



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

28 January 2009

Our ref: ICAEW Rep 12/09

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By email ConsultationIIPregulations2008@berr.gsi.gov.uk

Dear Marcia

APPLICATION OF THE REMAINING (NON-ACCOUNTS AND AUDIT) PROVISIONS OF THE COMPANIES ACT 2006 TO LIMITED LIABILITY PARTNERSHIPS

The Institute of Chartered Accountants in England and Wales (the Institute) is pleased to respond to your request for comments on the consultation paper *Application of the remaining (non-accounts and audit) provisions of the Companies Act 2006 to Limited Liability Partnerships* published by the Department for Business and Regulatory Reform (BERR) in November 2008.

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

ICAEW REP 12/09

Memorandum of comment submitted in December 2008 by The Institute of Chartered Accountants in England and Wales, in response to the *Application of the remaining (non-accounts and audit) provisions of the Companies Act 2006 to Limited Liability Partnerships* consultation paper published by the Department for Business and Regulatory Reform (BERR) in November 2008.

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the consultation paper Proposal for a European Council Regulation on the Statute for a European private company (SPE) published by the Department for Business and Regulatory Reform (BERR) in October 2008.

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 132,000 members in more than 160 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.

BACKGROUND

4. The ICAEW response to the Government's earlier policy consultation on application of the CA06 to LLPs is at: http://www.icaew.com/index.cfm/route/154904/icaew_ga/en/pdf, and the Government response to that policy consultation is at <http://www.berr.gov.uk/files/file46287.pdf>. The Government are now consulting on the detail of the Statutory Instrument (SI) that will be enacted to apply relevant provisions to LLPs, and the consultation is available at <http://www.berr.gov.uk/whatwedo/businesslaw/llp/page39897.html>.

GENERAL SUPPORT FOR GOVERNMENT'S APPROACH

5. We reiterate our support for 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, as we consider that LLPs are fundamentally different to companies in nature and structure.

COMMENTS ON SPECIFIC POINTS

Comments on the Areas of Change identified in the BERR consultation

6. Looking specifically at the areas where application of the 2006 Act provisions will result in some changes for LLPs:

E-Communications

7. We note the Government proposes to apply sections 1143 to 1148 of the 2006 Act on the sending by or supplying to LLPs of documents or information in hardcopy or electronic form if and to the extent that the members so agree (Reg 75, page 91). This would enable the members of an LLP to either opt to follow those provisions or agree separately the method of communications the LLP wishes to use.
8. We do not support this approach, which is effectively an 'opt in' that adds complication to the regulations.
9. We would suggest that the regulations are silent on internal communications (ie between the LLP and its members), which should be an internal matter for the LLP members. However, given that BERR have carried out the work in preparing the draft regulations to adapt the 2006 Act provisions for LLPs, it may be useful for BERR to publish this separately to assist LLPs that wish to adopt a communications regime akin to the 2006 Act regime for companies.
10. We note (and agree that) LLPs should not be able to opt out of the Part 35 regime in relation to communications with the Registrar.

LLP Members' Names and Addresses - Register of members

11. From 1 October 2009, the Government proposes that sections 162 to 165 of the 2006 Act on the register of directors' names will be applied to members of LLPs, with modifications. This will mean an LLP will have to keep available for inspection a register of members containing certain particulars, including a service address for each individual member and whether a member is a designated member. In practice, we note that most LLPs currently maintain a list of the names of all members at their principal place of business and we do not object to the requirement being imposed on LLPs. However, particularly given the criminal sanctions associated with failure to comply, it is important that BERR provides adequate information to LLPs about these new requirements to ensure compliance as from 1 October 2009.
12. We also note that LLP members (like company directors) will only be able to submit forms providing service addresses (as opposed to residential addresses) as from 1 October 2009, and there will therefore likely be a flood of such applications on 1 October 2009. We therefore think it is very important that Companies House endeavour to accept online filings from LLPs as from that date as we fear that any delay will lead to a backlog in processing such applications. We also believe it is important that the new forms be made available (in final form) at least a week in advance of 1 October 2009, so that applications (to be submitted on or after 1 October) can be prepared in advance. This will be even more important if online filing will not be available for LLPs from 1 October.

LLP - requirement to have at least two members

13. If an LLP carries on business without at least two members for more than 6 months the remaining member is liable (jointly and severally with the LLP) for the debts contracted during the period. In addition, the Government proposes to apply the new provision in section 156 of the 2006 Act to LLPs. This will enable the Secretary of State to enforce the requirement that an LLP have at least two members by issuing a direction to the LLP specifying the requirement breached, what must be done to comply and the period within which this must be done.
14. We support a change from the current position where the only enforcement option available is to consider striking the LLP off the register. However, we believe that criminal sanctions should not be imposed on the sole remaining LLP partner and so in regulation 13, s156(7) should be deleted. Given the removal of such penalty, the 'direction' should instead be referred to as a 'notification' eg alerting the sole remaining member that he will have unlimited liability, and given this will be an administrative function this can be issued by the Registrar of Companies (rather than the Secretary of State). We do not think that strike off is a suitable sanction for failure to appoint the requisite number of LLP members, as we do not think this would improve the position of third parties (such LLPs should be able to continue to trade, with the sole LLP member having unlimited liability).
15. An additional possible solution to some of the practical difficulties incurred by a sole-remaining LLP member would be to amend the voluntary 'strike off' provisions to enable a sole remaining member to dissolve the LLP (regulation 48, page 54).

Trading Disclosures

16. We support the Government's proposal that the provisions of the 2006 Act on trading disclosures, including the regulations made under those provisions, will be applied to LLPs. However, we note that the issues around defining overseas LLPs that arise in relation to extending the Overseas Company regime (see below) also apply here, and we query whether the definition in regulation 57 (s1051) on page 71 is sufficient as it simply applies the trading disclosures provisions to overseas entities with the words "limited liability partnership" in its name.

Other comments

Structure of the SI

17. We would suggest that the SI would be even better structured and easier to use if all of the modified provisions as applicable to LLPs were contained in one schedule (without being set in quotations within individual regulations), with all of the transitional provisions contained in a second, separate schedule.

Restoration

18. We note that the draft regulations (Part 12, ch3, page 65) do not reflect our suggestion that the new regime enabling applications to the registrar for administrative restoration (ie for cases of strike off in error) should be modified for LLPs. Under this new regime, any member will be able to apply to the registrar for restoration provided certain conditions are met. In respect of LLPs, we believe that all those who were members of the LLP when it was struck off should be notified of the application (although we agree there should be no requirement for the approval of such LLP members). This could be achieved by requiring the statement of compliance (in s.1026, page 65) to include a statement that the person applying for restoration has notified such members of the application for administrative restoration (in other words, the precise notification should be left with the LLP, which will still be carrying on business or in operation and have an LLP agreement).

Shadow Members

19. We disagree with the inclusion of the terms 'shadow member' and 'shadow designated member'. We note that governance arrangements are the defining difference between LLPs and companies, and we believe it is not appropriate to impose duties or responsibilities on 'shadow members' as it is for LLP members to agree amongst themselves how the LLP will be governed. We also believe that 'shadow designated members' could not logically exist etc because designated member is a purely administrative function.
20. We also note that the responsibilities and duties that apply to shadow directors are not applicable to LLP members, due to the different approach to governance arrangements, and so as a practical matter it would not make sense to impose such duties on 'shadow members'.
21. We therefore consider that the definition of shadow member in Regulation 16 should be deleted, along with all references to shadow member and 'shadow designated member', for example, in modified ss 156, 162, 165 and 858.

Overseas LLPs

22. We note that BERR have postponed the decision as to whether to apply the overseas company disclosure regime to LLPs. We understand that BERR would not want to hold up the application of the remainder of the Act to LLPs whilst the difficult question of overseas LLPs is considered, but we think this issue should be kept under review and tackled in due course because there is currently a discrepancy between the treatment of two different types of overseas body corporate (companies and LLPs).
23. We believe that a policy decision needs to be made in the UK as to whether, in principle, the overseas company regime should apply to overseas bodies corporate with limited liability (for example, because publicly filed accounts and charges for entities with limited liability enable third parties such as suppliers and customers to assess the financial strength of the entity they are contemplating doing business with), or whether the UK has adopted the

overseas companies regime in Part 34 of the Act simply to implement the directive rather than because it has any intrinsic merit.

24. If a policy decision is made to extend the regime to LLPs, we do not think a definition including the words '*limited liability partnership*' 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. This would be too narrowly-drawn given the variety of foreign legal regimes.

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