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Issuer Liability Consultation
Savings and Investment Team
Room 3/20
HM Treasury
1 Horseguards Road
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13 November 2008

BY POST AND E-MAIL

Dear Sirs

FMLC ISSUE 76: TRANSPARENCY OBLIGATIONS DIRECTIVE LIABILITY

Please find enclosed the Financial Markets Law Committee's ("FMLC") response to HM Treasury July 2008 consultation paper entitled 'Extension of the statutory regime for issuer liability.'

As you may be aware, the role of the FMLC is to identify issues of present or future legal uncertainty, or misunderstanding, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed. It is beyond the remit of the FMLC to offer opinions on issues of policy.

Accordingly, the enclosed response focuses only on those issues where the FMLC believes legal uncertainty problems could arise. Should you wish, the FMLC Secretariat would be delighted to discuss any aspect of the paper with yourself or an appropriate representative of your team. I can be contacted at the address at the top of this letter.

Yours sincerely

Joanna Perkins
Secretary

CONSULTATION RESPONSE

1) No changes are proposed to the current basis of liability (i.e. fraud).

We welcome this approach, as it mitigates any uncertainties that would arise when attempting to impose a lesser standard based on the concept of negligence.

2) Liability should attach in respect of securities admitted to trading on a UK regulated market or a UK multilateral facility.

The FMLC supports this proposal.

3) Markets to which the statutory liability regime should apply.

Paragraph 3.15 of the consultation paper sets out the arguments against extending the statutory regime to all cases where English law is found to be the applicable law. However upon further scrutiny, those arguments are not persuasive. It ought to be possible in principle to draft a definition which could be applied in respect of overseas markets that are equivalent to MTFs or UK regulated markets. Restricting the proposed regime to issuers admitted to a narrower group of markets would create uncertainty.

4) The application of the regime to 'transferable securities' as defined in section 102A (3) of FSMA, depositary receipts and other secondary securities.

The FMLC agrees with proposal to include depositary receipts; however there is concern that the simple "consent" of the underlying issuer is too vague a concept for the imposition of liability.

5) The scope of disclosure of the statutory regime.

A key concern is the use of the word 'published', which is not defined in the legislation. It is felt that this sets a low threshold for disclosure, and is potentially too narrow in its focus. A far more satisfactory phrase would be "notify"; this would also be in keeping with the wording used in the Disclosure and Transparency Rules (see DTR 2.2.1).

Paragraph 2(1) of the draft Regulation limits the scope of the new regime to disclosure made through a recognised information service. The FMLC considers that it should also apply to information disclosed outside the operating hours of such services, in accordance with the procedures set out in the FSA's disclosure rules. Otherwise anomalous results will be produced, with some investors buying in reliance on the out of hours disclosure (and being able to recover, perhaps, under a claim based on negligence) whereas others will buy in reliance on the RIS announcement made the next morning (and be subject to the statutory regime). In addition, the distinction may give companies an incentive to delay disclosure in order to bring it within the statutory regime by announcing through the RIS the next morning, rather than overnight.

6) The statutory regime should provide that the proposed immunity does not affect the rights of a holder of securities in his capacity as such.

The FMLC considers that the phrase "a holder of securities in his capacity as such" as set out in paragraph 6 (4) (a) of Schedule 10A is imprecise, and may give rise to uncertainty. Shareholders have rights in a number of different capacities. They have rights as shareholders as stewards of the company - the right to exercise their collective powers to reward or control or remove those to whom conduct of the company's business has been confided. They also have rights as investors in the company's shares. It is not clear therefore how the phrase 'in his capacity as such' would be interpreted. Furthermore, the carve out in paragraph 6(4)(a) should be limited to shareholders, rather than extending to 'holders of securities". These issues could be

relived by tying the capacity referred to in the sub-paragraph specifically to the stewardship role of a shareholder.

The following wording is suggested as a replacement for the phrase “a holder of securities in his capacity as such”: "(a) the rights of a holder of shares in connection with the powers that he has as a member of the body of shareholders as a whole, or of a particular class of shareholder, in relation to the conduct of affairs of the company".

Questions 7 – 11

Questions 7 – 11 concern policy questions relating to the imposition and the extent of liability. The FMLC does not comment on policy questions.

12) To make no changes to the statutory regime in respect of assessment of damages.

The FMLC supports this proposal.

13) To consider further the issue of subordination of investors’ claims.

The FMLC supports this proposal.

Miscellaneous

As a general overarching point, it should be noted that the proposals give rise a number of conflict of laws problems. The FMLC has previously engaged in correspondence with the Treasury on this issue (notably a letter dated 23 March 2006, and various telephone conversations with James Templeton). Moreover, the FMLC published a paper in September 2004 addressing this same issue; hence those arguments will not be rehearsed in this letter, suffice to say that the FMLC continues to hold the views set out in that paper.