16 October 2008

Issuer Liability Consultation
Savings and Investment Team
Room 3/20
HM Treasury
1 Horseguards Road
London SW1A 2 HQ

Dear Madam / Sir

Joint ICMA / SIFMA Response to HM Treasury Consultation on Extension of the Statutory Regime for Issuer Liability July 2008

The International Capital Market Association (ICMA) and the Securities Industry and Financial Markets Association (SIFMA) are pleased to respond to the HM Treasury Consultation Paper on the Extension of the Issuer Liability Regime

ICMA is a unique self regulatory organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers amongst its 400 member firms across almost 50 countries. ICMA's market conventions and standards have been the pillars of the international debt market for 40 years, providing the self regulatory framework of rules governing market practice which have facilitated the orderly functioning and impressive growth of the market. ICMA actively promotes the efficiency and cost effectiveness of the capital markets by bringing together market participants including regulatory authorities and governments.

SIFMA (the result of a merger between the Bond Market Association and the Securities Industry Association) brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA represents its members locally and globally. It has offices in London, New York, Washington DC, and its sister Association, the Asia Securities Industry and Financial Markets Association (ASIFMA), is based in Hong Kong.

Our response is based on extensive consultations with our member firms and their advisors. We attach our response as Annex to this cover letter and would be pleased to discuss them with you at your convenience.

Yours sincerely,

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ANNEX

ICMA/SIFMA RESPONSE TO THE HM TREASURY CONSULTATION ON EXTENSION OF THE STATUTORY REGIME FOR ISSUER LIABILITY

The International Capital Market Association (ICMA) and Securities Industry and Financial Markets Association (SIFMA) and are pleased to respond to the HM Treasury Consultation Paper on the extension of the statury regime for issuer liability. The response has been developed by the ICMA and SIFMA Working Group on periodic financial reporting. The Working Group comprises representatives of financial institutions, legal and accounting experts and other market participants. Its objective is to monitor and work with public policy makers on the implementation of the periodic financial reporting aspects of the Transparency Directive. The Consultation Paper's proposal to extend the statutory regime for issuer liability thus falls within the ambit of the Working Group.

We believe that, in general, the proposals achieve an appropriate balance between the interests of investors and the liability of issuers and others and we therefore support them. However, we have the following specific concerns in relation to the proposed legislation:

1 Preservation of rights of shareholders

Professor Paul Davies said in his final report that "the statutory regime should be drafted so as not to affect the rights of shareholders and others arising out of company circulars addressed to them" (see paragraph 45 of the report). However, this recommendation should be read in the light of earlier statements in the report, such as Professor Davies' agreement, in paragraph 43, with a comment made by the ABI that:

> "what is important, in point of principle (and as per one of the intentions within the Caparo judgment), is that accountability through liability by directors to shareholders *for governance purposes* should not be prejudiced." (emphasis added)

The draft legislation in the Consultation Paper attempts to implement Professor Davies' recommendation in paragraph 6(4)(a) of Schedule 10A, by saying that the general exclusion of liability does not affect "the rights of a holder of securities in his capacity as such".

We do not believe that this is sufficiently clear to achieve the result recommended by Professor Davies. 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; and it is these latter rights that have been potentially enhanced by the various statements in the Transparency Directive, to the effect that the purpose of company reports is to inform investment decisions.

It is therefore not clear how the proposed saving for a shareholder "in his capacity as such" would be interpreted, given the various capacities in which shareholders have an interest in a company's announcements. It would not be beyond the wit of a shareholder to argue that, in his capacity as an investor, he had relied upon a report and had decided to hold rather than sell his investment.

We also believe that the carve out in paragraph 6(4)(a) should be limited to shareholders, rather than extending to “holders of securities”. The governance purpose behind allowing shareholders to sue, that was set out in the Caparo judgement, clearly does not apply to holders of securities that have no right to vote at company meetings, such as holders of convertible bonds. Non-shareholders should be in the same position as investors who acquire or dispose and should therefore be subject to the statutory regime.

We believe that these issues should be resolved by tying the capacity referred to in the sub-paragraph specifically to the stewardship role of a shareholder.

2 Conflicts of laws

We agree that there is a lack of clarity under the Rome II regulation as to which law will apply, where an allegedly misleading report has been published (as it must be under the Transparency Directive) in all Member States. We believe that arguments can be made in favour of Article 4(3) of the Regulation, so that the law of the place of incorporation or (perhaps) of the home state for the purposes of the Transparency Directive applies. We would be happy to discuss these arguments further with you. We believe that it is in the interest of the market that these arguments should be developed further, with a view to their being accepted as widely as possible within the EU as the correct interpretation of the Regulation in this context. If this issue is not properly addressed, many of the benefits that the new UK regime is designed to promote will be prejudiced. The fear of non-UK litigation resulting from mandatory pan-EEA publication of reports may perpetuate a culture of defensive and over-cautious reporting.

We do not believe, however, that this uncertainty should affect the way in which English law should be developed. In other words, we think that the first option in paragraph 3.13 of the Consultation Paper should be chosen (that is, to extend the statutory regime to all cases where English law is found to be the applicable law). English law should, when it is found to apply, work in the same way for all issuers. The alternative proposal of limiting the new regime to issuers admitted only to certain markets would be confusing to investors and companies alike.

There is also a separate question as to the courts which are to have jurisdiction over negligence claims in this context. This aspect is dealt with in Council Regulation (EC) No 44/2001, which establishes as a general rule that a defendant domiciled in a Member State must be sued in the courts of that state, but makes an exception for claims in tort, giving jurisdiction to the courts of the place where the damage was suffered. It would make no sense if, assuming the interpretation of Article 4(3) of Rome II suggested above is adopted, the applicable law were English, but the courts seized with jurisdiction were from another jurisdiction. It would therefore be desirable for any revision of the 2001 Regulation to take proper account of jurisdiction in this context.

3 Meaning of “acquisition and disposal”

We are concerned by the extension, in paragraph 7(3) of the proposed Schedule 10A, of compensation rights to holders of “any interest in securities”. Given the complexity of the market, and the broad nature of the term “interest”, we believe that this gives undesirable scope for people only having a very tenuous connection with the company’s shares to make a claim. For example, someone who has a naked short position would be able to claim an interest; but it is arguable that a company's obligation to compensate investors should not extend to such persons. There is also a question of quantification of risk. A company will know the volume of its shares in issue and trading prices, and will thus have some idea of the likely loss that may result from a misleading statement. However, the value of derivative securities that relate to (and therefore could be said to have in interest in) a company's shares may well exceed its market capitalisation by a significant margin.

4 Disclosure mechanism

Paragraph 2(1) of the draft Regulation limits the scope of the new regime to disclosure made through a recognised information service. We believe that it should also apply to information disclosed outside the operating hours of such services (which currently are 7 a.m. to 6.30 p.m. London time), 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 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.

5 Depositary receipts

We agree with the intention behind the proposals for depositary receipts. However, we believe that simple "consent" of the underlying issuer is too vague a concept for the imposition of liability. Underlying issuers should not have to argue, for example, that their inaction when the receipt is admitted, or an unguarded approving comment from one of their officers, amounts to consent. We believe that the trigger for liability should be written consent given to the competent authority. We think that this is also a sensible trigger, given that the competent authority will wish to know that the underlying issuer is aware of its continuing obligations (such as the need to file reports under the Transparency Directive) and has agreed to comply.