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Anne Scrope
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

By email: Anne.Scrope@bis.gsi.gov.uk

Dear Anne,

**REGISTRATION OF COMPANY CHARGES: ISSUES TO BE RESOLVED BEFORE
PREPARATION OF DRAFT REGULATIONS**

ICAEW is pleased to respond to your request for comments on *Registration of company charges: issues to be resolved before preparation of draft regulations*.

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 COMPANY CHARGES: ISSUES TO BE RESOLVED BEFORE PREPARATION OF DRAFT REGULATIONS

Memorandum of comment submitted in May 2011 by ICAEW, in response to Department for Business Innovation and Skills consultation paper *Registration of company charges: issues to be resolved before preparation of draft regulations* published in April 2011.

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Registration of company charges: issues to be resolved before preparation of draft regulations* published by Department for Business Innovation and Skills.

WHO WE ARE

2. 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 136,000 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.
4. ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and the Institute is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners. ICAEW's Insolvency Committee is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of Institute licence holders.

GENERAL COMMENTS

5. We are concerned about the potential implications of the removal of the requirement to register charges on acquired property for Insolvency Practitioners because, in the event of the insolvency of the acquiror of an asset subject to a charge, the sanction of invalidity does not apply and in these circumstances, insolvency practitioners would have no way of knowing that the charge exists and that could have significant ramifications in those few cases, for example, if the liquidator sells the property and distributes the proceeds to unsecured creditors. We think more research needs to be done in this area with a view to safeguards being introduced if appropriate.
6. Regarding overseas companies, we see no reason why a registered UK establishment should no longer be required to register security created over UK assets, as this will result in those wishing to inspect details of any such charges created being required to go to the office of the UK establishment to do so, instead of being able to access it via the public registry.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Proposal A - Period allowed for delivery

To provide that the period for delivery of a charge be 21 days beginning with the day after the day on which the charge is execution of the deed is completed by delivery (with a requirement that the particulars indicate - by means of a tickbox - if this date is not the same as the date of execution). If there is no instrument, the period for delivery of a charge will continue to be 21 days beginning with the day after day on which the charge was created.

7. This proposal is intended to reconcile English and Scots law provisions, and we have no comment from an English law perspective.

Proposal B - On whom the obligation to register falls

The obligation to register the charge should apply to any person who takes a registrable charge or security over the property of a UK company.

8. We believe this reflects the current position in practice (with lenders usually arranging registration). Since both company and security beneficiary can register the charge, it seems sensible that the person benefiting from registration has the primary responsibility. However, we can see that safeguards will be needed to prevent malicious registration of charges against a company, and it would be useful for the Government to publish details of the proposed safeguards if they are to differ from those previously indicated.

Proposal C - Trustees

The brief particulars should include a requirement to reveal – by means of a tickbox - whether the chargor holds the charged assets in trust. This would mean that those for whom this information is relevant can see from the register whether they need to check the instrument (or extract therefrom).

9. This proposal appears sensible.

Proposal D - Registrable and non-registrable charges

Section 860 will apply to any charge or mortgage granted by a company registered in the United Kingdom over any of its property (wherever situated) unless expressly excluded by Regulations under the Companies Act or any other statute. It will also apply to a pledge under which the debtor has possession of collateral and attorns to the pledgee as if the pledge were a charge. The Regulations will only exclude charges that are —

- (a) (i) premiums trust deeds;
(ii) special Trust Directions,
(iii) overseas Business Regulatory Deposits,

that secure the underwriting obligations of members of Lloyds; and

- (b) security taken by a landlord to secure liabilities of its tenant under a lease
(c) charges over credit balances.

The exceptions will be subject to the following definitions:

- "premiums trust deeds" means the deeds (in the form for the time being required by the Council of Lloyd's) declaring trusts upon which the premiums and other monies received by or on behalf of a member of Lloyd's in connection with insurance business are to be held.
- "Special Trust Directions" has the meaning given to it in the premiums trust deeds.
- "Overseas Business Regulatory Deposits" has the meaning given to it in the premiums trust deeds.

Section 860 will also apply to a pledge under which the debtor has possession of collateral and attorns to the pledgee as if the pledge were a charge.

10. No comment; this proposal addresses some technical legal issues which we will leave to the legal profession for comment.

Proposal E - Charges over acquired property

Make it possible, but not a requirement, for a company to register a charge over acquired property [and remove the current criminal offence].

[If possible] Make it a criminal offence for a company to charge or sell property which is subject to a charge if that charge is not on its register of charges at Companies House.

- 11.** In the cases where property is sold subject to a charge (with the chargee/lender's consent, or possibly even at the chargee/lender's requirement) it is normal for the chargee/lender to take a new charge from the acquiror as well as leaving the existing charge in place. The proposals appear consistent with this market practice, and would address the issue of fraudulent transfers in circumstances where the chargee/lender is aware of the transaction.
- 12.** However, in those cases where no new charge is entered into (for example, where the asset is not property for which there is a specialist register and/or the chargee/lender is not involved), we have some concern regarding this proposal given the potential loophole set out in the consultation document, and we believe chargees and purchasers should be given protection (for example, by making it a criminal offence for a company to charge or sell property which is subject to a charge if that charge is not on its register of charges at Companies House).
- 13.** We are also concerned about the potential implications in the event of the insolvency of the acquiror of an asset subject to a charge as the sanction of invalidity does not apply where a company fails to register a charge if one exists on property that it acquires. In these circumstances, insolvency practitioners would have no way of knowing that the charge exists and that could have significant ramifications in those few cases, for example, if the liquidator sells the property and distributes the proceeds to unsecured creditors.

Proposal F - Constructive notice

From the day following the appearance on the public register, the registration of a charge created by a company should constitute notice of the existence of the charge and, in the case of a floating charge, whether or not it has a negative pledge to:

- **any person taking a charge over a company's property;;**
- **any purchaser of receivables from the company; and**
- **any buyer or similar donee of the company's assets unless those assets are of the kind regularly sold by the company in the course of its ordinary business.**

This provision will not override the notice regime applicable to any UK asset register.

- 14.** We agree with this proposal.

Proposal G - Rectification of register

The rectification power be revised so that it also:

- **covers whatever is filed under S.860A(2), ie. the extract or instrument or document; and**
 - **provides power for CH to replace the extract/instrument/document and to annotate the record to reveal that has happened;**
 - **and so as to ensure that CH can use its existing power (under section 1093) to resolve inconsistencies on the register if the Court order results in inconsistent information on the register.**
- 15.** We support this proposal, as we are aware of situations where Companies House not being able to fully rectify an error has given rise to problems in the past.

Proposal H - Floating charge issues

There will be a requirement that the filed particulars include an indication:

- whether the charge is expressed to extend to all the assets of the company; and
- if the charge is expressed to extend to either all the assets of the company or all the assets of a particular type then whether its terms prevent the chargor from creating any further security that will rank equally with or ahead of the charge.

The intention is that it should be possible for these indications to be given by tickbox.

16. This appears to be a sensible proposal.

Proposal I - The charge instrument

The requirement be for a certified copy of the instrument (if any) to be filed. There would not be a size limit. It is not intended to permit the copy to be redacted.

If there is no instrument, then the filer will be required to indicate this, by a tickbox, and to file a document with information that would have otherwise have [had] to be visible in the filed instrument.

17. It is not clear from the consultation paper whether a certified copy of the charging instrument will be required to be filed if the charging instrument exists (or whether it will be the choice of the filer whether to 'tick the box' and instead provide the required information). If the certified copy is required to be filed, and (contrary to the Government's statement made in December 2010) no redacting is to be permitted, we are concerned there may be issues of commercial sensitivity regarding placing the entire contents of the charge onto the public record. This concern does not arise if the filer has discretion to instead 'tick the box' and file a document containing the required information.

Proposal J - Satisfaction and release

If the statement of satisfaction is filed by the company (as opposed to the person entitled to the benefit of the charge), then it must be accompanied by:

- either a statement of verification or a statement of satisfaction or release or a deed of discharge;
- of a statement by the company setting out the reasons why the delivery is not being made by the person entitled to the benefit of the charge (with a tickbox so that those searching the register are alerted to this being the case).

18. We support this proposal, which appears a sensible way forward given it is an offence under section 1112 CA06 to knowingly or recklessly deliver to the registrar a document that is misleading, false or deceptive.

Proposal K - Requirement for brief particulars

Requirement for brief particulars: It is intended that the brief particulars be as follows:

(a) the registered name and number of the company

(b) whether the charged assets are held in trust by the chargor.:

(c) the day on which execution of the deed was completed by delivery (with a requirement to indicate - by means of a tickbox - if this date is not the same as the date of execution);

(d) whether the terms of the charge are expressed to extend to all the assets of the company. If not, whether any of the following assets are the subject of the charge:

(i) land registrable at Registers of Scotland, the Land Registry for England or Wales, or [NI Land Registry]

(ii) intangible property;

(e) where the charge is expressed to extend to either all assets of the company or all the assets of a particular type of the company, then whether its terms prevent the chargor from creating any further security that will rank equally with or ahead of the charge.

The intention is that a tickbox be provided for any particular [listed above] where the description begins “whether”.

19. This proposal seems reasonable, but we will leave the legal profession to comment on any detailed legal implications.

Proposal L - Register of Charges

To remove the requirement on the registrar to keep and maintain a register of charges.

20. Users of the Companies House register sometimes need to search against an asset (rather than searching against the company that owns the asset), and we would have some concern if the removal of the requirement for Companies House to keep a Register of Charges meant this search function would no longer be available, and so we would be grateful for confirmation that this would not be the case.

Proposal M - Overseas companies

It is intended that every overseas company that has a registered UK establishment will continue to be required to keep a register of any charge it has created over:

- land or other fixed assets in the UK;
- all the assets of the company or all the assets of a particular type.

These companies will continue to be required to keep this register, together a copy of any instrument creating such a charge, available for public inspection in the UK.

21. We see no reason why overseas companies with a registered UK establishment should no longer be required to register security created by them over UK assets at Companies House (meaning those wishing to inspect details of any charges created would need to go to their offices to do so). This appears to us to be a backward step in respect of companies that are purporting to be set up properly in the UK.

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