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Your ref:

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Dear Anne

## **REGISTRATION OF CHARGES CREATED BY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS**

The ICAEW is pleased to respond to your request for comments on *the Registration of Charges Created by Companies and Limited Liability Partnerships*.

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

REGISTRATION OF CHARGES CREATED BY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS PROPOSALS TO AMEND THE CURRENT SCHEME AND RELATING TO SPECIALIST REGISTERS

**Memorandum of comment submitted in June by the ICAEW, in response to Department for Business Innovation & Skills consultation paper Registration of Charges created by companies and limited liability partnerships proposals to amend the current scheme and relating to specialist registers published in March 2010**

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## INTRODUCTION

1. The ICAEW welcomes the opportunity to comment on the consultation paper Registration of charges created by companies and limited liability partnerships proposals to amend the current scheme and relating to specialist registers published by The Department for Business, Innovation and Skills.

## WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, we provide leadership and practical support to over 134,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. We are a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. We ensure these skills are constantly developed, recognised and valued.

## GENERAL COMMENTS

4. We set out below our general comments on the main areas addressed in the consultation paper, with our more specific comments on the questions and proposals set out further below.
5. In relation to the charges that should be registrable, we agree with paragraph 22 of the consultation document, which states that all charges should be registrable except for fixed charges over the following assets:
  - shares and equivalent securities;
  - bonds;
  - debt instruments that are negotiable on capital markets;
  - securities which are normally dealt in and which give the right to acquire any shares, equivalent securities or bonds, including title transfer financial collateral arrangements.

In particular, we believe that charges granted over expected future income from major projects should be registrable.

6. We also are supportive of the proposal to move towards electronic registration of charges, including a removal of the requirement to submit original documents or certified copies. Regarding safeguards, we consider that the offence of knowingly or recklessly delivering to Companies House a document that is misleading, false or deceptive in a material particular would provide protection from malicious registration, and we would also support the introduction of other safeguards such as:
  - a requirement that the filer be registered;
  - a verification statement being sent to the chargor;
  - the Registrar having power to remove data if satisfied that the data is frivolous or vexatious.

However, we would not support the introduction of a restriction that only the company creating the charge may register it.

7. Regarding specialist registries, we believe it is fundamental that those inspecting a company's record at Companies House be able to discover whether it has granted any registrable charges, ie we believe that Companies House should constitute a "one stop shop" for registration, with all charges registered there including those that are also registrable with other specialist registries. Where charges are also registrable with a specialist registry, we would support automatic duplicate registration (ie one registration resulting in entries in both relevant registries), which would simplify registration requirements with charges only needing to be registered once. For example, once electronic conveyancing is introduced at the Land Registry, we would support the proposal for registration at the Land Registry to be treated as meeting the requirements of Part 25 of the Companies Act 2006 provided the Land Registry automatically updates the register at Companies House at the end of each day, as this would simplify registration requirements whilst retaining Companies House as the comprehensive registry.
8. We also support the proposal that the requirement for a company to maintain a register of all the charges it has created should be abolished. However, we strongly reject the proposal to restrict the right to inspect underlying instruments creating charges to only members and creditors, as other parties such as insolvency practitioners need access to this underlying documentation (which is vital in assessing whether an insolvency practitioner should accept an appointment before the appointment is made) and prospective creditors may also need to see this underlying documentation.

## **RESPONSES TO SPECIFIC QUESTIONS AND PROPOSALS**

### **The Requirement to Register Certain Charges**

**Q1.A (p13) Do you consider that the same rules should apply to all UK companies?**

9. Yes, we consider all UK companies should have the same rules.

**Proposal A (p14): Any charge created by a UK company should be registrable unless specifically exempted.**

10. We support this proposal.

**Proposal B (p15): The only exclusion from the requirement to register charges created by a UK company should be Lloyd's trust deeds other than a Lloyd's deposit trust deed or a Lloyd's security and trust deed.**

11. We have no comment on Lloyd's trust deeds but please see our comments to Q1.B.

**Q1.B (p15): Under the proposal only to exclude charge over Lloyd's trust deeds (Proposal B), what charges that are not currently registrable would be made registrable?**

12. We consider that these charges should continue to be excluded due to the practicalities of the free movement of the financial markets - there might well be thousands of these in any week, and the registration of the charge and its satisfaction might (i) overwhelm Companies House and (ii) might have unwound before the 21 day registration period (eg overnight repo).

**Q1.C (p15) Do you consider that the requirement to register at Companies House should not apply to floating charges over financial collateral?**

13. Yes (see also Q1.B above).

**Q1.D (p16) Do you consider that there should be a requirement that the crystallisation of a floating charge be registered within 21 days of that event? If so, on whom should the requirement fall and what should be the sanction?**

14. We cannot see the benefit of introducing such a requirement. From an insolvency perspective, the priority of payment is determined by what the charge was as created.

**Proposal C (p17): The requirement to register charges existing on property acquired should be abolished.**

15. We believe this requirement is rarely applicable in practice. However, we are cautious about this proposal because, even if this requirement would arise in just a few cases, one would not know of the charge on insolvency and that would have ramifications in those few cases.

**Q1.E (p19) Do you consider that the 21-day time limit for registration should be abolished? Why?**

16. So long as chargees continue to be permitted to register charges, we would support the abolition of the 21 day time limit. The existing provisions in the Insolvency Act 1986 (“**IA86**”) regarding preference, transactions at under value, transactions defrauding creditors and voidability of floating charges should provide sufficient protection against any connected person seeking to take advantage by registration of security immediately before insolvency.

**Q1.F (P19) If the 21-day time limit for registration were abolished, do you consider there would need to be any safeguards?**

17. As mentioned in Q1.E above, in our view it is vital that chargees continue to be able to register charges if the 21 day limit is to be abolished.

**Q1.G (p19) In practice, do third parties suffer from charges being valid because a conclusive certificate has been issued in circumstances when in fact the requirements for registration were not met within 21 days of the creation of the charge?**

18. We have not seen this in practice.

**Proposal D (p20): There should be a definition of date of creation for the purposes of the timelimit for registration of a charge.**

- For a charge created under the law of England, it should be:
  - the date of the chargor’s signature in the case of a charge created by an instrument in writing; and
  - the date when the chargor entered into an enforceable agreement in any other case.
- For a charge created under the law of Scotland, it should be:
  - the date of registration in the Scottish Register of Floating Charges in the case of a floating charge (or, if these provisions are not in force, the date the instrument is executed by the chargor); and
  - in any other case, when the chargee acquires a real right.

19. There should be a clear definition which would need to take account of the requirement for the chargee to sign security in accordance with the Law of Property (Miscellaneous Provisions) Act 1989 and for a deed to be delivered (or released from any escrow arrangement) in addition to being executed.

**Proposal E (p21): The sanction of invalidity should be modified so that an unregistered charge is ineffective against a liquidator or administrator on insolvency and against execution creditors (under Scots law, creditors who have executed diligence)**

20. We would only be able to support this proposal if the chargee continues to be able to register the charge. We note that creating a charge within a short time of insolvency may well be invalid under the preference, transaction at undervalue, transactions defrauding creditors and voidability of floating charges provisions of IA86.

**Q1.H (p21) Is it necessary for the Act to provide for the situation where insolvency proceedings are begun 21 days or less after the creation of a charge?**

21. Yes, but this may be covered already by IA86 and should take that into account.

**Q1.I (p23) Should the buyer of property subject to an unregistered charge take free of the charge unless they know of it?**

22. If the chargor were to be the only person able to register the charge, then our answer would be NO. If the chargee continues to be able to register, then YES. As we have mentioned above, we believe the chargee should continue to be able to register.

**Proposal F (p24):**

- a. A person taking a charge over a company's property should be taken to have notice of any previous charge registered at the time the charge is created.
- b. No other person should be taken to have notice of a registered charge.

23. We consider that all people should be taken to have notice of a registered charge. Access to Companies House is free. Counterparties should be expected to take some sensible steps to protect themselves.

## **Procedures for Registering Charges**

**Proposal G (p29): The required particulars should be:**

- (a) The registered name and registration number of the company that created the charge;
- (b) the date of the creation of the charge and, in the case of a Scottish floating charge, the date of registration of any advance notice;
- (c) Whether there is an instrument creating or evidencing the charge. If not, how the charge was created (eg by registration in the Scottish Register of Floating Charges); The name and address of the person entitled to the charge or his agent, with it being disclosed if:
  - i. an agent for the chargee; or
  - ii. a trustee for a group of lenders;
- (d) the classes of property charged, say land; ships or aircrafts; other corporeal property; book debts; goodwill or any intellectual property;
- (e) whether the property charged includes after-acquired property and, if so whether it is over all present and after-acquired property;
- (f) in the case of a floating charge, whether there is:
  - i. an automatic crystallisation clause;
  - ii. a negative pledge.

24. The particulars would also need to specify whether the charges were stated to be fixed or floating (on the face of the document). There would also need to be specific details of assets eg property addresses or asset numbers otherwise the disclosure of a charge over land without any further information would not be useful.

**Q2.A (p29) Do you consider that all the proposed particulars (ie Proposal G (a)-(g)) are essential information about a company that should be available from Companies House? Is there any other information you consider should be required?**

25. See Proposal G above.

**Proposal H (p31) Registration of a charge should only prevent its invalidity for the classes of property included in both the brief particulars and the instrument creating the charge (if any).**

26. This will make the "brief" particulars quite lengthy, and could give rise to arguments as to how detailed they have to be. In addition, as indicated in Proposal G, if the registration is done solely on a tick-box basis, this will not provide sufficient information on the assets actually charged by the document.

**Proposal I (p31) Companies House should issue a certificate that is conclusive evidence of**

- the identity of the charger;
- the date of registration of the charge whose brief particulars are on the register;
- that the charge was registered within 21 days of its date of creation;
- the class(es) of charged property.

27. We agree the certificate should be conclusive.

**Q2.B (p31) Would the conclusive certificate still be needed for any purpose other than registration of land if the information on the public record were sufficient evidence for the courts of the facts in the conclusive certificate?**

28. We have not come across this being an issue other than in relation to land.

**Q2.C (p31) What would be the impact on chargees of land and those dealing with them if registration of a legal charge at the Land Registry often incorporated a note that the charge may not have been properly registered under the Companies Act?**

29. It would increase the time and costs on the sale of property by receivers, administrators and liquidators as it would throw into question their right to sell.

**Q2.D (p31) Apart from the consequences for the Land Register, what would be the effects of the proposed changes relating to conclusive evidence?**

30. See Q2.B above.

**Q2.E (p32) Do you consider there is a better way of preventing malicious registration than requiring that the charge to be registered by the chargor?**

31. We agree with the proposed safeguards in paragraph 75, but not with the restriction on chargee registration in paragraph 76.

**Q2.F (p32) Does the requirement to deliver the charge document reduce the risk of malicious registration of a non-existent charge?**

32. We do not see how a requirement for delivery of an original or a certified copy of the charged document reduces the risk of malicious registration. This can easily be forged by someone determined to do this.

**Q2.G (p32) What would be the advantages of electronic registration of charges? In particular, how would the cost of registration be affected?**

33. We would strongly support electronic registration as there would be a much shorter invisibility period, less chance of missing the time limit, and no risk of the document being lost en-route or

at Companies House. We also imagine that the costs relating to registration would be much cheaper.

**Q2.H (p33)** If electronic registration of charges were possible, should the time limit for registration be reduced to 14 days?

34. We would have no objections to this proposal.

**Proposal J (p34)**

- a. Abolition of the requirement for the instrument (or a certified copy) to be delivered to the register
- b. Introduction of a requirement that only the company that created a charge may register it
- c. If the charge is not registered within 21 days of its creation, it should be repayable on demand
- d. The civil liability for the accuracy of the particulars should be with the chargor.

35. (a) YES (b) NO – see Q2.E (c) YES (d) YES.

**Alternative Proposal J**

- a. Either the instrument creating the charge or a certified copy should be required to be delivered to Companies House for registration of the charge – which is filed being the decision of the person filing
- b. Companies House should check the instrument (or certified copy) to ensure that the name of the chargor is the same as that in the particulars filed. The instrument should then be returned to the person who filed the particulars
- c. The civil liability for the accuracy of the filed particulars, including the date of creation and the class(es) of property charge, should lie with the chargee at the time of the creation of the charge.
- d. The criminal sanction for failure to register a charge should be repealed. (73-78)

36. (a) We do not see the benefit of doing this, unless a copy of the document is retained and filed on the public record at Companies House (b) N/A based on (a) (c) Yes, if this proposal is adopted, or joint liability for it with chargor (d) Yes

**Q2.I (p33)** Under the alternative to Proposal J, should it be possible to deliver an electronic PDF copy of the charging document instead of the original or a certified copy? Or would this bring a significant risk of fraud.

37. This would have the advantages indicated at Q2.H and we do not see that the risk of fraud is increased. As we note at Q2.F, if someone is determined to commit fraud, they can just as easily produce an original document or a certified copy that appears on its face to be genuine.

**Proposal K (p35)** There should be provision so that in the event of a late registration as directed by a court, the conclusive certificate is not issued until satisfaction of any timing condition provided by the court.

38. Yes.

**Proposal L (p36)** There should be provision for:

- i The chargee voluntarily to file changes relating to the person entitled to the charge
- ii The chargor to be required to file the addition of a negative pledge.



39. We can see the benefit of these provisions to persons inspecting the record at companies House but this would have no impact on the position on insolvency.

**Proposal M (p37)** There should be provision for a memorandum of satisfaction in whole or in part to be filed by the chargee. On satisfaction of the terms of the charge, the charger should have the right to demand that the chargee files a memorandum of satisfaction. The chargee would be required either to make the appropriate filing within 15 days of the chargor's demand or to commence court proceedings. In the event that neither the chargee has neither made the filing nor obtained a court order has been obtained by the end of 90 days (or such longer period as the court may direct), then the charger can make the filing.

40. We would support this proposal wholeheartedly.

### **Public access to information about companies' charges**

**Q3.A (p38)** What use do you make of information about company charges held at Companies House?

41. We invariably make searches as a starting point on all cases and during the progress of a matter.

**Q3.B (p38)** How often do you access information about company charges:

- through Companies House Information Centres?
- Through copies ordered from Companies House Contact Centre;
- Online through WebCheck,
- Online through the subscription service, CompaniesHouseDirect
- Using the Companies House DVD ROM Directory;
- Through a bulk contract
- In the statutory 'Register of Charges'

42. The normal access would be through a bulk contract or Companies House Direct.

**Proposal N (p39)** The requirement for Companies House to maintain a "Register of Charges" for each company should be revised so that the particulars entered are the filed particulars of each charge.

43. This would provide a clear view of the charge particulars and we would support this.

**Q3.C (p39)**

- i. How often do you inspect a company's own register of its charges?
- ii. If you represent a company, how often has someone sought to inspect your register of charges?
- iii. How would you be affected by abolition of the requirement for a company to keep a register of its charges?

44. (i) On insolvency cases this is always done but it is rarely any more useful than Companies House. (ii) As far as we are aware, this right is rarely (if ever) exercised. (iii) The abolition of the requirement would have no affect on us and we would support this proposal.

**Q3.D (p39)**

- i. How often do you inspect the instruments creating charges of a company of which you are not a member or creditor?
- ii. If you represent a company, how often has someone who is not a member or creditor of the company sought to inspect an instrument creating a charge?

- iii. **How would you be affected by abolition of the right for anyone other a member or creditor to inspect a company's instruments creating charges?**

45. (i) On insolvency cases this is always done because it provides more information than Companies House. It is also vital assessing whether an insolvency practitioner should accept an appointment before the appointment is made. (ii) We are not aware of how often this right is exercised, other than by insolvency practitioners and restructuring professionals. (iii) We believe the right to inspect underlying instruments creating charges is very important for insolvency practitioners, and also to others such as potential creditors and their professional advisors, such as accountants and lawyers.

**Proposal O (p40) The requirement for a company to maintain a register of all the charges it has created should be abolished.**

46. We agree.

**Proposal P (p40) Only a company's creditors and members should have the right to inspect instruments creating a company's charges.**

47. We strongly reject this proposal, see 3.D(iii).

### **Application to entities other than companies formed and registered under the Companies Act 2006**

**Proposal Q (p41) The requirement to register charges should be the same for all UK companies, including unregistered companies.**

48. We agree.

**Q4.A (p42) Do you agree that overseas companies that have registered a UK establishment should continue to be required to register at least some charges that they create?**

49. We agree in principle but this would need careful review to ensure that it applies only to charges over assets which can be clearly identified as being within the UK but we have no strong views on this proposal.

**Q4.B (p43) What charges created by overseas companies should be registrable at Companies House?**

50. See Q4.A

**Q4.C (p43) Should the sanction of invalidity (see Proposal E) be modified in its application to charges created by overseas companies? If so, how?**

51. See Q4.A

**Q4.D (p43) Should there be any other differences between the requirements for overseas companies and UK companies?**

52. See Q4.A

**Proposal R (p44) LLPs should continue to be subject to the same rules relating to registration of charges as apply to UK companies. Any amendments made as a result of the consultation should, therefore, be applied to LLPs.**

53. We agree.

## **Specialist registers**

**Q5.A (p45) How important do you consider it to be that those inspecting a company's record at Companies House be able to discover whether it has granted any registrable charges?**

54. This is extremely important and we regard the ability to have one register at Companies House as a key requirement.

**Q5.B (p45) What would be the consequences for you if the record at Companies House did not include charges over certain assets for which there is a specialist register.**

55. This would increase costs and the likelihood of error in insolvency cases leading to uncertainty in the distribution and legality of the sale of assets.

**Q5.C (p48) Do you consider that the time limit for registration of a legal charge over land in England and Wales should be the priority period of an official search made before the creation of a charge?**

56. Our strong preference is for Companies House to remain as a one stop shop for checking on company charges and for this to become electronic. If this proposal does not impact on these aspirations, then we would not object to this but we have difficulty in understanding the interaction of the proposed procedures for the Land Registry and Companies House.

**Q5.D (p49) Do you agree that charges over land in England and Wales should continue to be registered at Companies House? If not, do you consider that:**

- Registration at the Land Registry should be treated as meeting the requirements of the Companies Act; or
- That land should be excluded from the list of registrable charges?
- What do you consider would be the advantages and disadvantages of these alternatives? (115-129)

57. We agree that charges on land should continue to be registered at Companies House.

**5.E 50 What do you consider would be the advantages and disadvantages of treating a standard security over land in Scotland created by companies as if they were registered at Companies House if the Keeper were to provide particulars to Companies House? (131 – 133)**

58. We express no opinion on Scottish security.

**5.F 52 Would it be sufficient if the information on the company's record at Companies House for a floating charge created under Scots law were**

- (a) The name and registration number of the company that created the charge;
- (b) The date of the creation of the charge; and
- (c) An indication that the charge was created by registration at the Scottish Register of Floating Charges;

59. We express no opinion on Scottish security.

**Or is it essential that the Companies House record show all the information proposed for charges registered at Companies House? (65 & 136-139)**

60. We express no opinion on Scottish security.

## Impact Assessment of Proposals

**6.A 53** What is the total cost of registering a charge under the current regime? Which of the proposals would increase this cost and which would decrease it - and by how much? (51-88 & 140)

61. We express no opinion on the current and proposed cost implications.

**6.B 53** How would the proposals affect the cost of checking the financial standing of companies? (88-94 & 140)

62. See Q6.A.

**6.C 53** Would the proposals bring any other benefits? (51-94 & 140)

63. See Q6.A.

**6.D 53** Would any of the proposals create one-off transitional costs? (51-94 & 140)

64. See Q6.A.

**6.E 53** Are there any other cost considerations that should affect the decision whether to implement these proposals? (51-94 & 140)

65. See Q6.A.

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