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Dear Anne

**Revised scheme for registration of charges created by companies and limited liability partnerships: proposed revision of Part 25, Companies Act 2006**

ICAEW is pleased to respond to your request for comments on *Revised scheme for registration of charges created by companies and limited liability partnerships: proposed revision of Part 25, Companies Act 2006*.

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

### **REVISED SCHEME FOR REGISTRATION OF CHARGES CREATED BY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS: PROPOSED REVISION OF PART 25, COMPANIES ACT 2006**

**Memorandum of comment submitted in September 2011 by ICAEW, in response to Department for Business, Innovation and Skills consultation paper Revised scheme for registration of charges created by companies and limited liability partnerships: proposed revision of Part 25, Companies Act 2006 published in August 2011**

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## INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Revised scheme for registration of charges created by companies and limited liability partnerships: proposed revision of Part 25, Companies Act 2006* published by Department for Business, Innovation and Skills in August 2011, 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 which obliges us to work 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 136,000 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 Company Law sub-committee of the Business Law Committee, which includes representatives from public practice and the business community. This committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.
5. This response also reflects consultation with the ICAEW Insolvency Committee which is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. This committee represents the views of ICAEW licence holders. ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners.

## MAJOR POINTS

6. We are broadly supportive of the proposals to revise Part 25 of the Companies Act 2006, in particular we support the proposed possibility of filing electronically and of copies of the charge instrument being placed on the public record.
7. However, we consider that the new scheme should include 'tickboxes' to show whether:
  - it is/includes a fixed charge / legal mortgage, **and/or**
  - it is/includes a floating charge, **and/or**
  - it has a negative pledge, **and/or**
  - it applies to the following class(es) of assets:
    - real property / land
    - aircraft
    - ships
    - book debts
    - intellectual property
    - shares
    - bank accounts/cash deposits
    - other

OR

- all assets of the company

and that the above should be completed on a 'tick all that apply' basis (and that section 860A be amended accordingly). We believe this will make the new regime most helpful for users of Companies House, as it will enable searchers to find out sufficient information about the type of charge and the assets covered so that they can determine whether they need to access the underlying copy of the charge instrument, and without creating an undue burden on those filing the charge.

## RESPONSES TO OTHER SPECIFIC QUESTIONS/POINTS

**The appropriate requirement to certify that the instrument being filed is a true copy of the original noting that it will be possible to file electronically (proposed section 860A(2))**

8. We support this approach, provided that the requirements of Volume 2, PART 9 of the Registrar's Rules on *Certified Copies and Verified Copies* continues to apply, meaning that the certification of the charge instrument must be given by 'a person who has an interest in the registration of the charge', rather than requiring certification by, for example, a solicitor as this would have cost implications.

**The proposed definition of "date of creation" and, in particular, on its likely impact on costs for the registration of securities granted by Scottish companies (proposed section 863A)**

9. We note that, currently, deeds held in escrow can be considered to be 'delivered' but their effect is suspended until the escrow condition is satisfied. However, once this has happened, the obligations nevertheless are currently deemed to have been effective from the [earlier] date of delivery/completion (and this is deemed to be the 'date of creation', rather than the date of satisfaction of condition / release from escrow). Under the proposed new rules, date of creation will be the [later] date of satisfaction/ release. We defer to the legal profession to comment on the implications of this proposed reversal of the existing caselaw for non-scots companies.

**The abolition of extra time for charges created outside the United Kingdom (section 870)**

10. We are not aware of circumstances where extra time has been required for filing charges created overseas, and we therefore have no comment on this proposal.

**The proposed safeguards for the filing of satisfaction or release (paragraph 9 and section 872)**

11. We note that the proposals for new requirements either for supporting evidence (eg, a deed of discharge), or a public indication of its absence, are intended to be safeguards against fraudulent filing. However, in our view they will give rise to additional costs for those who abide by the rules, but we believe they will not act as a deterrent and will not actually provide any protection, because the system can't ever protect against collusion or fraud.
12. However, we do support proposal for the particulars of release/surrender to include the identity of the person filing, because such a requirement to disclose the name of the individual submitting the release/surrender – ie, 'putting ones name to it' - could minimise the chances of errors (and possibly fraud). We do not support the proposal to require an explanation as to why the delivery of the release is not being made by the person entitled to benefit from the charge because again, in our view this will give rise to additional costs for those who abide by the rules, but we believe they will not act as a deterrent and will not actually provide any protection, because the system can't ever protect against collusion or fraud.

**The proposals for rectification of the register (section 873)**

13. This proposal for a court procedure for rectification appears sensible to us, which would permit the court to grant rectification if the court finds that omissions/mis-statements of any particular with respect to any charge or in a memorandum of satisfaction were:

- accidental/inadvertent, or
- not of a nature to prejudice the position of creditors or shareholders of the company, or
- that it is otherwise just and equitable to grant relief.

14. We think it may also be beneficial for the Registrar, on the application of the company or a person interested, to have the power to rectify an omission or mis-statement on the register in circumstances where the Registrar is satisfied that the omission / mis-statement of any particular with respect to any charge or in a memorandum of satisfaction was accidental or due to inadvertence, without the need to go to court in these circumstances.

#### **The assumptions of costs and benefits in the draft Impact Assessment (pages 38-46)**

15. We agree with the estimated cost of £300 for registration of a routine charge under current requirements (page 44). However, we would query whether 6-8 hours of trainee time would be needed *‘to read into the underlying facility and security document to pick out the right clauses and to decide which definitions to include etc’* (see page 44) – we consider that this would not usually be required except in the case of a very complex security document. We agree with the estimated figure of £50 per charge if companies are required to keep a register of their charges (page 45).

#### **Whether the scheme should also apply to unregistered companies and mutuals (ie Industrial & Provident Societies)**

16. We support the status quo, meaning that we support the proposal that the provisions in Part 25 should not be applied to unregistered companies and mutuals, because (by definition) their information is not required to be filed at Companies House.

### **OTHER COMMENTS**

17. Under section 862, we do not believe there would be an advantage in making it an offence to dispose of property subject to an unregistered charge. This ‘offence’ would presumably be intended to be a protection for the chargee and, in these circumstances, we think that better protection would be given if the chargee is permitted to register the particulars of charge against the company acquiring the asset (ie either s860(2) should be extended to include this situation, or s862(2) should be expanded to allow registration by ‘the person interested in the charge’). This is best illustrated by way of example: if Company A creates a charge over an asset and then sells the asset to Company B then, in our view, the chargee should be permitted to deliver the statement of particulars for filing against Company B. We note that the chargee would usually be required to give prior consent to the transfer of the asset (and can make re-registration of the charge a condition of such consent). However, the protection we suggest above is to cover circumstances where chargee consent is not required (we have assumed that, in these circumstances, notice of the transfer would be required to be given to the chargee, meaning the chargee would be made aware that the charge should be re-registered).

18. We do not agree that section 876 (Requirement for companies’ own registers of charges) should be retained in respect of charges granted without a charge instrument. Such charges can be registered at Companies House under the new regime (see proposed section 860A(1)(d)), and we therefore consider that s876 should be deleted and that, instead of being required to keep a register of charges available for inspection under s877, the company should be required to retain a copy of any statement of particulars filed under s860A(1)(d).

19. We note that, in respect of charges over registrable land and standard securities, there will continue to be a need for registration at the relevant land registry, but that at some future date it is hoped that it will be possible to make provision so that a charge or security registered at a land registry in the UK is treated as if registered at Companies House –

thus ending the need for double registration. We support this intention and would call for the end of such double registration as soon as possible.

20. We note the commentary on proposed s869(2) states that '*The certificate of registration will be conclusive only that the charge is not invalid as a result of failure to register within 21 days. ... The certificate will **not** be conclusive evidence of any other matter, such as the charged assets or the existence of a negative pledge.*' We note that this may give rise to further costs because, if a charge certificate is no longer conclusive, a further review etc will have to be carried out (although we acknowledge that in the vast majority cases, if it really matters there will be review of the charge and circumstances anyway, so this may not be an issue in practice).
21. We note that it is not clear from the discussion document how the date of delivery to Companies House will be evidenced (see s870).
22. Should these proposals give rise to changes to the Registrar's Rules, such changes should be subject to due consultation.

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