17 September 2013

Our ref: ICAEW Rep 125/13

Transparency and Trust
Spur 1, 3rd floor
Corporate Governance Team
Business Environment Directorate
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By email: transparencyandtrust@bis.gsi.gov.uk

Dear Sirs

**Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business**

ICAEW is pleased to respond to your request for comments on *Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

# TRANSPARENCY & TRUST: ENHANCING THE TRANSPARENCY OF UK COMPANY OWNERSHIP AND INCREASING TRUST IN UK BUSINESS

**Memorandum of comment submitted in September 2013 by ICAEW, in response to Department for Business Innovation and Skills discussion paper Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business published in July 2013**

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## INTRODUCTION

**1.** ICAEW welcomes the opportunity to comment on the discussion paper *Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business* published by Department for Business Innovation & Skills on 15 July 2013, a copy of which is available from this link.

## WHO WE ARE

**2.** ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

**3.** ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

**4.** This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

## MAIN POINTS

**5.** We support the Government determination to fight corporate crime (including tax evasion) (the **'reduction of crime objective**') and to understand tax evasion with a view to its control. We also understand the desire for increased transparency especially in the fight against crime. However, these objectives need to be balanced against requirements for personal security and commercial confidentiality and a regulatory regime which best enables business to thrive. Because of the inherent tensions between these competing objectives and interests, our approach in this response is in general one of identifying matters that require careful consideration to avoid unintended consequences rather than advocating one approach over another as a matter of principle.

**6.** The UK is already a leader in compliance with FATF requirements and we support initiatives designed to maintain the UK's reputation as a trusted place in which to conduct business. However, achieving this, while at the same time meeting the objective of encouraging UK enterprise requires a balanced approach, both from a domestic perspective and an international one.

**7.** In the international context, the government has committed to avoid any 'gold plating' of EU regulation and this principle should not be overlooked in this context. Where foreign companies are involved in a chain of ownership of a UK company, there is no straightforward way to obtain (or, at least, verify) information unless either those above the UK company in the chain cooperate, or there is sufficient transparency under the relevant foreign laws.

**8.** A register of the kind proposed (whether maintained by companies or on a central register) is unlikely either to be fully up to date at all times, nor to include reliable ownership information on those, such as criminals, who can be expected to conceal their interests. Information obtained by companies or a central registry may not have been verified to the levels which would be required by law enforcement authorities (or levels performed by those currently subject to anti-money laundering regulation (the 'AML Regulated Sector'). As a result, apart from enabling enforcement authorities to identify beneficial owners more quickly than would otherwise be the case where relevant information has been disclosed, it is unclear what the perceived benefits

would be and we suggest that the intended benefits and cost savings should be more clearly articulated.

**9.** The regulated sector already has to collect this kind of information on those companies with which it carries out business and if companies are required to undertake the same kind of checks, the additional costs to business are likely to be significant. We would like greater clarity on areas of duplication or areas where companies are to have lesser responsibilities (for instance, responsibility to verify information) and consideration of ways in which areas of duplication could be mitigated significantly, whilst maintaining the integrity and independence of the information which already exists in this context within the regulated sector. Without that greater clarity we believe that it would be inappropriate to presume that the net additional cost to the economy as a whole would be small.

**10.** We note that the Secretary of State commits to reducing regulation and the burden on business and that the Government will introduce deregulatory measures alongside these to form a cohesive package for reform. Without seeing the proposed deregulatory measures, we are unable to comment on the overall burden, but, regardless of parallel initiatives, these reforms should be restricted to change which is essential to achieve improved transparency to the law enforcement authorities and others with a real need for the information.

### Transparency - Obligations on UK companies

**11.** There are a number of concerns arising out of the proposal to require companies to obtain information on beneficial owners, maintain a register and provide information to a central register, in particular:

- In our view, information on beneficial ownership on any register should be kept confidential, for example, for reasons of security (see response to Q19 below for further examples). Even if a company is not required to make the information publicly available (or disclose to a register where it will be publicly available), the fact that its directors will become privy to the information may in some cases be of legitimate concern to beneficial owners (for instance, in the context of certain family-run companies). The risk of disclosure may be increased merely by virtue of further individuals (the directors) being aware of it, particularly as directors will not necessarily be subject to the same obligations of confidentiality found within the AML Regulated Sector or enforcement authorities. This concern could perhaps be alleviated if a mechanism could be devised for a beneficial owner to make disclosure to a central confidential register or to a relevant AML Regulated Sector service provider, in lieu of the company.

- A typical (ie, small) company cannot necessarily be expected to have the sort of skills or support resource available to conduct the enquiries to a reliable level (eg, to the standards of the AML Regulated Sector). While in some cases, legal and beneficial ownership will be the same and known to all involved, this will not always be the case. We would like greater clarity on the level of obligation to be placed on companies. In particular, will it be enough to make a proper enquiry of those above the company in the chain and rely on the response in the absence of some clear indication that the response is inconsistent with information already known or is otherwise clearly incorrect? If the proposal is to impose an obligation on companies to verify the information provided, we would strongly argue that this duty should be proportionate to the scale and resources of the business affected and that duplication of what is already required to be carried out by the AML regulated sector is minimised.

- The proposed consequences of non-compliance by a company (and its directors) are not clear. It appears that failure would be a criminal offence. We think that this requires careful consideration. If the obligations of the company are merely administrative it may be possible to equate non-compliance with failure to file returns or the like at Companies House, but will failure be subject to fixed penalties? If so, how will failure be identified

(presumably only following an investigation by enforcement authorities) and will a regime of this kind produce the intended results of reduction of crime? If not, what level of exposure will companies (or directors) have? If the company and its directors are to have duties to make enquiries, particularly if they are to have duties to verify information, how will these obligations be framed? There is a high risk of inadvertent failure and care needs to be taken to avoid the risk of criminalising companies or directors who do not have criminal intent.

**12.** We recognise that, in some cases, companies do have relevant information (or can easily obtain it) but do not fully co-operate with the AML Regulated Sector (or others charged with meeting the reduction of crime objective). We believe that companies should be required to assist the AML Regulated Sector in obtaining the relevant information, although questions regarding the scope of that obligation and sanctions for non-compliance would also need to be addressed. Coupled with our suggestions in relation to the AML Regulated Sector below, we see this as a possible alternative to imposing more extensive obligations on companies themselves.

### Transparency - Obligations on beneficial owners

**13.** If the law is to be changed to introduce a register or other record of beneficial ownership, it seems to us to be more sensible to impose the obligation to inform the register holder of such ownership on the beneficial owners themselves. If a company is to hold the register, it would then merely need to record the information it receives, which would make compliance by it relatively easy. It is our preference that such disclosure should not be made public for the reasons set out above, but should only be available to law enforcement agencies or others, where appropriate.

**14.** Nevertheless, the concept of beneficial ownership can be complex and if the obligation is to be enforced by criminal penalties this could lead to the criminalisation of many well intentioned beneficial owners who inadvertently fail to comply. We therefore strongly advocate not only a proportionate requirement on the level of due diligence but also provision within the law which restricts it to those where criminal intent exists.

### Company or central register

**15.** We have noted in paragraph 9 above, potential concerns on using companies to obtain and keep a register of the relevant information. However, if it is ultimately decided that companies should maintain registers, it is unclear how having a central register would further advance the reduction of crime objective, given that the information would be obtainable from company itself by the relevant authorities. Information currently provided to Companies House is generally provided for public information, but, as noted above, we do not believe that information on beneficial ownership needs to be made public to meet the stated objectives here.

**16.** It is possible that the obligations to record information proposed to be imposed on companies could, as an alternative, be directly imposed upon a central registry. Assuming that the information kept by the registry is not made available to the general public and can be accessed only by those (defined in the law) as having a legitimate interest in the information, this could better address concerns on confidentiality (assuming that appropriate safeguards were to be put in place within the central registry). However, it would not in itself address concerns regarding the quality or reliability of the information held.

**17.** It is possible that a central registry could be given responsibility to verify information to a degree which could not realistically be imposed on companies (and that this might ultimately be more useful for enforcement authorities). We understand, for instance, that the Land Registry does take steps to verify information it is sent. However, it is clear from experience in the AML Regulated Sector that this would involve significant resource and it is perhaps unrealistic to suppose that adequate resource would be allocated to a central registry for this

purpose. It would also, to a large extent, result in duplication of work already undertaken in the AML Regulated Sector.

**18.** It is envisaged that Companies House is to be the central registry. We note that, historically, Companies House has not performed a verification function but has merely recorded what it is sent (so long as a document contains the required information on the face of it). If this model is to be followed for a register of beneficial ownership, our comments on the limited usefulness of the register for the purpose will carry particular weight. If the information provided is to be challenged or verified by a central register, the question of resources of Companies House (and, indeed, its culture) would need review and it may be that a different or new government departmental body (independent of other bodies) should be used for the purpose.

**19.** The issue of how frequently the information on the register is required to be updated arises in respect of both company and central registries. The less regularly it is updated, the less useful it will be, but the more often it is required to be updated, the greater the regulatory burden (on whomever that burden falls). See our response to Q15 for further detail on this issue

### Role of AML Regulated Sector

**20.** In general we believe that the AML Regulated Sector regime is robust and meets international requirements. However:

- Companies can be registered in the UK through Companies House without the use of an AML Regulated Sector service provider and may trade only outside the UK (so having no UK bank account or other AML Regulated Sector involvement as a company trading the UK typically would have).

- The regulation of the AML Regulated Sector is not uniformly sound. In particular, we believe that there are concerns around trust and service company providers.

**21.** The AML Regulated Sector undoubtedly devotes significant resource to performing customer due diligence and there are elements of duplication in work done by different service providers. While requiring companies or a central registry to obtain the information might, if the AML Regulated Sector were to have access to that information, reduce the resource required, we do not believe that the reduction would be sufficiently material in itself to justify the proposed initiatives. This is because the AML Regulated Sector will continue to have its self-standing duties and will not be absolved from those duties by claiming reliance on the information provided. Neither should it be absolved given, in particular, that the information is unlikely to be up-to-date at all times and that there is a risk that the information has not been verified to the standards of verification required by the AML Regulated Sector itself.

**22.** In practice, therefore, the proposals will not prevent duplication of effort, but, on the contrary, will increase duplication by imposing an additional burden on the corporate sector.

**23.** While it might be desirable for the AML Regulated Sector to have access to any information held on a company or central register under these proposals, we think that there would be practical difficulties in operating a system catering for this in a way which would respect confidentiality. Clearly, the entire sector could not have access to all information at all times on all companies with an expectation of confidentiality being maintained. Where the company itself has the information (and authority to disclose it in the context) no issue would arise, but as noted above, we are concerned that a regime requiring disclosure to the company may not adequately protect interests of security and confidentiality of a beneficial owner. In other cases, a gatekeeper (probably acting on court order) would be required for access

**24.** We believe that imposing a duty on a company to assist the AML Regulated Sector in their duties could be of more effective for the AML Regulated Sector than providing access to them to a register of the type envisaged.

### Alternative or additional suggestions and solutions

**25.** We believe that the existing AML Regulated Sector regime could be further leveraged as an alternative to the proposals outlined in the paper. In particular:

- Companies could be required to have an AML Regulated Sector service provider on incorporation and at such times as the company would otherwise periodically be required to obtain and provide information itself under the proposals.

- Any existing sectoral weaknesses in the AML Regulated Sector should be identified and addressed.

**26.** While the proposals do not cover foreign companies doing business in the UK, those companies may present as real concerns regarding law enforcement as UK companies and should be reviewed in this context. We would expect those companies to have similar obligations imposed on them (by UK law unless already effectively provided for by relevant international law applicable to companies operating in the UK). Assuming that the registers are not to be public, circumstances in which law enforcement authorities may access information held in the UK register from abroad and rights of UK enforcement authorities to access information held in foreign registers will need to be defined and safeguards included to maintain confidentiality as appropriate.

## RESPONSES TO SPECIFIC QUESTIONS

### Part A

### Beneficial ownership and a central registry

#### Q1. Do you have views on the proposed definition of beneficial ownership and its application in respect of information to be held by a central registry?

**27.** We agree that any requirement along these lines should be limited to substantial interests (ie, over 25%) and cover indirect interests (ie, the broader definition). Subject to our introductory comments, terminology used should be consistent with that used for money laundering regulations (updated if necessary to clarify any usage which is currently unclear) in order to maintain consistency. A threshold under 25% would add to the administrative burden.

**28.** This section of the paper raises a number of general issues and we refer to our ‘Main Points’ above for our comment on these.

**29.** While in general terms we support use of terminology consistent with that used in the anti-money laundering regulations (subject to qualifications regarding beneficiaries under trusts), we note that a number of proposals envisage use of company law provisions. Care will need to be taken in implementing the proposals to avoid gaps or inconsistencies and the provisions will need to be sufficiently clear and workable to minimise administrative burdens and the need for costly advice to affected companies.

#### Q2. Do you have views on the types of company and legal entity that should be in scope of the registry?

**30.** We are not aware of any reason why the principles should not apply to all types of entity currently within scope of Companies House. We note that Companies House does not, of course, deal with the full range of UK bodies corporate such as OIECs.

**31.** In the interests of minimising additional regulation, we support the proposal to exclude listed companies from the scope of the new regulations, but we note that if there is to be a public central register, this would mean that information most likely to be of interest to the public at large will be excluded from it and there would not be a ‘single register’ for the purposes of law enforcement.

**Q3. Do you have views on whether there should be exemptions for certain types of company? If so, which?**

**32.** See Q2 regarding exemption for listed companies. In the case of groups of companies, it would seem unnecessarily burdensome for each member of the group to be required to obtain and disclose the information, so that, where there is a UK parent, we propose that it should be able to state the position in respect of itself and all companies of which it has a 75% or higher beneficial ownership.

**33.** It would typically be disproportionate for dormant companies to be required to undertake additional reporting obligations, but we note that exclusion of subsidiaries as outlined above would, in effect, exclude many of the dormant companies currently registered at Companies House, as they will often be part of a larger group.

**34.** It seems likely that, in the majority of cases, legal and beneficial ownership will be the same. Any reporting scheme should take that into account, so that, if covered by the annual return, the return would provide either for confirmation that the company is not aware that shareholders are not beneficial owners or, where the company is aware, would call for details to be disclosed. As noted above, procedures would be required to maintain confidentiality of this information, if included in an annual return.

**Q4. Do you have views on extending Part 22 of the Companies Act 2006 to all companies as an aide to beneficial ownership identification by the company?**

**35.** If an obligation to obtain this information (or to provide assistance) is to be imposed on companies, then they will need to have the power to discharge the obligation, presumably along the lines proposed. Exactly how to implement a provision such as this would require careful consideration, particularly as regards maintaining confidentiality (and provisions requiring registers of use of the powers to be kept).

**Q5. Do you have views on placing a requirement on the company to identify the beneficial ownership of blocks of shares representing more than 25% of the voting rights or shares in the company; or which would give the beneficial owner equivalent control over the company in any other way?**

**36.** Earlier on we have referred to the additional burdens that this would place on the economy. The concerns around the work involved for private companies and the ability of the average director to pursue any difficult issues that might arise are exacerbated where there are a number of shareholders who may, or may not, be jointly controlling a block of shares. This might be the case, for example, with family members who may not have any formal agreement between them, but who would have a tendency to seek consensus. There may also be complicated situations where one or more investment funds has a stake.

**37.** As noted above, an alternative to requiring a company to obtain the information would be for it to provide assistance to AML Regulated Sector (with any gaps in the AML Regulated Sector regime also being filled).

**Q6. Should there be a requirement on beneficial owners to disclose their beneficial ownership of the company to the company?**

**38.** If a company is to have duties to obtain and provide this information, then yes, there would need to be a corresponding duty on the beneficial owner, but note concerns identified in Main Points above. We would also note that it is unlikely that a beneficial owner involved in criminal activity would make any disclosure in practice. If the concerns are not addressed, individuals who are interested in companies, such as family owned or run companies, would bear the increasing burden of these regulations (including education or training needs that would result) and the prospect of committing an offence for failure to comply without having any criminal intent. This is a material burden on the business community. The procedure for notification would need to be considered. For instance, would notification need to be made by both the

transferor and transferee and would some kind of verification be required to avoid spurious notifications? In order to reduce the risk of inadvertent breach, we think that 'actual knowledge' by a person that he is the owner or has control should be required and that failure should only be criminal if there is a criminal intent.

**Q7. Are there additional or other requirements we could apply to ensure that information on all companies' beneficial ownership is obtained? If so, what?**

**39.** We have noted in our Main Points gaps in the existing AML Regulated Sector regime and how they might be filled in this context.

**40.** The regulation of the AML Regulated Sector is not uniformly sound. In particular, we believe that there are concerns around trust and service providers. We propose that any existing sectoral weaknesses in the AML Regulated Sector be identified and addressed.

**41.** If there is to be a central register, then the body administering the register could, in theory, perform a number of the obligations proposed to be performed by companies and be given the relevant powers to carry out those obligations. The body would need to be adequately resourced, but could be enabled to carry out its obligations on a risk basis (as does the AML Regulated Sector under the current regime, but which it would be difficult to translate to obligations imposed on companies). Assuming appropriate safeguards on confidentiality and access (by law enforcement agencies), this would avoid some of the concerns arising with respect to disclosure of information to the company itself.

**Q8. Should the trustee(s) of express trusts to be disclosed as the beneficial owner of a company?**

**42.** Yes, where trustees are beneficial owners, their interests in a company should be disclosed as for other beneficial owners.

**Q9. Would it be appropriate for the beneficiary or beneficiaries of the trust to be disclosed as the beneficial owner as well? Under what circumstances?**

**43.** Privacy (including safeguarding security) and related issues are likely to be particularly relevant in this context (for instance, family trusts) so that we support an approach which requires disclosure only where strictly necessary to meet the crime reduction objectives. This would be the case where a beneficiary has power to direct the trustee as if he were the legal owner, or where the trustee is required to act on the directions of more than one beneficiary acting together in relation to the shareholding. We would note that that not all legal systems have a trust concept and that where issues of 'beneficial' as opposed to 'legal' ownership arise, the proposal may have a greater impact on common law jurisdictions such as the UK, which do.

**Q10. Should the investigative powers in the Companies Act 1985 be extended to specified law enforcement and tax authorities?**

**44.** In principle we believe so, subject to appropriate controls.

**Q11. Should the requirements that apply in respect of a company's legal owners be used as the model for beneficial ownership information to be provided to the company and the registry?**

**45.** It is difficult to see why more information should be required of beneficial owners than legal owners, given that rights of ownership in a company are conferred on the legal owner and any chain of ownership interests would ultimately need to be exercised through the legal owner.

**Q12. If not, what additional or other information we might require? How?**

**Q13. Is there a need to introduce additional or other measures to ensure the accuracy of the beneficial ownership information that is filed with Companies House and retained on the register? If so, what?**

**Q14To what extent would the benefits of these measures outweigh the costs and other impacts?**

**46.** Q12-14. A legal owner of a private company is currently required to disclose name and address only (with access by the public subject to a statutory procedure, and only the name being recorded at Companies House). If additional information is to be disclosed, we assume that this would apply both to legal and beneficial interests, in the interests of consistency. Additional requirements in this respect would therefore affect the entire UK corporate base. Even including additional basic information such as date of birth could give rise to concerns of confidentiality (and identity security). The issue of verification also arises – to what extent would a company be expected to check information provided by any person? If companies were to be required to obtain (and verify) all the sorts of information that the AML Regulated Sector (and, no doubt, the enforcement authorities) are sometimes required to do in their investigations, the burden on companies would be unsustainable and the risk of inadvertent non-compliance would increase yet further.

**47.** It would be necessary for any declared beneficial interests to be matched against the legal ownership of given shares. It may be that more than one person might have an interest in the same shares (joint ownership).

**48.** There is an important difference between information currently required to be kept in a company registry and that proposed to be kept for beneficial ownership, in that a person acquiring legal ownership has a natural incentive to ensure registration in order to obtain legal ownership rights and transfer of legal rights requires completion of relevant documentation. The transfer cannot be effective without notice to the company in prescribed form. By contrast, beneficial ownership may be transferred without registration or notice to the company and does not affect third party dealings with the company. In practice, therefore, it may be supposed that levels of accuracy will be lower in this context than in respect of information currently required to be filed.

**49.** If Companies House simply relies upon what it is sent by companies (as, in effect, it normally does) then its register will be no better than that of the company (and, in practice, less reliable due to time lag). If it obtains the information itself, then the accuracy of its register will depend in part on the resources given to it and the degree of due diligence and verification it undertakes.

**Q15.Should companies be required to update beneficial ownership information at fixed intervals or as the information changes?**

**50.** We favour an obligation to update at fixed intervals (for instance, as part of the annual return). Any filing requirement should be on the basis of matters of which the company has actual knowledge. A requirement on the company to make enquiry in advance of making a filing would be administratively burdensome, even if only required at fixed intervals. Clearly, it would not be feasible for a company to have a continuous obligation to make enquiry and update, so that information obtained by it is likely to be stale to some degree at any given time.

**Q16. Should beneficial owners be required to disclose changes in beneficial ownership information proactively to the company?**

**51.** See our response to Q6.

**Q17. What are the appropriate timeframes for notification of changes to the company or Companies House?**

**52.** Notification to the company would need to be in a short timeframe if the record is to be up to date, but note earlier comment on likelihood of the criminal few complying with this versus the honest. For reasons noted above, if there is a time lag in notification to Companies House, the Companies House record will not be definitive and of limited use for enforcement etc.

**Q18. Do you have views on the broad possible costs and benefits of a policy change to the annual return?**

**53.** We await further detail on the proposal before commenting.

**Q19. Should information in the registry be made available publicly? Why? Why not?**

We do not believe that the information on beneficial ownership (whether held by the company or at Companies House or otherwise) should be made public. The driver for the proposal appears to be to enhance information available to the enforcement authorities (through due process) and that objective can be met by the information being kept on a confidential basis. We do not consider that accuracy would be improved through public availability to any significant degree. There is no other objective apparent from the proposal which would justify the information being made public.

**54.** As noted in the paper (para 2.60) there are legitimate reasons for confidentiality, for instance:

- a person may not wish to be visibly associated with a company at risk of failure (but the risk of failure is a necessary risk for entrepreneurship and a vibrant economy)
- investment may be by a family or individual with high privacy and related security requirements. These are often perfectly legitimate, and should be respected, such as avoidance of kidnap risk, or for high profile people wanting to avoid media intrusion.
- disclosure of investment strategies (eg, for private equity investments), particularly for influential investors such as sovereign wealth funds
- maintaining investment from jurisdictions where confidentiality is important
- protection of minors (eg, under trusts).

There is also a risk that including information such as this on a public register would assist criminals to commit identity theft of the beneficial owner or the company.

**55.** We believe that the identity of any beneficial owner, not just residential address, should be confidential. As noted, we have concerns about disclosure being required to be made to the company itself, which would not be fully addressed even if the company keeps some of the information on a private part of the register (as is the case for directors' residential addresses). There is a clear justification for the identity of directors (although not their private addresses) to be availably publicly because directors are legally empowered to manage it and bind it to contracts with third parties. Access to confidential information (whether held by the company or on a central register) should be restricted to law enforcement agencies (and, possibly, the AML Regulated Sector) under due process.

**56.** Even if access to information is restricted to the relevant authorities (eg, HMRC) there would remain concerns regarding transfer of the information to jurisdictions under international agreements where it might be used for illegitimate reasons (for instance, appropriation of assets on racial grounds) and appropriate safeguards would be required.

**57.** While we do not consider the case for 'a right to know who is behind' all companies has been adequately made, and have noted potential disadvantages to the introduction of a public register, there may be a case for exceptions to be made to the general proposition that the information is kept private, for instance where the beneficial owner is a politically exposed person.

**Q20. If not, whether the information should be accessible to regulated entities? Why? Why not?**

**58.** While it would be desirable if this could be done in a controlled way preserving confidentiality, we do not readily see how that could be achieved in a practicable way. See comments on this under Main Points.

**Q21. Should a framework of exemptions be put in place? If yes, which categories of beneficial owners might be included? How might this framework operate?**

**59.** See answers to Q19. If a decision is ultimately made that the information should be publicly available, then we believe that a framework for exemptions would be required, but at this stage, we find it difficult to see why, say, a sovereign wealth fund (or celebrity) should in principle be treated differently (or at least, more favourably in this context) than any other citizen, but easy to see why they would be concerned with public disclosure of their beneficial interests in private companies.

**Q22. What are the broad possible costs and benefits of a policy change to the registers of members?**

**60.** We await further details on these proposals before commenting.

**Q23. Should beneficial ownership information held by the company be made publicly available? How?**

**61.** No, for reasons stated above (Q19). Please also see earlier comments with our concerns about the information being required to be disclosed to the company in the first place.

**Q24. Should any framework of exemptions in relation to information held by the registry also apply to information held by the company?**

**62.** The same principle applies in relation to the company as to Companies House, namely that the information should be kept confidential.

**Q25. What are the costs and benefits of this policy change for companies, beneficial owners, regulated entities and other organisations?**

**63.** The costs are difficult to quantify, but given the potentially large number of companies affected, even a small cost would result in a material additional burden on enterprise as a whole. There may be indirect costs, such as reduced investment in UK companies should the policy be implemented in a way which reduces confidentiality more than strictly necessary to meet regulatory objectives. Set against this, the benefits seem uncertain and have not been fully substantiated in the paper. As noted in answer to Q26 below, the proposals may in some cases accelerate the gathering of information by law enforcement agencies, but the accuracy and completeness of the information will have inherent limitations, so that in itself does not seem compelling.

**64.** There may be a reduction in customer due diligence work required by the AML Regulated Sector. However, this may be less material than might be supposed. In particular, as noted in Main Points above, the sector will continue to have independent duties to obtain and verify information and if the information required to be kept by companies/Companies House is periodic only (eg, updated annually), it is unlikely to suffice for all purposes.

**Q26.In particular, do you have views on:**

- **The link between the proposals and crime reduction**
- **The link between the proposals and the incentives to invest**
- **The numbers of companies affected**
- **The amount of time it would take to obtain, collate and report data on beneficial ownership – for both simple and more complex ownership structures**
- **Costs to the regulated entities**
- **The changes which regulated entities might make to their actions**
- **The number of beneficial owners**
- **The degree of publicity and guidance required**
- **Likely compliance**
- **Potential unintended consequences**
- **The varying impacts of the alternate options.**

**65.** We fully support the objective of crime reduction but are concerned that this proposal may impose too great a burden on a large number of companies in an attempt to address the concerns arising in a minority of cases (with limited chance of success). We would, therefore, advocate consideration of alternative ways to fill any gaps in the UK implementation of the money laundering regulations (and other international commitments) as outlined in our Main Points above. The proposals affect all un-listed private companies, numbering, according to the paper, well over two million so that, even if the cost for each company were to be low, the overall cost to UK corporates in aggregate might be very material. It seems extremely unlikely that criminals behind companies will comply but very likely that there will be a high incidence of inadvertent non-compliance by other essentially honest individuals. Where there is divergent beneficial and legal ownership, which has been appropriately disclosed and registered, the authorities may be able to speed up their enquiries, but beyond this, the envisaged benefits have not yet been substantiated in the paper. In cases of serious money laundering by beneficial owners, it seems unlikely that relevant disclosures would be made (whether due to complicity or otherwise of the company and its directors) and the current regime involving the AML Regulated Sector appears to be best designed to tackle transfers of cash or other assets involved.

**66.** We do not believe that the proposals will increase investment activity and investment from some jurisdictions where confidentiality is important may be threatened if confidentiality is not assured.

**67.** We have sought to identify in this paper areas where we think that burdens might be disproportionate to likely benefits and a number of alternative approaches.

### Bearer shares

**Q27. Should the issue of new bearer shares be prohibited?**

**68.** We are not aware of any generally applicable reasons to retain a regime for bearer shares, although we understand that they may be used as part of a Scheme of Arrangement for shares to be traded on US markets, and they should not, therefore, be abolished until this use has been investigated and alternative mechanisms put in place (if necessary). We note, however, that this would not prevent other mechanisms being used privately in relation to interests in shares, for instance derivatives (which may or may not involve a change in beneficial ownership, depending upon definition).

**Q28. Should individuals be given a set period of time to convert existing bearer shares to ordinary registered shares? How long?**

**69.** Yes, a reasonable period should be allowed to permit individuals (and relevant companies) to make any necessary adjustments (say 2 years).

**Q29. Are there additional or other measures that we might take?**

**70.** See above on other mechanisms.

**Q30. What are the costs and benefits of this policy change.**

**71.** We do not know, but subject to the point raised above on Schemes of arrangement, we are not aware of any obvious benefit and the costs for the shareholders and company would appear to be one-off costs.

**Nominee directors**

**Q31. Should we more widely communicate the application of directors' statutory duties to all company directors and – alternatively or in addition – require nominee directors to disclose their nominee status and the name of the beneficial owner on whose behalf they have been appointed? Why? Why not? If yes, should that disclosure be made available on the public record?**

**72.** We support the approach outlined under Q32 rather than initiatives under this Question.

**73.** Given that there is no established meaning of the term 'nominee director', it does not seem appropriate that any attempt should be made to disclose by reference to it. The practices which are considered undesirable (and in some cases already unlawful) can be addressed by other means (as outlined in Q32).

**Q32. Should we make it an offence for a director to legally divest themselves of the power to run the company. Why? Why not?**

**74.** Yes, although we do not believe that a director can lawfully do so at the moment and comply with his duties (eg, under section 172 of the Companies Act 2006) so that this would only alter sanctions available.

**Q33. Whether there are additional or other measures that we might take?**

**75.** There may be merit in reconsidering the shadow director regime, which currently applies where the directors (ie, the board as a whole) are accustomed to act at the direction or instruction of a person (the shadow director) in particular whether it might be made to apply to persons directing or instructing individual directors. This would, however, require careful consideration to avoid unintended consequences (eg, in the context of joint venture companies where an exemption along the lines of that given to parent companies might be appropriate, but difficult to draft).

**Q34. The costs and benefits of this policy change.**

**76.** The cost should not be material given that we believe the behaviour is unlawful anyhow.

**Corporate directors**

**Q35. Whether we should prohibit UK companies from appointing corporate directors. Why? Why not?**

**77.** We note that following responses to the 2002 White Paper, the government concluded in 2005 that the case for abolition of corporate directors was not made. However every company is now required to have at least one natural director and we understand that use of corporate directors by incorporation agents is not widespread (as it used to be) so it may be that the position has since changed and reform would be appropriate.

**Q36. If yes, what transitional arrangements might be appropriate?**

**78.** If the change is to be made, we think that one year for compliance should suffice.

**Q37. Whether there are additional or other measures that we might take?**

**79.** We have no suggestions.

**Q38. The costs and benefits of this policy change.**

**80.** We do not comment on this.

**Part B**

**81.** In the Introduction to this section, there are references to directors acting 'fairly' and to tackling 'unacceptable conduct'. While we would not disagree in layman's terms, these are subjective terms and legal duties and responsibilities of directors generally need to be set by more objective criteria or the resulting uncertainty may discourage appropriately qualified individuals from becoming directors where risks arise from this.

**Clarifying the responsibilities of directors**

**Q39. The merits of strengthening responsibilities of banking directors by amending the directors' duties in the CA06 to create a primary duty to promote financial stability over the interests of shareholders. This should be considered in the context of the banking regulation reforms the Government has already committed to and the further economy-wide measures set out in the rest of this paper.**

**82.** We do not see any merit in this proposal. Safety and soundness of financial institutions is the remit of banking regulation and company law should not be used to remedy any shortcoming in banking regulation (itself significantly reformed since the crisis). Directors' duties under company law would, in any case, be an inadequate remedy in the context of bank failure. We agree, as set out in our answers to subsequent questions, that there are also other steps that can be taken to address the underlying concern.

**83.** A director has a duty to promote the success of the company for the benefit of members, but this does not require or allow business-specific regulation to be ignored. In the context of a banking business, a director would need to have regard to banking regulation. Furthermore, s172 already explicitly requires directors to have regard to the likely consequences of any decision in the long-term, and it is hard to see how it could be in the members' long-term interest for a bank to be run in a way that is unsafe and unsound.

**84.** The proposal would make safety/soundness take precedence over the interests of members so that, where shareholder interests might be different (eg, where there would otherwise be a choice to be made between distributing or retaining funds not required under banking regulation) those interests would effectively be disregarded. Banks would become very unattractive to investors.

**85.** Company law regulates the company as a vehicle, not the business that any given company chooses to carry on. Regulating types of business is the function of regulation and, in the context of banking, regulation sets a level (or threshold) of safety/soundness that a bank must meet. Complete safety and soundless is not guaranteed by this, but, in effect, regulation determines the residual risk that the economy will bear. Directors are then able to operate the business in accordance with company law principles and in compliance with regulation. We can see no reason of principle why shareholders' interests should be made more remote than banking regulation already requires. We can see only adverse consequences, in particular: lesser shareholders returns than banking regulation would facilitate (ultimately potentially zero returns) and hence more difficulty (ultimately, impossibility) of raising capital; and further deleveraging by banks (as the only other way, other than cutting shareholders' returns, of

being safe and sound above and beyond all other considerations). We would also note that directors may be personally bound by applicable sector regulation and banking regulators have extensive powers of enforcement.

**86.** If taken at face value, the proposal would result in banking regulation being replaced with eight words: 'promote the safety and soundness of the bank'. This is self-evidently unrealistic and further definition would be required. It is difficult to see how that definition would differ from the elements of banking regulation designed to address the issue, which would result in unwarranted and, effectively, unworkable duplication.

**87.** Finally, if any shortcomings in banking regulation were to be rectified, we do not believe that a duty imported into company law, however worded (eg, even if primacy were taken out) could have any good effect, because a duty of the type proposed would be satisfied either by continued compliance with regulation (rendering the duty pointless) or by going beyond banking regulation, which is either unjustifiable or a pointer to the need for action on banking regulation itself. This response is not concerned with the details of banking regulation, but suffice it to say that it has changed radically since the financial crisis. Similar considerations would apply in respect of other sectors.

### Allowing sectoral regulators to disqualify

**Q40. Whether, in certain circumstances, directors barred or prohibited from senior positions in key sectors should be considered for disqualification from acting as directors of any CA06 company?**

**88.** So long as appropriate safeguards are in place, we believe it would be appropriate for the relevant regulators to be able to refer to the Court for disqualification order that might extend beyond the relevant sector. The wrong doing involved should merit the remedy, for instance, involve criminal activity in connection with the operation of a company sufficiently serious to render the person unfit to run any company. As regards giving of undertakings, we understand that the director would have the option to go to court rather than give undertakings. However, we have reservations about the regulator/ Secretary of State having power to accept undertakings in this context, because the regulator will be in a position of considerable influence over the individual and may seek to exercise its power for purposes of publicity or the like without necessarily appreciating the likely effect on the individual as regards other sectors (in relation to which the regulator may have no particular knowledge or expertise).

**Q41. Which sectoral regulators should have the ability to make an application to the Court for a disqualification order, or to accept a disqualification undertaking from a director?**

**89.** We understand that this proposal arises from the banking crisis and resulting public concern regarding sanctions imposed on those involved but it is not clear to us that the proposal should be extended to sectors other than the banking sector.

**Q42. The potential costs and benefits of this proposal.**

**90.** It would be necessary to establish a pattern of persons being barred from one sector going on to become directors of a company in another sector and committing further wrongdoing meriting disqualification as a director in order for this proposal to be merited. We are not aware of the statistics in this respect.

### Factors to be taken into account

**Q43. Whether Schedule 1 to the CDDA should be amended to provide that any breach of sectoral regulations is a matter of unfitness that may be taken into account by the court in disqualification proceedings?**

**91.** Yes, we believe that relevant information should be taken into account.

**Q44. Whether Schedule 1 to the CDDA should be amended to provide that 'wider social impact' is a matter to be taken into account by the courts in disqualification proceedings?**

**92.** No – this is a draconian power which can stigmatise an individual and directors should only be exposed to sanction where they are in breach of clearly defined obligations. This is another example of subjective requirements as noted in our introductory comment to Part B.

**Q45. How wider social impact should be defined and whether a materiality test should be applied?**

**93.** N/A

**Q46. Whether, where unfitness meriting disqualification has been found against a director of a company that dealt with high volume deposits or otherwise vulnerable creditors, two tariffs of disqualification should be handed down (or agreed by way of undertaking):**

- **A tariff with respect to acting in the management of all companies; and**
- **An increased tariff with respect to acting in the management of any company dealing with high volume deposits or otherwise vulnerable creditors (or a company engaged in a business similar to that in relation to which he had been disqualified).**

**94.** We do not believe that prescribing a tariff in relation to particular sectors such as this in this sort of detail is appropriate. Case law has already effectively established guidance for the courts and they are well able to assess the seriousness of any wrongdoing and apply appropriate remedies without this. See also our answer to Q47 regarding a sectoral approach more generally.

**Q47. Whether Schedule 1 to the CDDA should be amended to provide that failure to pay particular regard to the protection of deposits, pre-payments or otherwise vulnerable creditors once a company has become insolvent is a matter to be taken into account by the court when deciding whether a director is unfit and should be disqualified (or by the Secretary of State in deciding whether to accept a disqualification undertaking)?**

**95.** Schedule 1 already contains a provision dealing with the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part) and unless this provision is considered to be ineffective, it seems to cover deposit taking. The proposal would effectively impose additional duties on directors by sector, which we do not favour as noted above. We believe that the correct approach would be businesses whose core activity involves the acceptance of deposits or pre-payments to be regulated, for instance, by imposing client money rules or the like on them. A breach of those regulations would then be dealt with as proposed above.

**Q48. What account the court (and the Secretary of State when deciding whether to take action) should take of the track record of the director (including the number of failures a director has been involved in) when deciding whether or not to disqualify an individual and for how long?**

**96.** We believe that the Court should have wide discretion and that seeking to impose numerical guidelines or requirements would be unhelpful. If numerical requirements were to be imposed it would be likely to penalise investors in start-up businesses or private equity houses, and thus discourage funding for entrepreneurs.

**Q49. Whether there should be a certain number of failures beyond which the presumption is that a director is unfit and should be disqualified. If so, what should that number be?**

**97.** No, as reasons can vary from failure to file returns to serious criminal acts and a Court would need to weigh up appropriately. Any number is likely to be arbitrary and there will always be cases which fall outside of any framework set out in law. The Court is best placed to judge if the circumstances of a case merit disqualification. There will also be turnaround specialists

who are appointed as a directors of failing companies which may fail despite their best efforts – such individuals would inevitably fall foul of any limit set.

### Improving financial redress

**Q50. How frequently the possibility of bringing wrongful and fraudulent trading claims arise, are pursued and what value the existing civil remedies for wrongful and fraudulent trading provide?**

**98.** We do not believe that claims are pursued frequently or that large sums are generally involved (whether because of lack of available assets or otherwise). Under the current regime, the Courts are required to assess what a director 'knew or should have known' at the relevant time, without the benefit of hindsight, which can be difficult to establish and the costs of investigating and bringing claims can be high. We would note that, while implementation of the Jackson reforms on conditional fee arrangements and after-the-event-insurance have been delayed until 2015 for insolvency cases, they will, when in force, adversely affect the ability of creditor redress in insolvency cases and the possibility of retaining this exemption could usefully be considered along with the proposals considered under Q51 below.

**Q51. Whether, if liquidators were able to sell or assign wrongful and fraudulent trading actions, more actions would be taken? If so, how many more?**

**99.** We think it unlikely that the ability to assign claims would make a material difference as the problems in bringing claims and enforcement would not be affected. Depending upon how fee structures develop and the extent to which liquidators/creditors consider all alternatives open to them, it may also be that amounts recovered for creditors would be reduced because third parties would only buy claims in the expectation of making a profit.

**100.** We would also question why the legislation as enacted does not allow for the assignment of claims. If there was a valid public policy reason why the ability to take such action was restricted to the liquidator, what has changed? The consultation paper doesn't offer any explanation for this proposed change in approach.

**Q52. To what extent creditors would benefit from this proposal?**

**101.** We do not believe that creditors would benefit materially as there will only be a limited number of cases where the assessment of a liquidator as to whether or not a claim is worth pursuing (or what the amount recovered might be) would differ from that of third parties motivated by profit. While it remains to be seen how any market would develop, given the nature of wrongful and fraudulent trading cases, it is likely that the sale price offered by any potential purchaser would be low, offering little financial benefit to creditors. Creditors may feel comforted that the director is being pursued for something which carries a personal liability, but may feel less comfort if the proceeds of the action are received by a commercial funder (see our comments at Q55 below).

**Q53. What practical difficulties might prevent third parties pursuing claims and how these might be overcome?**

**102.** The same difficulties as arise for liquidators in pursuing claims. It is not only the difficulties in obtaining funding to pursue a court case that prevents a liquidator pursuing claims. Establishing that there was wrongful or fraudulent trading to the extent that court action may be successful will involve a detailed, often forensic investigation – the investigation in itself may be costly and time consuming. Also, a purchaser may face greater difficulties in establishing a case as they would not have the statutory powers of a liquidator to question third parties and recover documents.

**Q54. Whether safeguards would need to be introduced to prevent certain parties acquiring such a claim? If so, who should they apply to and what form they should take?**

**103.** We do believe that there should be safeguards. There will be those who would wish to purchase a claim to effectively kill the action and protect the director from liability There are also those who would seek to purchase a claim to harass the director because of a grudge. There is also an issue of natural justice – a director of limited means faced with a well-funded action may choose to settle even if there is little merit in the case. It may be difficult to frame appropriate and effective safeguards in these respects in regulation. For instance, in the case of assignments to protect directors, those connected with the director could hide behind a limited company or a family friend who would have no apparent connection with the director.

**Q55. Whether this proposal would improve confidence in the insolvency regime?**

**104.** We do not believe that these changes would improve confidence to any material degree and there is a risk that where third parties do profit from assigned claims, this will (rightly or wrongly) be perceived as being at the expense of creditors. The paper does not appear to consider the effect these proposals might have on the willingness of individuals to act as directors. While liability may not arise absent wrongful or fraudulent trading, the prospect of a market developing where the commodity is the right to sue directors may act as a broader deterrent to acting as director, particularly of challenged companies.

**105.** We consider that confidence would be more likely to be improved if the Insolvency Service were resourced adequately to take disqualification action in every case where it appears justified.

**Q56. The benefits of giving courts the power to make compensatory awards against directors?**

**Q57. The potential costs and drawbacks of this proposal?**

**Q58. Who should receive any monies recovered by action: should it be creditors generally or left to the court to determine?**

**106.** Q56-58. We would have no objection to the Court having power to make a compensation order in favour of creditors where a director has been found guilty of fraudulent or wrongful trading in conjunction with being disqualified. This would avoid duplication of proceedings in relation to matters already before the Court and we assume that the same rights of defence and evidence would apply as currently apply for claims by liquidators. However, the proposals appear to extend beyond this, although it is unclear exactly what is proposed. If directors are potentially to become personally liable in circumstances other than those already provided for in law, this could be a very significant change in law potentially undermining the concept of limited liability which has been so beneficial to enterprise and this would merit a separate consultation exercise. In particular, if compensation is to be paid to anyone other than the company's creditors, the basis on which compensation would be made would need to be considered carefully.

**107.** The consultation document does not consider the director's ability to pay. Any change would simply be window dressing if the majority of directors would be unable to contribute to a compensation order. As the Insolvency Service recovers costs from the directors in disqualification proceedings, their success or otherwise could be an indicator of the potential for recoveries.

**Q59. Whether the IS (acting on behalf of the Secretary of State) should be able to request and agree a compensation award from a director when it accepts an undertaking from the director not to act in the management of a company for a certain number of years?**

**108.** We think this should be a matter for the courts. We are concerned that this sort of arrangement might result in undue pressure on less aware directors with limited assets, rather

than result in swifter justice against those with material assets (who might be in a better position to fight a case rather than give undertakings).

**Q60. Whether this proposal would improve confidence in the insolvency regime?**

**109.** We do not believe that this would make a material difference, because in high value cases where directors have material assets available, liquidators might be expected to pursue claims already (and directors might be expected to contest). As noted above, creditors may derive some comfort initially that a director is to lose financially, as they have lost, but the sums received would have to be high for the creditors to derive any real financial benefit.

**Time limit**

**Q61. Whether the period within which disqualification proceedings under section 6 of the CDDA must be instituted should be extended beyond two years?**

**Q62. If yes, should that period be five years, some other period, or no limit at all?**

**Q63. How many directors are likely to be affected?**

**110.** Q61-63. The consultation paper states that the current time period does not cause any significant problems. We think that extending the period generally would not be appropriate and that those involved should be incentivised to pursue claims with all diligence in the interests of natural justice. We would expect those involved to know early in the process if there are factors that might lead to more time being required. We would therefore suggest that the period could be extended on application to court made within the two year period for an extension, but that only one such application would be permitted and that the total time allowed should never exceed a fixed time (say, five years). The Court would need to take all circumstances into account in deciding whether to grant an extension, including the grounds on which disqualification is sought. It should be noted that an administration is limited to one year, without extension, and that any need to extend so that proceedings can be taken by the Insolvency Service will need to be carefully considered as the costs involved (and the costs of responding to IS requests) currently fall largely on the creditors.

**Educating directors**

**Q64. Whether, if some form of director education were to be introduced, it would increase trust in the enforcement regime?**

**Q65. What form the training should take and who should provide it?**

**Q66. What would be the likely cost of such training?**

**Q67. Whether successfully completing any such training should enable a reduced period of disqualification; or should be a pre-condition for any disqualified director wishing to seek leave of the court to run a company whilst disqualified?**

**Q68. Whether there would be value in offering such training to all directors of failed companies – irrespective of whether they were disqualified - having regard to the fact that the director would need to cover the cost?**

**111.** Q64-68. We doubt that requiring directors to undertake training would materially increase trust of directors generally. The high profile cases of management failure in, for instance, the banking sector, involved individuals who will have undertaking training within their sector. Other high profile cases have involved criminals whose behaviour would not have been altered by training. That said, we think that there is merit in requiring training for a director who has been disqualified or was a director of a failed company and who wishes to become director again, particularly if in the context of a reduction of the period of disqualification. Presumably, training could be made available by accredited institutions in the form of modules covering the main areas of law that lead to disqualification. As regards failed companies, there would need to be a means of tracking directors who have been responsible for the failure of a company. In general, we believe that the cheapest form of education (remote web based with no personal interaction) is likely to be the least effective. The costs of effective education are likely to be

material in the context of an average director of a small company and we think that, therefore, any requirement for education should be limited to directors who have been disqualified (or would be disqualified, absent an undertaking to undertake training). However, it is unclear how many disqualified directors actually want to be a director again – is this data captured anywhere? If disqualified directors generally exit the market, then offering training would be of limited merit.

### Overseas restrictions

**Q69. Whether regulations should be made using the powers in Part 40 of the CA06 to prevent persons who are subject to foreign restrictions (which fetter their freedoms to act in connection with the affairs of a company) being able to be directors or act in the management of companies in the UK?**

**112.** Yes

**Q70. If yes, should the foreign restrictions be made to apply automatically in the UK, or should they require the Secretary of State to make an application to a court?**

**113.** A court application should be required, as foreign restrictions may not be equivalent to UK restrictions and a check would be required to guard against disproportionate application

**Q71. If not, should a person subject to foreign restrictions be obliged to notify the Registrar of Companies if they act in the promotion, formation or management of a company in the UK?**

**114.** We query whether foreign individuals would necessarily make the required disclosures in practice or even be aware that such a disclosure is necessary.

**Q72. Whether the Secretary of State should have the power to bring disqualification proceedings against a person on the sole basis that that person has been convicted of a criminal offence overseas in connection with management of a company or business overseas?**

**115.** Yes, so long as the criminal offence was in connection with the management of a company or business and there is sufficient reason to believe that there would be misconduct in the UK (to be determined by the Court).

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