



The City of London Law Society

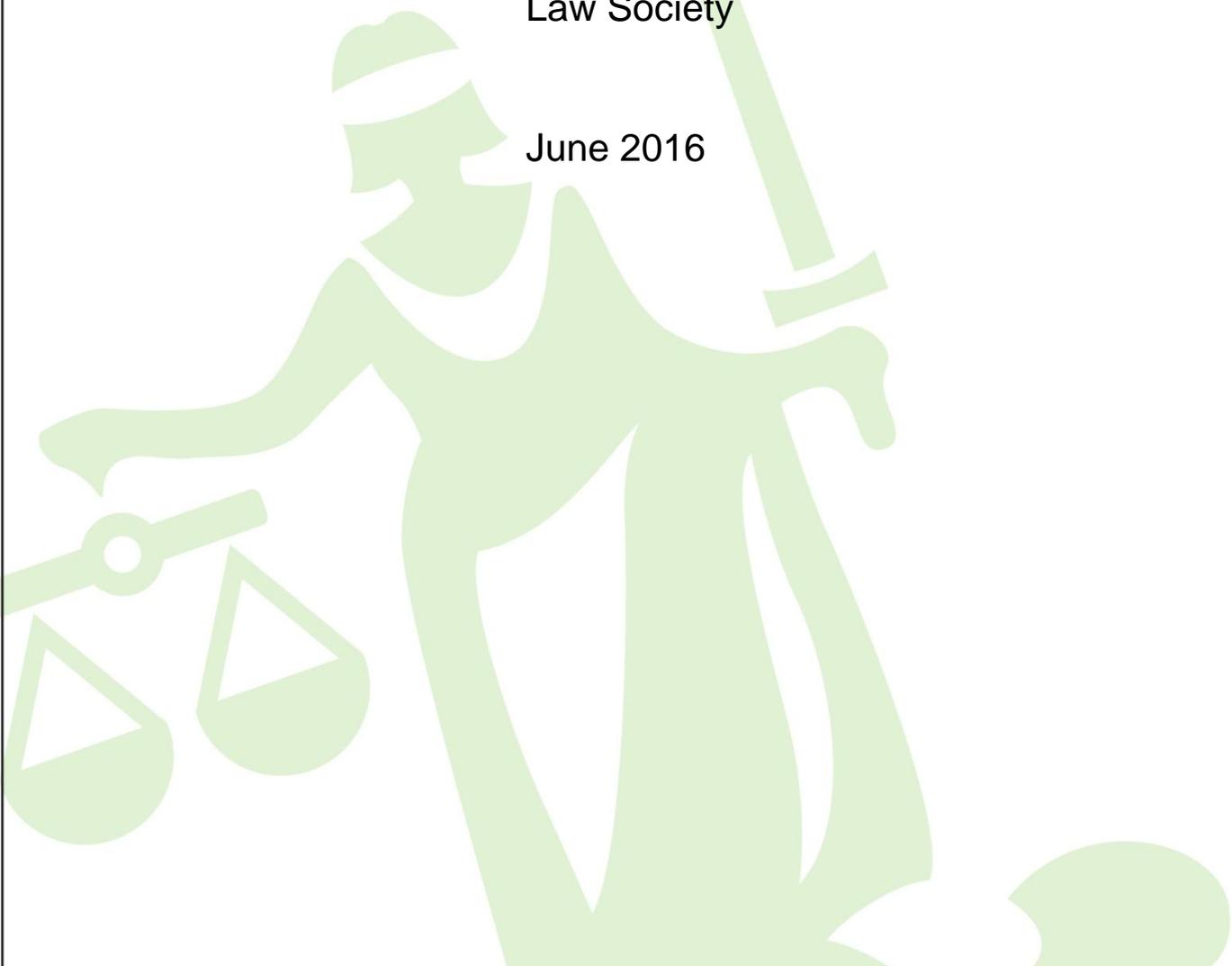


The Law Society

**Exposure draft of updated Guidance  
on the determination of realised  
profits and losses in the context of  
distributions under the Companies  
Act 2006**

Joint response by the Law Society of  
England and Wales and the City of London  
Law Society

June 2016



## Introduction

- (1) The comments set out in this paper have been prepared jointly by the Company Law Committees of the Law Society of England and Wales ("the Society") and the City of London Law Society ("CLLS").
- (2) The Society is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.
- (3) The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.
- (4) The Company Law Committees of the Society and the CLLS are made up of senior and specialist corporate lawyers.

## Comments

We welcome the opportunity to comment on the Exposure Draft which, though largely aimed at accountants, is referred to widely by the legal profession. Our general comments are set out below, and are cross-referenced to the relevant paragraphs of the Exposure Draft. In addition, some drafting comments are attached. The rationale for these is explained below (to the extent this may not be obvious).

Paragraph number	Comment
2.6A	It would be useful if references to the cases on which this paragraph is based could be footnoted.
2.6B	We suggest that the example of "knowingly" transferring an asset at an undervalue is deleted. The example tends to contradict the statement earlier in the paragraph that intention is not the determining factor.
2.8G	<p>The final paragraph of section 2.8G is confusing. Please consider including an example of the double-entry accounting treatment which applies on making a provision and on the subsequent discharge/waiver of the liability.</p> <p>Also, it would be useful if terms which are defined by statute (eg 'non-cash asset' in paragraph 2.8G) could appear in bold in the document and be included in a new appendix of legally defined terms.</p>
New 2.23A	We have suggested including a new paragraph 2.23A as this has been an issue for a number of companies in practice. If you agree, it would also be useful to include a footnote to the cases which confirm this point (eg <i>Precision Dippings Ltd v Precision Dippings Marketing Ltd (CA)</i> [1985] 3 WLR 812).

2.47C	It would be useful to further expand upon the inconsistency between Solvency II and section 843.
3.11(e)	It would be helpful to include guidance on what constitutes “intent” and, in particular, whether a prior step (eg. a board decision on intent to declare) is required ahead of the actual declaration of the dividend in order to create the realised profit out of which the dividend is then declared. If a prior step is required, the guidance should also explain what happens if the dividend is then not declared (presumably the realised profit becomes unrealised at some point).
6.41	In the examples that follow paragraph 6.41, it would be useful to include alternative tier 1 instruments.
9.56	Presumably the amount of the distribution/capital contribution referred to in this paragraph is only the difference between the discounted cash flows and the sum advanced. It would be useful to explain how the remainder is accounted for, as has been done in previous paragraphs.

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