this section does not affect any lien on a document.

1624. New *section 89I* sets out the requirements connected with the Authority's power to call for information. The Authority will be empowered to specify the form of the information or documents it calls for under *section 89H (1)*, and may require its authentication or verification (*subsection (2)*). The Authority is permitted, under *subsection (3)*, to take copies of and extracts from the documentation provided, and may also require the persons providing the information, or any "relevant person" within the meaning of *subsection (4)* (which includes directors, auditors, actuaries, accountants, lawyers and employees), to submit an explanation of any documentation produced.

1625. If a person fails to comply with the requirement to produce a document, the Authority is permitted under *subsection (5)* to require a person to state where the document is.

1626. New *section 89J* sets out the supplementary provisions in relation to the competent authority's power to call for information in *sections 89H and 89I*.

Section 1268: Powers exercisable in case of infringement of transparency obligation

1627. **Section 1268** inserts four new sections into Part 6 of FSMA: *sections 89K to 89N*.

1628. The four new sections set out the Authority's powers in case of infringement of transparency obligations. *Section 89K* enables the Authority to make a public statement if an issuer is failing or has failed to comply with its obligations. It may only do so after it has issued a warning notice to the issuer (*subsection (2)*), and after any representations from the issuer, it has provided the issuer with a decision notice (*subsection (3)*).

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Subsection (4) requires the Authority to provide the issuer with notice that it has a right to refer the matter to the Tribunal.

1629. New *section 89L* gives the Authority the power, in certain circumstances, to suspend or prohibit trading of securities admitted to trading on a regulated market, or to request the market operator to suspend or prohibit such trading. The powers are to be used where the Authority suspects (*subsections (2) and (3)*) or finds (*subsection 4*) applicable breaches of transparency obligations. The Authority's powers to request a market operator to prohibit trading could be used where an issuer whose home member State is the UK is listed in another EEA State.
1630. *Section 89M* sets out the procedures relating to the suspension and prohibition powers of the Authority set out in *section 89L*.
1631. New *section 89N* sets out the right for those who receive a decision notice or a notice under *section 89M* to refer matters to the Tribunal.

Section 1269: Corporate governance rules

1632. **Section 1269** inserts new *section 89O* into FSMA which gives the Authority a power (under Part 6 of FSMA) to make rules implementing, enabling the implementation of or dealing with matters arising out of Community obligations on corporate governance of issuers on a regulated market.
1633. This rule-making power will enable the Authority to make corporate governance rules to cover issuers for whom the UK is the home member State, and whose securities are traded on a regulated market in the UK or elsewhere in the EEA.
1634. *Subsection (2)* sets out the type of corporate governance provision covered by this rule making power. These include:
- the nature, constitution or functions of the organs of issuers;
 - the manner in which organs of the issuer conduct themselves;
 - the requirements imposed on organs of the issuer;
 - the relationship between the different organs of the issuer;
 - the relationship between the organs of the issuer and the members of the issuer (or holders of the issuer's securities).
1635. *Subsection (3)* provides that greater burdens must not be imposed by corporate governance rules on issuers whose securities are traded outside the UK than those imposed by corporate governance rules or listing rules on issuers with securities on UK markets.

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).

Section 1271: exercise of powers where UK is host member State

1654. **Section 1271** inserts a new section into Part 6 of FSMA: section 100A.

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1655. New *section 100A* sets out the Authority's ability to exercise powers in relation to infringements of prospectus rules and transparency rules or related provisions where issuers' home State is not the UK. *Subsection (2)* clarifies that the enforcement powers extend only to cover infringements required by the relevant directive. *Subsection (3)* sets out the process by which the Authority must engage with the home State competent authority when it finds there has been an infringement. *Subsection (4)* sets out limitations on the Authority's ability to act in those circumstances, but *subsection (5)* provides that, in the appropriate circumstances, it must take all appropriate measures to protect investors.
1656. *Subsection (6)* imposes an obligation on the Authority to inform the Commission where it takes action to protect investors.

***Section 1272 and Schedule 15: Transparency obligations and related matters:
minor and consequential amendments***

1657. *Section 1272* introduces Schedule 15, which makes minor and consequential amendments to FSMA related to the provision in sections 1265 to 1271. The Schedule also makes amendments to the C(AICE)Act 2004.