



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

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Our ref: ICAEW Rep 20/08

Your ref:

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Dear Tunde

**PROPOSALS FOR THE APPLICATION OF THE COMPANIES ACT 2006 TO
LIMITED LIABILITY PARTNERSHIPS (LLPs)**

The Institute of Chartered Accountants in England and Wales (the Institute) is pleased to respond to your request for comments on BERR's *Proposals For The Application Of The Companies Act 2006 To Limited Liability Partnerships (LLPs)*.

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

Yours sincerely

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**THE INSTITUTE
OF CHARTERED
ACCOUNTANTS**
IN ENGLAND AND WALES

ICAEW Representation

ICAEW REP 20/08

PROPOSALS FOR THE APPLICATION OF THE COMPANIES ACT 2006 TO LIMITED LIABILITY PARTNERSHIPS (LLPs)

Memorandum of comment submitted in February 2008 by The Institute of Chartered Accountants in England and Wales, in response to the Department for Business, Enterprise and Regulatory Reform consultation paper Proposals For The Application Of The Companies Act 2006 To Limited Liability Partnerships (LLPs) published in November 2007

Contents	Paragraph	
Introduction	-	1
Who we are	2	3
Major points	-	4
Responses to Specific questions	5	- 33

INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the consultation paper *Proposals For The Application Of The Companies Act 2006 To Limited Liability Partnerships (LLPs)* published by the Department for Business, Enterprise and Regulatory Reform.

WHO WE ARE

2. The Institute 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, the Institute provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 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. The Institute ensures these skills are constantly developed, recognised and valued.

MAJOR POINTS

Support for the initiative

4. We consider that LLPs are fundamentally different to companies in nature and structure. Therefore, where the Companies Act 2006 (CA06) introduces substantively new provisions in relation to companies, we consider these should not be extended to LLPs unless this can be justified in the light of the different nature and structure of LLPs as compared with companies. We strongly support the Government's view that it would not be appropriate to apply company law provisions that relate to the internal management arrangements of companies to LLPs. For example, we agree it would not be appropriate for the provisions on directors' duties or directors' reports to apply to the members of LLPs. The legislation governing LLPs should continue to provide freedom to LLPs and their members to make whatever governance and managerial arrangements they wish.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Do you have any views on the proposed approach of applying to LLPs provisions of the 2006 Act which correspond to 1985 Act provisions already applied to LLPs?

5. We agree with the Government's intended approach of applying to LLPs provisions of the 2006 Act which correspond to 1985 Act provisions that are already applicable to LLPs.

Q2: Do you have a view on the proposed outlined approach for amending regulations? Are there other options or issues the Government should consider in relation to the legislative approach?

6. Regarding the structure of the LLP legislation, we support the Government's proposal to apply the appropriate provisions of the 2006 Act to LLPs by setting out those provisions in full, as modified to take account of the particular characteristics of LLPs. We also strongly support the proposal that the underlying LLP regulations should follow this format of setting out the provisions in full rather than be made by way of amending regulations. Such 'stand alone' legislation and regulations will be easier to access and more coherent than the current 'amending legislation' structure for applying the 1985 Act to LLPs.
7. In particular, we support the proposal that the accounts regulations for LLPs should follow the same format as for companies, with one separate set for small LLPs and one for medium-sized and large LLPs. We requested this in our response to the February 2007 consultation on CA06 implementation because LLPs are becoming increasingly popular with smaller businesses, e.g. medical practitioners, smaller firms of lawyers, small investment businesses and even farms are increasingly adopting this legal form.

Q3: Do you agree that the current system of incorporation for LLPs should be retained with only consequential amendments made for LLPs? If not please explain your reasons.

8. Yes, we consider that the current system of incorporation for LLPs works well and should continue to apply.

Q4: Do you agree with the Government's proposal to apply the changes on execution of deeds to LLPs? If not please explain your reasons.

9. Yes, we agree.

Q5: Do you agree with the Government's proposal to align the requirements on LLP names with those of companies? If not, please explain your reasons.

10. Yes, we agree. In particular, we think the provisions preventing cyber-squatters from holding company names to ransom should be applicable to LLPs.

Q6: Do you agree with the Government's proposal relating to members' residential addresses? If not, please explain your reasons.

11. Yes, as requested in our response to the February 2007 consultation on CA06 implementation, we believe the protection from disclosure of directors' residential addresses (including the higher protection regime preventing disclosure to eg credit reference agencies where there is risk of violence or intimidation) should be extended to the members of LLPs.

Q7: Do you have any comments on the Government's proposal on the application of Part 15 to LLPs?

12. Regarding the financial reporting provisions in Part 15, we agree with the Government's proposal to take the same approach as in the current regulations of applying to LLPs the rules as they apply to a private company. However, care needs to be taken to exclude or modify any provisions that deal with internal

management arrangements. For example, s423 *et seq* should be modified to permit LLP accounts to be circulated to members in whatever manner the members have from time to time agreed (see also Question 15 below).

13. We note that LLPs are not currently subject to a requirement to prepare a report equivalent to a directors' report, and we are strongly of the view that this approach should be continued as (for the reasons given in paragraphs 4 and 32) it would not be appropriate for the provisions on directors' reports to apply to the members of LLPs.

Q8: Do you have any comments on the timetable for the implementation of these provisions?

14. We are content for the revised filing deadlines and late filing penalties to apply to LLPs at the same time as for companies (for accounting periods beginning on or after 6 April 2008, with filing penalties applicable to late filings on or after 1 February 2009).
15. We are content for the remainder of Part 15 to be applied to LLPs for accounting periods commencing on or after 1 October 2008. We note these provisions will apply to companies sooner (for accounting periods commencing on or after 6 April 2008). However, for March and December year ends these provisions will in practice apply at the same time for companies and LLPs so the practical impact of this different implementation date may not be significant.

Q9: Do you have any comments on the Government's proposals on the application of Part 16 to LLPs?

16. We agree with the government's proposals regarding the application of Part 16 to LLPs.
17. In particular, we agree that the restrictions on liability limitation (and the associated Liability Limitation Agreement (LLA) provisions) should not apply to LLPs, given that the prohibition in s310 CA85 has never applied to LLPs; members of LLPs should have the freedom to agree a limit on the liability of their auditor, they do not need the protections afforded to shareholders because, in the case of LLPs, there is no distinction between the owners of the business and those running the business (and also responsible for the accounts).
18. We also agree that it would be inappropriate for the rights of quoted company shareholders to raise audit queries to be extended to the members of LLPs as this is an internal matter to be dealt with by agreement between the LLP members.
19. We are content with the Government's proposal for the auditor offence, the new resignation statements regime (in so far as it applies to unquoted companies) and the signature of audit reports provisions to be extended to LLPs.

Q10: Do you agree with the Government's proposal to apply the changes in respect of time limits for executing a disclaimer to LLPs? If not please explain your reasons.

20. Yes, we consider that time limits should be harmonised wherever possible to reduce confusion and simplify the process.

Q11: Do you agree with the Government's proposal to apply the new provisions in the 2006 Act on restoration to the register to LLPs? If not please explain your reasons.

21. We agree that wherever possible the time limits for such procedures as restoration to the Register should be harmonised between companies and LLPs. We consider, however, that the new regime enabling applications to the registrar for administrative restoration should be modified for LLPs. Under this new regime, any shareholder or director may apply to the registrar for restoration provided certain conditions are met. In respect of LLPs, we consider that all LLP members should be notified of the application.

Q12: Do you agree with the Government's proposal to apply the relevant sections of Part 35 to LLPs (with modifications)? Are there any issues the Government should give specific consideration to when applying Part 35 to LLPs?

22. We are content with the Government proposal that where in practice the functions of the Registrar are common or similar to those for LLPs, those sections that are not automatically applied to LLPs should be applied with any necessary modification. We are not aware of any issues that need to be given specific consideration but we look forward to the opportunity to comment on the proposed modifications, as any issues may be more evident when looking at the detail.

Q13: Do you agree with the Government's proposal to apply the Part 37 provision on service of documents to LLPs? If not please explain your reasons.

23. Yes, we agree that the service of documents provisions should apply to LLPs.

Q14: Do you agree with the Government's proposal that Part 42 should be applied to those acting as auditors of LLPs? If not, please explain your reasons?

24. Yes, we agree that the statutory auditor provisions should apply to LLPs. We note that the consultation does not address the timing of this, and we strongly recommend that Part 42 is applied to LLPs at the same time as Part 16 on audit (ie for accounting periods commencing on or after 1 October 2008).

Q15: Do you have views on the application of the 'communication provisions' of the 2006 Act to LLPs? Would this be beneficial; and if so, should LLPs be able to contract out of the statutory provisions?

25. We strongly support the Government's general approach that provisions dealing with internal management of companies should not be extended to LLPs, and we think this approach should be applied in respect of the CA06 communications provisions. We therefore consider that the communications provisions should apply to LLP communications with third parties, but should not extend to communications as between LLPs and their members. The arrangements for communications between LLPs and their members are an internal matter and as such should be governed by agreement between the members.

26. Section 423 *et seq* should be modified accordingly, so that LLPs are required to circulate accounts to members in the manner that the members of the LLP have from time to time agreed.

Q16: If the Government was to extend Part 34 to overseas LLPs, what issues would need to be considered? Do you have views on how best to define an overseas LLP?

27. As we mentioned in our response to the February 2007 consultation on CA06 implementation, it seems anomalous that the level playing field between UK companies and overseas companies with a UK establishment does not apply as between UK LLPs and overseas LLPs with a UK establishment.
28. We agree in principle that the overseas company regime should apply to LLPs, as they are bodies corporate with limited liability, subject to any comments we may have on the detailed proposals. Disclosure is often described as the *quid pro quo* for limited liability. In general, publicly filed accounts for entities with limited liability enable third parties such as suppliers and customers to assess the financial strength of the entity they are trading with or otherwise contemplating doing business with, to enable them to make decisions regarding their dealings with the relevant entity.
29. We do not think the 1985 Act definition (as modified by the LLP regulations) would be sufficient, as overseas entities that have the same characteristics as LLPs may not be required under their domestic law to include the words '*limited liability partnership*' or a direct translation thereof in their name. The previous definition is therefore too narrowly-drawn given the variety of foreign legal regimes; the concept should cover any similar legal entity to a UK LLP without being too prescriptive as to its legal title. We believe the Government should introduce an alternative definition, setting out the characteristics of overseas entities that are within the regime and thus required to publicly file certain information (for instance, entities that have limited liability and separate legal personality).

Q17: Do you agree with the Government's proposal not to apply the duties in Part 10 of the 2006 Act to members of a LLP? If not, please explain your reasons.

30. Yes, we strongly support the general approach that provisions dealing with internal management of companies should not be extended to LLPs. In the case of LLPs, there is no distinction between those running the business and the owners and it would therefore be inappropriate for directors' duties to apply to LLPs, and (as noted in the consultation document) there is no equivalent case law on which to base codification of LLP member' duties.

Q18: Do you agree with the Government's analysis that a statutory scheme allowing members to pursue a claim on behalf of the LLP against another is not required? If not, please give your reasons.

31. Yes, we strongly support the proposal that derivative claims procedures should not be applied to LLPs. LLP members are not remote from LLP affairs in the same way as company shareholders. Disputes among LLP members are an internal matter and should be dealt with in the Members' agreement.

Q19: Do you agree that the provisions on narrative reporting for companies should not be extended to LLPs? If not, please explain your reasons.

32. Yes, we strongly support the proposal that the narrative reporting provisions should not be applied to LLPs, especially given the express link in the legislation

to directors' duties and the very different nature of LLPs and companies as LLP members are not remote from LLP affairs in the same way as company shareholders.

33. We also note that the arguments for excluding LLPs from the narrative reporting requirements also apply to wholly-owned subsidiary companies. We acknowledge that this would need to be addressed at European level, and we therefore encourage BERR to continue to raise this issue with the Commission.

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