

**REGISTRATION OF COMPANY
CHARGES**

**Issues to be resolved before
preparation of draft regulations**

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REGISTRATION OF COMPANY CHARGES

Issues to be resolved before preparation of draft regulations

The current proposals for the issues listed below are headed **03/11 proposals**. Views are sought on all these proposals.

Main issues to be resolved

- A Period allowed for delivery
- B On whom obligation to register falls
- C Trustees
- D Registrable and non-registrable charges
- E Charges over acquired property
- F Constructive notice
- G Rectification of register
- H Floating charge issues
- I The charge instrument
- J Satisfaction and release

Other issues

- K Requirement for brief particulars
- L Register of Charges
- M Overseas companies

This note refers to:

- the 2010 consultation document, published in March 2010 (2010 consultation)
- proposals included in the Government response to the consultation, published in December 2010 (12/10 statement)

A summary of the 03/11 proposals relating to each of these issues is at Appendix A.

The deadline for responses to this document is 13 May 2011.

Main issues

A. Period allowed for delivery

Present position: The deadline for registration is 21 days beginning with the day after the date of creation (with special provision for charges created outside the UK) (sections 870(1) & 886(1)). Under English law, the date of creation is a matter of common law. However “creation of a charge” does not have a meaning under Scots law because there is no concept of equitable security in Scots law. Therefore CA06 provides a definition for the purposes of registration of charges by Scottish companies: the date of creation of a floating charge is the date on which the instrument was executed¹ and for all other charges, the date on which it was constituted as a real right (section 879). For assignments in security by Scottish companies, Companies House require a recorded delivery stub or acknowledgement by the party being notified of the assignment. For standard securities (ie over land in Scotland), Companies House take the date of creation on the form in good faith. For other assets for which there is a specialist register, that registry’s date stamp is the date of creation for security granted by Scottish companies. This means that the start-date for the period for delivery for charges over ships, aircraft and intellectual property depends on the jurisdiction in which the company is incorporated, even though the charge itself might not be governed by that law.

Problem: For assets for which there are specialist registers, having two different definitions of the period for delivery would create significant practical difficulties for a unified UK scheme.

2010 consultation: There was a proposal to introduce a definition of date of creation for the purposes of the timelimit for registration of a charge. The proposal was based on sections 870(1) and 886(1). Most respondents who commented agreed that there should be a definition for the purpose of calculating the 21 day period with several considering the detail needed further consideration. However, it was noted that under English law the date of creation of a charge is the same as for any other legal obligation. There was concern that a statutory definition for charges would create the potential for a divergence between a charge and any other document that creates an obligation and should be avoided in principle (unless it is simply a restatement of the law).

12/10 statement: The Government do not intend to provide a definition of the date of creation. However the Government do intend to retain the 21-day time limit for registration.

¹ Part 2 of the Bankruptcy and Diligence Act 2007, which is not yet in force, provides for floating charges to be created under Scots law by registration at the Register of Floating Charges (to be created for this purpose). Provided that this will not increase costs for third parties, it is intended to make Regulations so that floating charges created by Scottish companies are treated as if registered at Companies House.

03/11 proposal: To provide that the period for delivery of a charge be 21 days beginning with the day after day on which 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.

The rectification provision (see Issue G) would be available if a registered charge were not constituted as a real right under Scots law.

Consideration was given to an alternative to this proposal with different rules for the start date for the period of delivery along the following lines:

- a definition that provides for continuation of the existing regime in the case of standard securities under the law of Scotland;
- the date of notice to debtor counterparties in the case of an assignation under the law of Scotland;
- the date of execution of the document in the case of:
 - a floating charge or any other security under the law of Scotland or
 - any charge which is delivered on the day of execution; and
- in all other cases, the day on which execution of the deed is completed by delivery (with a requirement that the particulars indicate - by means of a tickbox - that this date is not the same as the date of execution).

We have rejected this approach as it does not fit well with actual practice.

In any event, there would be no change for any charge created outside the UK, ie s.870(1)(b).

This proposal would not in any way affect separate requirements under Scots law. However it would enable compliance with these requirements to be done in parallel with registration under company law rather than in a more complex serial manner as at present. It will also ensure that the same rules apply for security granted by UK companies, regardless of both the jurisdiction of their incorporation and the law under which the security is granted.

B. On whom the obligation to register falls

Present position: The obligation to register the charge falls on the chargor with a criminal sanction, with provision so that filing can be done by “a person interested in” the charge (sections 870(1),(2),(4)&(5) & 878(1),(2),(4)&(5)). In practice, charges are almost always registered by the lender or the lender’s representative.

12/10 statement: The Government intend that the requirement to register should apply to every charge or mortgage granted by a company registered in the United Kingdom over any of its property (wherever situated) unless expressly excluded. . . . The criminal sanction for failure to register a charge will be abolished. There will not be any change to the sanction of invalidity.

03/11 proposal: 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.

Consequential:

- Provision needed to require the filing to be against the record of the chargor;
- provision needed so that the filing can be done by the company creating the charge; and
- removal of provision for chargee to reclaim fee from chargor (s.860(3)).

C. Trustees

Present position: The Act is silent. It appears that practice is not consistent. The obligation to register a charge falls on a company that creates a registrable charge with the definition of registrable charge being in terms of the type of asset used as security, including any interest in land other than a charge for rent or periodical payments. If a company acting as trustee were to create a charge over registrable land in England and Wales and not to register the charge at Companies House, then the Land Registry would annotate the entry in its register. There is some uncertainty as to whether a charge over other property held in trust is registrable.

This issue was not addressed in the Government response to the 2010 consultation.

Principal arguments:

- On the one hand, it is argued that the sanction of invalidity is ineffective against the liquidator or administrator as the charged assets are not part of insolvency estate of the chargor.
- On the other hand, it is argued the sanction of invalidity is and should be effective against other creditors and that it protects a subsequent chargee who takes a charge without notice of the first.

03/11 proposal: 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.

Consequential:

- The filed extract should include the identities of the chargor, any information in the instrument relating to the ownership of the charged assets, and the chargee;
- It is not proposed to require disclosure that the chargee is acting as trustee.
- The proposal to make the obligation fall on the chargee would affect formulation of provision relating to when chargor is a trustee.

D. Registrable and non-registrable charges

Present position: There are separate lists of registrable charges for Scottish companies and for other UK companies (sections 860(7) and 878(7)).

12/10 statement: The Government response to the 2010 consultation was that the requirement to register should apply to every 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.

Charges currently excluded under other statutes are:

- if the chargee is the Bank of England, the central bank of another country or the European Central Bank (under section 252 of The Banking Act 2002), and
- if it is a title transfer financial collateral arrangement² or a security financial collateral arrangement³ (under Regulation 4 of the Financial Collateral Arrangements Regulations 2003).

The Regulations will only exclude charges that are:

- Lloyds premium trust deeds; and
- rent security deposit deeds.

03/11 proposal: Following advice from stakeholders, the intention is that **the requirement to register should apply to any:**

² An agreement or arrangement, including a repurchase agreement, evidenced in writing, where—

- (a) the purpose of the agreement or arrangement is to secure or otherwise cover the relevant financial obligations owed to the collateral-taker;
- (b) the collateral-provider transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and beneficial ownership of equivalent financial collateral to the collateral-provider; and
- (c) the collateral-provider and the collateral-taker are both non-natural persons.

³ An agreement or arrangement evidenced in writing, where—

- (a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker;
- (b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations;
- (c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute equivalent financial collateral or withdraw excess financial collateral shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; and
- (d) the collateral-provider and the collateral-taker are both non-natural persons.

- **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;**
- **standard security, assignment in security, and any other security over incorporeal moveable property;**
- **any pledge under which the debtor has possession of collateral and attorns to the pledgee as if the pledge were a charge⁴**

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 Lloyd's;
- (b) security taken by a landlord to secure liabilities of its tenant under a lease**
- (c) charges over credit balances; and**
- (d) market charges.**

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.**

⁴ The Law Commission explanatory note to its draft Regulation to this effect was:

A pledgee may take 'possession' of property that is in the physical possession or custody of a third person (for example, a warehousing company) if the third person agrees with the pledgee to hold to its order ('attorns' to the pledgee). There is authority that there may be a pledge where the debtor itself has physical possession or custody and attorns to the pledgee. (If the arrangement is in writing it is registrable as a bill of sale.) The arrangement may mislead others dealing with the debtor into believing that the property in the debtor's possession is unencumbered and under these Regulations it is treated as a charge.

E. Charges over acquired property

Present position: Section 862 provides that a company that acquires property which is the subject of a registrable charge must register the charge. This is subject to a criminal sanction. We understand that instances are rare and that the few instances usually relate to property for which there is a specialist register.

12/10 statement: The Government intend to abolish the requirement to register charges existing on property acquired.

Stakeholder criticism: Abolition of the requirement would create a loophole whereby a financial package is created that involves:

- the creation of the charge over asset X by company A
- the acquisition of asset X by company B
- Company B charging or selling asset X with the chargee/purchaser unaware of the charge.

This scenario is most likely when companies A and B are linked and/or the lender to Company A is a connected person to at least one of the two companies. But the lender may be innocent of involvement in the scam.

03/11 proposal: Make it possible, but not a requirement, for a company to register a charge over acquired property.

Should there also be some other protection for the purchaser? It has been suggested that it should be 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 – but it is not clear whether this is possible.

F. Constructive notice

Present position: The Act is silent. .

12/10 statement: Any person taking a charge over the company's property will be deemed to have notice of any previously registered charge. (The common law would continue to apply in other circumstances, ie registration is constructive notice to those who should be reasonably expected to search the register.) A buyer of property subject to an unregistered charge will take free of the charge with an exception for property subject to the rules of a specialist register.

03/11 proposal: 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 disponent 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.

Cconclusion: leave out buyers – or restrict to UK tangible property

G. Rectification of register

Present position: If a registrable charge is not registered within the period allowed for delivery, either the chargor or the chargee may apply to the court for an order extending the period for the registration of the charge. They may also apply to the court for an order that an omission or mis-statement be rectified. (Sections 873 & 888)

2010 consultation: No change proposed to the current provision. This was because the power to make Regulations does not provide power to make a late registered charge rank behind prior registered charges.

03/11 proposal: The rectification power be revised so that it also:

- covers whatever is filed under S.860A(2), ie. the instrument or document; and
- provides power for Companies House to remove and replace the instrument/document and to annotate the record to reveal that this has happened;

and so as to ensure that Companies House 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.

The power to remove and replace the instrument would apply where, for example, the wrong instrument had been filed, or there was some other error or omission from the instrument or where the charge was not constituted as a real right within 21 days of the execution of the deed was completed by delivery.

H. Floating charge issues

12/10 statement: In the case of a floating charge :

- there would not be a requirement to register the crystallisation;.
- the requirement for particulars to be filed would include whether there is an automatic crystallisation clause and/or a negative pledge

03/11 proposal: Following further consideration, it is intended that **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 be possible for these indications to be given by tickbox.

I. The charge instrument

Present position: For charges created by Scottish companies, the requirement is to deliver a certified copy of the charge document, for all other charges, the requirement is for the original (sections 878(1) & 860(1)). In all cases, the document is returned to the filer without a copy being kept for the public record.

There is a public right to inspect all instruments creating charges at the premises of the company that created the charge. This means that it is imprudent for the instrument to include personally or commercially sensitive information..

12/10 statement: The requirements for registration will be the filing of specified particulars together with a copy of an extract from the charge instrument covering:

- the identities of the chargor, any information in the instrument relating to the ownership of the charged assets, and the chargee
- the date that:
 - purports to be the date the charge was created or,
 - in the case of a charge of land created by an electronic document, the date when the document takes effect; or
 - in the case of a security granted under Scots law, the date on which the deed was executed and delivered.
- in the case of a floating charge, any clause that prevent the chargor from creating any further security that will rank equally with or ahead of the charge

The extract may be redacted to conceal information that is not required. Provided that it does not exceed a specified limit, say 20,000 words, the entire instrument may be filed instead.

03/11 proposals:

- **The requirement be for a certified copy of the instrument (if any) to be filed. There will 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 to be visible in the filed instrument.**

J. Satisfaction and release

Present position: A statement of satisfaction and release for a Scottish company's floating charge must be accompanied by either a statement of verification by a creditor entitled to the benefit of a floating charge or, if that cannot be readily obtained, a direction from the court. There is no similar provision for other charges.

12/10 statement: Any filing of a memorandum of satisfaction should generally be by the party that does not stand to benefit from a fraudulent filing, ie the chargee. However there needs to be provision for circumstances where the chargee cannot or refuses to file the memorandum of satisfaction. This might be provision so that the chargor applies to a court. Alternatively, it might be provision so that a chargor is able to file provided that the filing is accompanied by an explanation, which would be placed on the file, of why the filing is not being made by the chargee. It is an offence, under section 1112 of the Companies Act 2006, for a person knowingly or recklessly to deliver to the registrar a document that is misleading, false or deceptive in a material particular.

03/11 proposals: 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).

Other issues

K. Requirement for brief particulars

Several stakeholders have questioned why it is intended to require any brief particulars, ie why it will not be sufficient simply to file the charge instrument (or extract therefrom).

There are two reasons for requiring brief particulars. First, sufficient information is required to ensure that the charge instrument is filed against the right company – hence the requirement for the company's registered name and number. Second further particulars are needed for the benefit of those who use the register – including bulk downloaders and those doing “broad brush” analyses rather than in-depth consideration of a particular company. Information provided in a PDF document, eg in the instrument, is more expensive and more expensive to access and cannot be manipulated as easily as information provided in “fields”. The primary purpose of the further particulars is to provide sufficient information on the free part of the register so that those inspecting it can make an informed decision as to whether to inspect the filed instrument (or extract therefore).

03/11 Proposals: 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 where the description begins “whether”.

L Register of Charges

Present position: With very limited exceptions, all documents and information delivered to Companies House are placed on the register and made available for public inspection; this includes filed particulars of charges. The exceptions are the types of material listed in section 1087; these include charge instruments (and certified copies). In addition, Companies House must keep a separate “Register of Charges” for each company.

2010 consultation: 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.

12/10 statement: Companies House will enter the reference number, the filed particulars and the date of registration of the charge on the company’s record, together with a link to Companies House’s copy of the instrument. The Government intend to revise the requirement for a “Register of Charges” as proposed.

03/11 proposal: To remove the requirement on the registrar to keep and maintain a register of charges.

M. Overseas companies

Present position: Those overseas companies that have registered a UK establishment are required to register charges over their property in the UK. There is also a public right to inspect copies of instruments creating registrable charges.

2010 consultation sought views on whether registered overseas companies should continue to be required to register at least some charges that they create.

12/10 statement: The requirement for overseas companies to register charges over UK property will be abolished with effect from 1 October 2011.

03/11 proposal:

The requirement for overseas companies to register charges over UK property will be abolished with effect from 1 October 2011.

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.

APPENDIX A: SUMMARY OF 03/11 PROPOSALS

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.

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.

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).

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.

E Charges over acquired property

- Make it possible, but not a requirement, for a company to register a charge over acquired property.
- 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.

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 disponent 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.

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.

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.

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 to be visible in the filed instrument

Other matters

J 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 where the description begins “whether”.

K Register of Charges

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

L. 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 .

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