

## **EXPLANATORY NOTES TO ACCOMPANY DRAFT REGULATIONS REVISING PART 25 OF THE COMPANIES ACT 2006: AUGUST 2012**

The current system of registration for company charges dates back to the start of the 20<sup>th</sup> century. Over one hundred years later and following extensive consultation a fully-modernised system has been developed, which aims to:

- streamline procedures and reduce costs for those putting information on the public record, in particular by enabling electronic filing
- reduce uncertainty as to what charges must be registered
- replace two current schemes with a single scheme for all UK companies
- improve the quality of information about security given by companies
- improve access to instruments creating companies' charges

The department estimates that these reforms, taken together, could save those presenting charges around £22m per annum.

The draft regulations are made under section 894 of the Companies Act 2006 and amend the provisions of Part 25 of that Act. The provisions are applied, with minor modifications, to limited liability partnerships by a second statutory instrument which amends (by substitution) Part 9 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (S.I. 2009/1804). Those regulations were made under section 15 of the Limited Liability Partnerships Act 2000.

The primary purpose of the draft regulations is to give effect to the Department's policy of providing for a single scheme for registration of company charges irrespective of the place of incorporation of the company (as in current Part 25 of the Act). This draft applies the provisions on registration to charges created by companies which are registered in England and Wales, Northern Ireland or Scotland. Furthermore, the reforms aim to modernise the system of registration to enable those presenting the charge to the Registrar to do so by electronic means.

The new provisions have been inserted as Chapter A1 in order not to cause confusion with the numbering used in the current provisions. Current Chapters 1 and 2 are deleted. Section numbers commence with the final numbered section of Part 24 and are numbered sequentially commencing with section 859A.

The main change upon which the Department consulted was the move from a mandatory filing regime enforced by criminal sanction (s.860/s.878 Companies Act 2006) and the sanction of invalidity (s.874/s.889 Companies Act 2006) to a regime in which registration with the registrar was at the discretion of the company and the removal of the criminal sanction. However, the retention of the sanction of invalidity means that in fact this is not truly optional for a company or a lender in commercial terms. What has been removed is the prospect of a criminal penalty for non-registration. The change

in emphasis is, however, significant in terms of the drafting of the legal provisions. Section.859A does not refer to a duty on the company or person interested in the charge or security (as in s.860/s.878 Companies Act 2006) but is expressed in terms of obligations on the registrar (s.859A(2) and throughout). “May” is used, rather than “shall”, to allow for situations as in *Re Charles*, where necessary.

The period for delivery of the charge or security to the registrar remains at 21 days (s.859A(4)), and the sanction of invalidity remains the same (s.859H). In order to clarify when the period of 21 days starts to run, section 859E sets out, for the purpose of Part 25 only, a table identifying the date of creation of charge or security.

A further significant change is that the draft assumes that all charges (for which there is an interpretation provision at section 859A(7)) other than those listed in section 859A(6) can be registered. This is a significant simplification of the former law on this matter. The Department has given consideration to the issue of excluding charges arising by the operation of law. However stakeholders are divided on this issue and it seems that as this is a scheme which now places the onus on the presenter to determine whether a charge should be registered that practitioners are best placed to take future decisions.

The draft also gives effect to the Department’s proposal to increase transparency and the quality of information in the public domain through creating a regime in which the full text of the charge instrument or document is available on the register at Companies House. The instrument or other document will be capable of redaction (s.859G) to take account of certain personal information. The instrument will be accompanied by particulars, the content of which is set out in section 859D. The required particulars are intended to improve the ease of searching the register, including those lenders and credit agencies that would rely upon ‘bulk downloads’. The particulars are also intended to direct the searcher to any other relevant UK register where information is held relating to that charge. The current regulations on the particulars of charge are to be revoked (the Companies (Particulars of Company Charges) Regulations 2008 (S.I. 2008/2996) (see draft regulation 4).

Provision is made in section 859I for the registrar to allocate a unique reference code (URC) to the charge, which will enable those searching the register to track a charge more easily, including whether it has been fully or partially satisfied. The URC will also enable the register to present a more accurate picture of the extent to which a companies assets are encumbered. The certificate and its effects remain the same as at present (s.859I).

Provision is also made for a company which is holding property as a trustee to have this noted on the register (s.859J) and some minor changes are made to the registration of enforcement of security (s.859K) including the registration of notice of ceasing to act as receiver or manager (these changes do not apply in Scotland).

Provision is made for the notification of a negative pledge (s.859O).

In respect of companies own registers and keeping of copies of instruments or documents of charge, the Department has taken the advice of stakeholders and has abolished the need for companies to keep a register of charges, however companies are still required to keep copies of the full instrument available for inspection. The Department does not intend to make any further amendment to the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI 2009/1917) and overseas companies will continue to be required to maintain a register of charges.

Concerns have been expressed to the Department that since under the new scheme registration of the charge itself, as well as any negative pledge, is optional that the current case law will no longer hold that the registration of a charge (in particular a floating charge) gives rise to constructive notice. The draft contains a provision which states that, notwithstanding that registration is optional, the fact that the charge and pledge have been registered should give rise to constructive notice. However, we welcome further comments on the impact of the inclusion or exclusion of this clause.

The department wishes to give stakeholders a final opportunity to consider the text of the draft regulations before they are laid before both Houses of Parliament in the autumn and also to make any preparations they deem necessary ready for when the proposed changes come into force. If you have any concerns about any significant effects, intended or unintended, that these changes may have which you wish to raise with the Department, please email **[part25companiesact2006@bis.gsi.gov.uk](mailto:part25companiesact2006@bis.gsi.gov.uk)** before **5pm on the 7th September 2012**.

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