

29 November 2002

Edwin James
Companies Bill Team
Ground Floor
4 Abbey Orchard Street
London SW1P 2HT

Dear Mr James

White Paper "Modernising Company Law"

The IMA is grateful for the opportunity to respond to the DTI's White Paper on Modernising Company Law. As you are aware, the IMA is the trade body representing the UK asset management industry, representing some £2 trillion funds under management and over 99% of the UK investment funds industry (unit trusts and oeics). In managing assets for both retail and institutional investors, IMA members are major investors in companies whose securities are traded on regulated markets. Therefore, we have an interest in Company Law from the standpoint of institutional investors.

The Government's White Paper, "Modernising Company Law" sets out its response to the Company Law Review's (CLR's) final report, together with draft clauses to form part of a Bill. The White Paper covers the major areas of company reporting, including proposals for:

- improving governance, for example, by setting out directors' duties in statute;
- reducing the burden on smaller firms, for example, simpler accounts for more companies by increasing the definition of a small company to the EU maximum;
- simplifying and streamlining the Law;
- improving governance - amendments to the requirements relating to meetings;
- improving governance - more transparency on how institutional shareholders exercise their powers;
- improving transparency such that both large public and very large private companies will be required to prepare an Operating and Financial Review and quoted companies will have to post annual reports on their web in advance of filing with the registrar (the time for which will also be shortened); and
- ensuring a flexible structure for rule-making and enforcement.

In summary, we believe that existing Company Law, combined with the Combined Code, provides a satisfactory framework for our members to discharge their responsibilities and obligations as institutional investors such that there is no need for radical change. Where issues do arise, they are more about how effectively this framework works in practice as opposed to whether the framework itself is adequate.

Nevertheless, we welcome the White Paper reducing the administrative and regulatory burden on small companies whilst increasing the accountability and transparency of large companies. This should help small companies develop and improve the corporate governance of the companies in which institutional investors invest. In particular, companies have a duty to deliver success for shareholders, and the draft Bill recognises that fact, through codifying directors' duties in statute and making the Operating and Financial Review, which provides accountability for that duty, mandatory for large private and public companies. However, it is important that any new law does not become weighed down with detail. Our comments on the proposals in the draft Bill are set out below and our answers to the specific questions raised in the White Paper are in the attached annex.

Meetings

Currently an AGM must be held in each calendar year with no more than 15 months between each meeting. The AGM is an important forum, particularly for private investors, for ascertaining facts about the company and airing any grievances. It is also where the directors lay the accounts for the most recent financial year. The accounts are fixed for twelve months and we welcome the period in which the AGM must be held being linked to the year-end and being within six months for a public company and ten months for a private company (paragraph 2.16).

The draft Bill also proposes that the minimum notice period for the AGM is reduced to 14 from 21 days (paragraph 2.17). Notice periods are crucial to the effective working of the system and we consider 14 days is too short a time. A short period does not give shareholders time to consider the issues and accounts fully, nor for due process to take place. It also means that many existing nominee and proxy voting services would not be able to ensure that votes are cast (see final paragraph of section on "Rights of Beneficial Owners"). In particular, if the notice is sent out before a public holiday, such as Easter or Christmas, then the holiday days count and investors would have little or no time. In conclusion, at worst we consider the existing position should be maintained but our preference would be for a notice period of 15 business days.

A company's accounts are dispatched with the notice for the AGM. We do not consider that 14 days, or even 15 business days, is sufficient time for shareholders to consider them. Companies should be required to dispatch their accounts well before the AGM and we would welcome the period being extended to eight weeks beforehand.

Rights of beneficial owners

The White Paper seeks to facilitate the process whereby the beneficial owners of a company hold the directors to account for the company's performance. The Paper states that "the owners need to have appropriate information, and be able to express their views through voting and, if necessary, requisitioning resolutions and meetings" (paragraph 2.37). To help ensure this, the Government proposes amending the Law

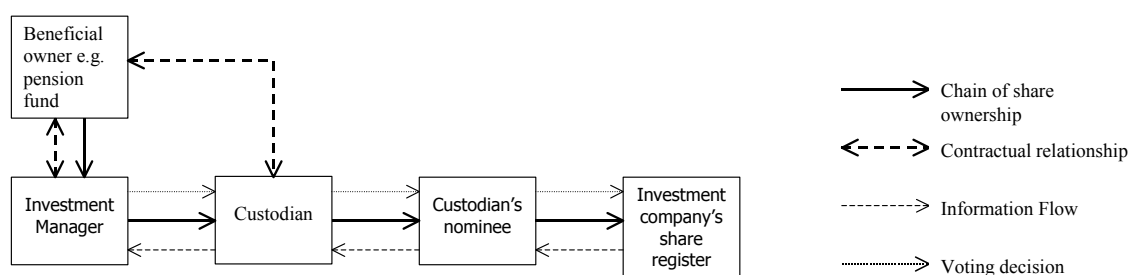
so that “companies are able to recognise, if they wish, rights of the holders of beneficial interests in shares at the request of the registered member” (paragraph 2.40). We also understand that the Government is considering the practicality of a mandatory approach whereby companies would be forced to recognise the rights of another person (paragraph 2.41).

We consider that both of these approaches would need to recognise that in practice the parties which hold directors to account are, with important exceptions, not the multiplicity of beneficial owners but the investment management firms who act on their behalf. It is those firms which tend to hold significant proportions of the shares of a company and to maintain a dialogue with the directors of the company. If the Law does not make it clear that the relevant rights can also be conferred onto investment managers or other parties, a provision aimed at the beneficial owners could have the perverse result of undermining the existing relationships under which boards are held to account by their shareholders. It would also mean extra administration and costs for investee companies which potentially, with the mandatory approach, could be very substantial.

We believe the White Paper underestimates the complexities of the existing arrangements under which there are numerous parties in the chain between the investee company and the beneficial owners. The White Paper only considers the role of the nominee company, the beneficial owners and the investee company. It recognises that very often the investee company’s members, as recorded on its register, are not the true beneficial owners in that shares are held in the name of a nominee company. A nominee company is the legal and not the true beneficial owner, but has the advantage of reducing the volume and cost of effecting transactions. Legal owners can arrange for others to receive company information and be appointed as proxies at a company general meeting. In this respect, we welcome the draft Bill enhancing the powers of proxies so that in future they will be able to speak, vote on a show of hands and join with others in demanding a poll (paragraph 2.18).

Most beneficial owners, for example pension funds, will appoint a professional investment manager, under an investment management agreement, to manage their investments, i.e. the investment manager makes the decision to invest or otherwise. Another party, a custodian, safeguards the actual investments themselves. The beneficial owner normally appoints the custodian under a custody agreement to which the investment manager is not a party. It is the custodian’s nominee that is recorded in the register of members as the legal owner of the shares and which has the right to receive information and vote at general meetings.

This is further complicated by the fact that majority of beneficial owners under the investment management agreement delegate responsibility for voting to the investment manager. Thus when an investee company convenes a company meeting, the notice and associated material is first received by the custodian’s nominee/custodian who forwards it to the investment manager. The investment manager then instructs the custodian on how to vote and the decision is conveyed back to the company. This is represented in the following diagram.



The numerous layers through which information and votes must pass inhibit the voting process. We consider that the White Paper does not address all the layers involved and that the respective roles and duties of investment managers and custodians need to be taken into account. Essentially the Law needs to recognise that the rights of beneficial owners can be conferred onto investment managers and other parties and give those other parties the same rights as the beneficial owners.

The chain that votes need to go through increases the scope for error and delay. We welcomed the CLR recommending that electronic voting should be permitted as this should ease these difficulties and we await the Government's proposals in this regard. However, there are other limitations in the existing system which we believe need to be addressed. In particular, the voting process means that it can take up to two weeks for voting instructions to be received by the registrar. Discrepancies between the custodian's and registrar's records as to who owns what means that the registrar may accept or reject voting instructions. For example, an investment manager voting on behalf of its clients may vote on 250,000 shares when, due to the dealings that have taken place, the registrar only records 200,000 and may reject the entire vote. This is an example of the kind of problem generated by the present failure of Company Law to recognise the arrangements which beneficial owners make in practice and which we do not consider is adequately addressed by the White Paper.

Institutional investors and conflicts of interest

On conflicts of interest, we support the Government in not adopting the CLR's recommendation for companies to disclose suppliers of financial services on the basis that companies could have to disclose long lists of suppliers, when only a very few played a role in their corporate governance (paragraph 2.47).

We understand that the Government is still considering the issues raised by the CLR on conflicts of interest. In this respect, the White Paper states that the Government believes "it would be in the public interest for institutional investors to be required to disclose publicly how they have voted in respect of their shareholdings in British quoted companies" (paragraph 2.47).

We disagree with this. Institutional investors are obliged to exercise voting and other rights in the best interests of their clients. We consider that a requirement for institutional investors to disclose publicly how they have voted could undermine the voting process. It could also lead to a general dumbing down of the process due to the levels of confidentiality and confidence required. In particular, public knowledge of a disagreement with an investee company's management through the disclosure of voting activity may have an adverse effect on shareholder value without solving

the disagreement. The Institutional Shareholders' Committee¹ recently published a statement of principles setting out best practice for institutional investors in relation to shareholder activism. The statement was published after extensive consultation with the industry and has been widely supported. It states that institutional investors will set out in a public document their policy on activism. It also states that investment managers will report regularly to their clients, as opposed to publicly, details on how they have discharged their responsibilities. To quote "the particular information reported, including the format in which details of how votes are cast will be presented, will be a matter for agreement between agents and principals as clients." If the intention is to encourage greater activism by institutional investors, we believe that the accountability to clients created by the Institutional Shareholders' Committee's statement of principles will be far more effective than a statutory requirement for public disclosure.

Distribution and publication of accounts

We support the electronic publication of quoted companies' accounts as soon as practicable after they are approved and within four months of the year-end (paragraph 4.50). We also support quoted companies being required to publish preliminary announcements electronically (paragraph 4.51). Electronic reporting will greatly improve accessibility and timeliness of reporting which will improve shareholder communications and is essential for market transparency.

In the draft Bill the times for filing and distributing accounts to members are reduced to seven and six months for private and public companies, respectively (paragraphs 4.49 and 4.24). We do not think this reduction goes far enough. The annual accounts are an important means of communicating with institutional and private shareholders, other investors, analysts and journalists. They:

- contain information on which investors rely when making decisions;
- communicate messages about the company; and
- are used as a comprehensive source of information about a company.

If quoted companies are to be required to publish accounts on the Internet within four months we consider that they, and other limited companies, should be required to distribute them in the same timeframe.

A flexible structure for rule-making and enforcement

The Government proposes changing the existing structure for rule making and company reporting in line with the CLR's recommendations. We support the establishment of a successor to the Financial Reporting Review Panel, the Reporting Review Panel, to enforce "form and content" rules for the accounts of public and large private companies and the fact that it will cover non-financial as well as financial data (paragraph 5.6). We also support the Government wanting to

¹ The members of the Institutional Shareholder's Committee are: the Association of British Insurers; the Association of Investment Trust Companies; the National Association of Pension Funds; and the Investment Management Association.

introduce future changes through secondary legislation and a new Standards Board's powers to make detailed rules and not adopting the CLR's recommendation for a statutory Company Law and Reporting Commission with a duty to keep company law under review (paragraph 5.27).

The establishment of a new Standards Board (SB) as a non-governmental business-led body to cover all areas of company reporting will allow much more flexibility and a speedier response to changing needs. Reporting and accounting issues tend to go hand in hand and making one body responsible for them should lead to greater clarity in reporting, and avoid unintentional conflicts and duplication. However, we note that the Government intends to have fallback powers to overrule the SB, for example, where it will be in the public interest. We believe it is important that the instances when the Government would use such powers are specified so it is clear that the SB remains effective. We will look carefully at the next installment of the draft Bill to determine the precise arrangements for the SB.

Europe and Corporate Governance

As stated above, we believe that overall the UK has high standards of corporate governance and that existing requirements provide a satisfactory framework. However, with developments in Europe and the various Directives that aim to ensure companies can have a single passport, it is possible that the UK's concept of listing and associated requirements may change². There are a number of requirements that are specific to the UK listing rules that provide potential investors with valuable information. Going forward it is important that either the Government, in company law, or the FSA, as the UK's listing authority, identify ways to preserve the key functions of the UK's listing rules which may have to be dropped. Thus we consider it reasonable to make the comply-or-explain disclosure requirement in relation to the Combined Code an SB rule as opposed to keeping it in the listing rules in order to ensure that it is safeguarded in the future (paragraph 5.11).

The White Paper refers to the Combined Code's requirements in relation to the appointment and role of non-executive directors (paragraph 3.31). The importance the IMA attaches to, and views on, the role played by non-executive directors is set out in our detailed response to the Higgs Review of the "Role and Responsibilities of Non-Executives". We await the Government's proposals in this regard.

If you have any queries on this response, then please do not hesitate to contact us.

Yours sincerely

Liz Murrall
Senior Adviser – Regulation

² The Prospectus Directive aims to ensure that companies can have a single passport that operates throughout the EU so that a prospectus approved in one Member State is acceptable in all others. It is a "maximum harmonisation" Directive such that Member States will not be able to create additional "super equivalent" provisions for prospectuses.

ANNEX

IMA'S RESPONSE TO THE DTI'S WHITE PAPER "MODERNISING COMPANY LAW"

IMA's answers to the specific questions raised in the White Paper are set out below. We have not provided an answer to those questions where we do not consider they are in the IMA's remit or do not have a view.

Improving governance, for example, by setting out directors' duties in statute

Directors' duties

The draft Bill codifies directors' duties in Schedule 2. The draft states that directors must aim to secure the success of the company in the interests of the shareholders, consider its impact on the community and environment, and recognise that it must foster relationships with its employees, suppliers and customers.

(Question 1) (i) Does the draft statutory statement of directors' duties provide clear and authoritative guidance for directors? (ii) Does it strike the right balance between modern business needs and wider expectations of responsible business behaviour?

The IMA's view

We welcome the clarification of director's duties in statute as to date they have only been enshrined in case law. This will mean that directors will no longer be able to plead a lower level of responsibility under the common law of skill and care. We attach particular importance to executive and non-executive directors being required to promote the success of the company primarily "for the benefit of its members". We also support the draft Bill requiring directors to have regard to other "stakeholder" interests, as although directors' main duty is to promote the company's success in the best interests of its shareholders, they need to work with other stakeholders in order to maximize shareholder value.

In summary, in general Schedule 2 provides clear guidance for directors and strikes the right balance. However, we have one concern in that the notes to Schedule 2, paragraph 2, introduce a subjective test. Paragraph 2 requires a director, in deciding what would promote the success of the company, to take into account all material factors. In the notes "material factors" are defined as "the likely consequences of the actions open to the director, so far as a person of *care and skill* would consider them relevant."

As to what constitutes care and skill is subjective and setting this in statute could be counterproductive and discourage people from taking up directorships. This is particularly important in relation to non-executive directors where there is already a limited pool of suitable candidates. We note that one of the objectives of the Higgs' review on the "Role and Effectiveness of Non-executive Directors" was to look at how the pool of non-executive directors could be widened.

Directors' duties to creditors

Directors have a duty to creditors in that, if they have not taken every step to minimize the potential loss to them on liquidation, the liquidator can declare they should make a contribution. The draft Bill has not adopted the CLR's recommendation that directors' duties to creditors should be disclosed in the statutory statement (this will replace the directors' report for all companies other than those that are required to prepare an Operating and Financial Review).

(Question 2) Would it be appropriate to include mention of creditors, perhaps by reference to the company's obligations to them, in the notes setting out the factors which, where they are relevant, directors must take into account in complying with the paragraph 2 duty?

The IMA's view

We do not consider it necessary to disclose directors' duties to creditors. Investors are generally already aware of this duty and the introduction of a requirement to state it could lead to boilerplate reporting and detract from the objective of the accounts.

Corporate directors

Under the draft Bill all corporate directors will be prohibited after a transitional period of say, three years. This is as only individuals can act and control a company.

(Question 3) Do you agree that, subject to the transitional provisions described, corporate directors should be prohibited?

The IMA's view

We support the prohibition of corporate directors. It is important that those who run and are responsible for companies can be held individually accountable for their actions. As stated in the White Paper, if the directors are not individuals then it can be difficult to determine who is actually controlling a company.

A point to note is that currently Open-Ended Investment Companies are required to have corporate directors, normally in the form of the manager. However, they are carved out of the requirements of the current Companies Acts. It is not clear how this is being taken forward in the new Bill.

Reducing the burden on smaller firms

In the draft Bill the small company reporting limits are raised to the EU maximum and they will not be required to provide a cash flow statement nor a consolidated financial statement.

(Question 4) Do you support the redrawing of the consolidation exemption threshold at the proposed higher threshold for small companies?

The IMA's view

We welcome the draft Bill reducing the administrative and regulatory burden on small companies. This should help small companies develop.

Simplifying and streamlining the Law

Access to the register

Currently anyone can access a company's register and for a fee obtain copies. However, very often the information is used for marketing purposes as opposed to in the interests of members. The Government does not propose adopting the CLR's recommendation that information from the register will only be able to be used for the purposes relevant to the holding of interests recorded in the register or the exercising of rights attached to them.

(Question 5) Do you agree that the draft Bill should retain the present rights to inspect and to obtain copies of companies' registers of members, subject to the discretion of the court as to whether access should be given?

The IMA's view

We welcome the Government's proposal. In the interests of transparency, the present rights for anyone to be able to access a company's register should be retained.

Disclosure of breaches of the Companies Act

The CLR recommended that companies should disclose any convictions for breaches of the Companies Act requirements. However, the Government believes that this would be costly to enforce and is considering naming and shaming companies who flout company law in a central register.

(Question 6) (i) Do you think disclosure of convictions under the Companies Act would increase compliance with its provisions? (ii) Should such disclosure be by companies themselves or through a central register?

The IMA's view

We would welcome the introduction of a central register to record breaches. This could be more easily policed rather than leaving the disclosure to the companies themselves. It would also increase pressure on directors to ensure compliance with the requirements of the Companies Act. For example, investors searching at Companies House will be able to decide whether they wish to deal with the directors of the companies concerned.

Improving governance - amendments to the requirements relating to meetings

Meetings – Secretary of State and the AGM

Under the draft Bill, the power whereby the Secretary of State can call an AGM if the company does not is to be dropped; it has not been used in recent years.

(Question 23) Do you agree that there is no need to retain the power of the Secretary of State to call an AGM where the directors fail to do so?

The IMA's view

We support the Government in not retaining this power for the reasons stated in the White Paper.

Private companies

Under the draft Bill, private companies will not have to hold an AGM but it will be open for a single member to require one. Public companies will still be required to hold an AGM and will only be able to opt out if the decision is unanimous.

(Question 24) Should a single member have the right to requisition an AGM of an opted out company?

The IMA's view

In general, we support the proposals in the draft Bill on meetings. However, we have some reservations about a single member being able to require a private company to call an AGM. This would mean that one dissenting shareholder could cause extra administration and expense for a company in convening a meeting when the vast majority of shareholders do not consider it necessary. We believe that it would be more appropriate for there to be a minimum threshold, either of size of holding or number of members, before an AGM can be requisitioned.

Members requiring the directors to call an EGM

Under the draft Bill, members will be able to require the directors of both private and public companies to call an EGM. It suggests that the requests for an EGM must all be made within 6 months of each other to count.

(Question 26) The Bill currently suggests that the requests for an EGM must all be made within 6 months of each other to count. Is this 6 month period appropriate, and if not, what would you suggest, and why?

The IMA's view

We welcome a six-month period for requests for an EGM to count. We consider that it would be too restrictive if requests had to be made at the same time or within a shorter period.

Notice for meetings

Under the draft Bill there is to be a minimum notice period of 14 days for both AGMs and EGMs of limited companies (currently it is 21 days for an AGM). The period runs from when the company either distributes the accounts or notifies any person about the publishing of the accounts on the web site.

(Question 27) Should members of unlimited companies be given the same 15 days' notice of a general meeting as members of other companies?

The IMA's view

Although IMA members do not invest heavily in unlimited companies, to give shareholders time to consider the information, we consider that the notice period

should be extended and be the same as for limited companies. In this respect, we comment in the covering letter that we do not consider that 14 days is sufficient notice. Also to give shareholders time to consider a company's accounts, the accounts should be dispatched well before the AGM and we would welcome shareholders receiving accounts eight weeks beforehand.

Members requiring companies to circulate a statement

Under the Bill shareholders will still be able to require the directors to circulate a statement on the business to be dealt with at a general meeting. However, there is a new provision that requires those requiring the meeting to fund the company in advance with the costs of circulating the statement. According to the White Paper the aim is that if the requisition is received in time for the company to be able to include the statement in its mailing for the AGM then those calling the meeting would not need to fund the company.

(Question 28) Do you agree that the current wording of clause 150 will deal appropriately with the great majority of cases, and that no further provision is needed? If further provision is required what should it cover?

The IMA's view

We do not consider that the draft clause would prevent a company circulating meeting notices in advance of its mailing for the AGM and requesting funds. However, we cannot see any benefit in the company doing so. On the basis that we do not consider this to be a major difficulty, the proposed clause is adequate.

Improving governance - more transparency on how institutional shareholders exercise their powers

Greater transparency on how institutional shareholders exercise their powers

To help improve the effectiveness of the voting process, the draft Bill requires quoted companies to publish a statement of the results of polls on the Internet and in their annual report. Members will also be able to require the procedures for establishing the admissibility of votes and proxies, voting and counting votes, to be scrutinised to ensure that the statement is accurate.

(Question 32) The provisions for scrutiny of polls in clauses 164-168 are new. The need for a scrutiny of a poll is likely to be very limited in the case of a private company with only a handful of shareholders, each of which knows how many shares the others hold. Indeed it may give scope for dissident minority shareholders to cause mischief and expense to the company where there are only a few dozen votes to be counted. Equally there are a few private companies with extensive numbers of shareholders where the appointment of a scrutineer might help resolve any potential disputes over the counting of a hotly contested poll. Should these provisions apply to all companies or only, for example, to public companies?

The IMA's view

We believe that the need for a scrutiny of a poll is likely to be very limited in the case of a private company as the majority have only a handful of shareholders, each of whom knows how many shares the others hold. As stated in the White Paper, if a dissident minority of shareholders were able to demand a scrutiny of a poll then this could cause mischief and expense to the company when there are only a few dozen

votes to be counted. Thus, we support the requirement for members being able to demand scrutiny of a poll being limited to public companies.

Improving transparency – a statutory Operating and Financial Review (OFR)

A statutory OFR

Under the draft Bill the narrative directors' report is to be abolished. Small companies will be required to publish a short supplementary statement to act as a "fair review". Public and large private companies will have to report non-financial information in an OFR with the objective of enabling users to make an informed assessment of: (a) the company's operations; (b) its financial position; and (c) its future business strategies and prospects. It is proposed that legislation will outline the content of the OFR leaving rules on the detail and form, i.e. the ordering of the information, to the new SB.

(Question 44) Do you agree that the Bill should set a high level objective for the OFR?

(Question 45) If so, does the high level objective in clause 73(3) ["providing such information.... as will permit.... an informed assessment"] represent a useful starting point around which to frame the OFR?

(Question 46). Is the approach to the content of the OFR set out in clause 73(4) appropriate? If not what would you suggest?

(Question 47). Do you agree that the approach to rules on the form of the OFR in clause 73(4)(b) is useful? If not what would you suggest?

The IMA's view

We welcome the OFR being made mandatory for large private and very large public companies; financial reporting has become increasingly complex and the OFR in reporting both financial and non-financial information has a vital role to play in helping shareholders understand a company. A statutory OFR is a positive step towards greater transparency of a company's performance.

We also support statute setting out a high level objective for the OFR, the clause in the draft Bill and the proposed approach to its content. If the OFR is going to serve a useful purpose then its overall aims should be specified otherwise there could be too much disparity in the information reported. In particular, the ASB's statement of July 1993 on the recommended contents of large companies' OFRs referred to the OFR's "spirit" but spirit was not defined.

Content of the OFR

The OFR will have a mandatory and non-mandatory part. It must contain the core elements: a statement of the company's business for the year; a fair review of performance; and a fair projection of the prospects for the business and of events that are likely to substantially affect that business. The directors must decide whether details are required of a company's: policy on employment; receipts from and returns to members; policies and performance in relation to environmental, social, ethical and community issues; and management structure, in order for the OFR to achieve its objective.

(Question 49). Do you agree that the approach of clause 74 to the core elements – and in particular the element of objectivity – is appropriate?

(Question 50). Do you agree with this draft's approach to the Review's materiality test? If not, what alternative would you suggest?

(Question 51). Is the split between the core elements in clause 74 and those elements that the directors must consider in clause 75 clear? Are there other ways in which this policy could be expressed?

(Question 52). Does the list in clause 75 (2) strike the right balance between providing enough detail for the directors to consider the issues, while not encouraging boilerplate reporting?

(Question 53). Does the approach in clause 75 (2) provide enough guidance to directors in deciding whether information on one or more of these factors is relevant to the achievement of the review objective? If more guidance is needed, how might this best be provided?

The IMA's view

In general, we support the split of mandatory and non-mandatory items as set out in the draft Bill and the need for objectivity and judgment in preparing the OFR. We do not consider that Company Law should specify a detailed list of disclosures as this could lead to "boilerplate" reporting which would not meet the objectives of the statement and would not add any value. However, the OFR is to replace the Directors' Report, the contents of which is set out in the Companies Acts. We consider that the current requirement to disclose in the Directors' Report directors during the year is important to the users of accounts. To carry this forward in to the OFR the non-core element "management structure of the company" should be moved to the core elements (question 51).

The OFR's users' needs

The draft clauses present the objective of the OFR in terms of including such information as will "enable an informed assessment".

(Question 43). The draft clauses present the objective of the OFR in terms of including such information as will "enable an informed assessment". Will members in differing circumstances (e.g. a 10 per cent shareholder and a 0.001 per cent shareholder) and of differing experience (e.g. a City analyst and someone who invests only on advice) need different information to reach an informed assessment? If so, how should the Bill handle this?

(Question 48). What is the best approach to ensuring that members get all the information in the OFR as a single package, while recognising that other users may only be interested in part of the information?

The IMA's view

We consider that all shareholders should have access to the same information in the annual accounts. The OFR fulfills much of the key aspect of the investor relations work of large companies. It also provides an opportunity for the company to set the framework for informed discussions and questions. In conclusion, investors should each have the same information and the OFR should be aimed at the informed investor and have the highest quality of disclosure.

Confidentiality

The CLR recommended that companies should not have to disclose information that is confidential or commercially sensitive, the draft Bill does not address this issue. The Government believes that if there is to be a confidentiality exemption then it should be made clear to the users that information has been omitted.

(Question 54). Can you identify any issues which would warrant inclusion in the OFR but were so sensitive that companies would legitimately wish to make no mention of them in even the broadest terms?

(Question 55). If use was made of any exemption for information of such confidentiality or commercial sensitivity that its publication would materially prejudice the company's interests, how should the OFR make clear that information was being withheld?

(Question 56). If there is an exemption for information of such confidentiality or commercial sensitivity that its inclusion in the OFR would materially prejudice the company's interests, should the directors be able to invoke this directly themselves? If not what should be the mechanism?

The IMA's view

We consider that companies should not have to disclose matters in progress that are of a confidential nature, for example, significant acquisitions that are not complete (Question 54). To do so could have consequences for the matters in progress or for the share price. We believe that the directors themselves should decide whether the information is commercially sensitive as otherwise the information would not be confidential (question 56). That information is being withheld should not be disclosed. To require such a disclosure could result in a statement that is so bland that it is meaningless or alternatively could trigger speculation such that the company is forced to make full disclosure against its commercial interest (question 55).

Safe harbour in respect of the OFR

The CLR recommended that there should be a safe harbour for directors from liability in respect of OFR statements as otherwise the threat of litigation may discourage meaningful disclosure. However, there is no safe harbour in the Bill on the basis the Government considered it would raise the question as to whether it should be provided for all annual reporting documents and that there is already adequate protection under common law.

(Question 57). Do you agree that the draft Bill should not include a "safe harbour" provision in relation to statements made as part of the OFR?

(Question 58). We would also welcome any more general comments on the draft's possible approach to implementing the OFR.

The IMA's view

We consider that directors should exercise due skill and care when preparing the OFR and that this standard should be relied on in any defence to an action. However, if by not providing a safe harbour there is a risk of bland standard language being used which is meaningless and has no beneficial use, then the situation needs to be reconsidered.