

Title: Registration of Charges Lead department or agency: Business, Innovation & Skills Other departments or agencies: Companies House	Impact Assessment (IA)
	IA No: BIS0136
	Date: 01/11/2010
	Stage: Development/Options
	Source of intervention: Domestic
	Type of measure: Secondary legislation
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Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

The existing scheme for registration of company charges is intended to ensure that companies cannot conceal the extent to which their assets are charged to another part as security. It is criticised because the procedures are cumbersome and use out-of-date definitions; the particulars on the public record may be inaccurate; and because the effect on third parties is not clear. Other criticisms are that double registration is required if there's a specialist register for a particular type of charged asset; that the scheme is not wholly appropriate for overseas companies; and that unregistered companies are not covered by scheme.

What are the policy objectives and the intended effects?

The objective is to ensure that companies' access to finance, whether or not secured, is not hampered by uncertainty as to whether their assets are encumbered.

The intended effect is to improve the existing scheme by: (a) reducing costs for those putting information on the public record, in particular by enabling electronic filing; (b) improving the quality of information about security given by companies; (c) reducing any uncertainty as to what information must be put on the public record and the consequences of publicity; (d) minimising costs when Scottish Register of Floating Charges is established.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

A range of options are presented and analysed within the main text of this document affecting: what charges are registrable; the procedures for registering charges; the application of the scheme to overseas companies; and the effect of registration on third parties. The preferred option combines:

- making all charges registrable unless explicitly excluded
- an extract from instrument creating the charge being placed on the public record together with the possibility of electronic filing;
- excluding overseas companies from the scheme; and
- making clear the effect of registration on third parties.

Further detail on the full range of policy options can be found from pg7.

When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?	It will be reviewed 01/2017
Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes

SELECT SIGNATORY Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:..... Date:.....

Summary: Analysis and Evidence

Policy Option 1

Description:

Price Base Year 2010	PV Base Year 2010	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 122m	High: 157m	Best Estimate: 139m

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	2m		0	2m
High	2.3m		0	2.3m
Best Estimate	2.1m		0	2.1m

Description and scale of key monetised costs by 'main affected groups'

Transitional costs are estimated at 2.1m and will occur in the first year. These are comprised of costs borne by Companies House (which operates as a trading fund) and Businesses that file company charges. Costs to Companies House are estimated to be £0.2 - 0.5m. These costs cover estimated costs of setting up an electronic filing system. Costs to those filing charges, ie lawyers and banks, are mostly familiarisation costs, estimated at £250-£1,000 depending on how often they file charges.

Other key non-monetised costs by 'main affected groups'

Loss of information at Companies House on charges created by overseas companies over property in the UK at the time of creation.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0		14.4m	124m
High	0		18.4m	159m
Best Estimate	0		16.4m	141m

Description and scale of key monetised benefits by 'main affected groups'

The new system will reduce the costs of filing charges through reduced errors and the allowing electronic filing which is more efficient. The level of cost savings will be dependent upon the number of charges filed. Savings are estimated to be £200 per electronically filed charge and £100 per non electronic filing. This amounts to £14.5m pa. Savings resulting from reduced errors and late filings total £1.7M. Savings to Scotland are around £200,000 (£50 per charge).

Other key non-monetised benefits by 'main affected groups'

The new system, particularly the changes to the definition of registrable charges (option 3) and provision for constructive notice (option 12), will reduce legal uncertainty.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

The number of future charges to be filed is not known. The best estimate of costs and benefits is based upon the number of charges filed remaining constant. The upper and lower estimates are based upon a range of +/- 10,000 either side of the current volume of charges (75,000). Cost savings related to electronic and non electronic filing are assumed to be £200 and £100 respectively. Number of late filings rejected are assumed to be reduced by 50%. The composition of companies filing future charges is assumed to be constant. Familiarisation costs of businesses filing charges will be based upon the size of the company. The number of filings per company has been used as a proxy for size with familiarisation costs assumed to be small: £250, med: £500, Large: £1000

Impact on admin burden (AB) (£m):			Impact on policy cost savings (£m):	In scope
New AB:	AB savings:	Net:	Policy cost savings:	Yes/No

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Options UK		
From what date will the policy be implemented?			06/04/2012		
Which organisation(s) will enforce the policy?			Companies House		
What is the annual change in enforcement cost (£m)?			zero		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:
Does the proposal have an impact on competition?			Yes		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			Costs: N/A		Benefits: N/A
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro	< 20	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties¹ Statutory Equality Duties Impact Test guidance	No	78
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	79
Small firms Small Firms Impact Test guidance	No	79
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	80
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	80
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	81
Human rights Human Rights Impact Test guidance	No	81
Justice system Justice Impact Test guidance	No	81
Rural proofing Rural Proofing Impact Test guidance	No	81
Sustainable development Sustainable Development Impact Test guidance	No	82

¹ Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
1	Registration of Charges created by companies and Limited Liability Partnerships: Proposals to amend the current scheme and relating to specialist registers http://www.bis.gov.uk/Consultations/registration-of-charges
2	Sections 860-894, Companies Act 2006 http://www.opsi.gov.uk/acts/acts2006/ukpga_20060046_en_1
3	Sections 93-107, Companies Act 1989 (not brought into force) http://www.legislation.gov.uk/ukpga/1989/40/contents
4	Sections 37-47, Bankruptcy and Diligence etc (Scotland) Act 2007 http://www.opsi.gov.uk/legislation/scotland/acts2007/asp_20070003_en_1
5	2010 consultation document: Registration of Charges created by Companies and Limited Liability Partnerships http://www.bis.gov.uk/Consultations/registration-of-charges?cat=open
6	The Financial Collateral Arrangements (No 2) Regulations 2003 (S.I. 2003/3226)
7	The Companies (Particulars of Company Charges) Regulations 2008 (S.I. 2008/2996)
8	The Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (S.I. 2009/1917)

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	2.1	0	0	0	0	0	0	0	0	0
Annual recurring cost	0	0	0	0	0	0	0	0	0	0
Total annual costs	2.1	0	0	0	0	0	0	0	0	0
Transition benefits	0	0	0	0	0	0	0	0	0	0
Annual recurring benefits	16.4	16.4	16.4	16.4	16.4	16.4	16.4	16.4	16.4	16.4
Total annual benefits	16.4	16.4	16.4	16.4	16.4	16.4	16.4	16.4	16.4	16.4

* For non-monetised benefits please see summary pages and main evidence base section

Evidence Base (for summary sheets)

Background

1. The Coalition Agreement includes a commitment to develop effective proposals to ensure the flow of credit to viable SMEs. In many cases, lenders will seek to minimise the risk of their funds not being repaid by securing loans against the company's assets (also known as placing a charge on its assets). The interest rate for a secured loan can be significantly less than that for an unsecured loan. A company with such a lending arrangement will continue to have the use of the charged assets; if it goes into liquidation or a receiver or administrator is appointed, then lenders with loans secured against specific assets have first call on those assets.
2. A charge may be "fixed" or "floating" – but there have been occasions when the courts have ruled that a charge that was created as fixed is in fact a floating charge. A fixed charge is linked to a particular asset which the company cannot dispose of without the agreement of the lender. A floating charge may be over all or part an undertaking and extends to assets not yet acquired. It leaves the company free to deal with the charged property in the ordinary course of its business.
3. Under English law, companies may use any of their assets as security for loans. The security may include their future orders and assets not yet acquired. The same asset may be used to secure more than one loan. This means that appearance may belie a company's financial weakness. It also means that a company's insolvency may have fatal consequences for its creditors, whether or not secured. Following some serious incidents in the 1890s, a requirement was introduced to register at Companies House any charge created by UK companies over specified assets. The public availability of this information has limited the impact of insolvency and thus facilitated the availability of loans to companies.
4. Property law is devolved. The Bankruptcy and Diligence etc (Scotland) Act 2007 (the "2007 Act") provides that a floating charge will only be recognised under Scots law if it were created by registration at the Scottish Register of Floating Charges. Commencement of these provisions in the 2007 Act has been deferred.
5. Recent lending to UK businesses peaked at £17 billion in October 2007 (statistic obtained from www.bankofengland.co.uk). Most UK companies secure their borrowing through charges. According to *Trends in Lending* (Banking of England, January 2010), six lenders account for about two-thirds of this. A 2004 survey of smaller quoted companies showed that nearly 60 per cent had granted a fixed charge and a similar percentage a floating charge (*The financing of small quoted companies: a survey*, Peter Brierley & Mike Young). Some 75,000 charges a year are registered at Companies House.

The current scheme

6. Since 1900, brief particulars of a registrable charge must be delivered to Companies House together with the instrument creating the charge (for charges created by companies registered in Scotland, with a certified copy of the instrument) within 21 days of the creation of the charge. If the instrument is in a language other than English, a certified translation into English must also be delivered to Companies House. This requirement applies to fixed charges over specified classes of assets and to floating charges. It also applies if a charge instrument includes both registrable and non-registrable charges. Special provision for Scottish companies was added later because Scots law does not recognise fixed non-possessory charges over goods and has only recognised floating charges since 1961.
7. The brief particulars that must be filed are:
 - (a) the date of the creation of the charge;
 - (b) a description of the instrument (if any) creating or evidencing the charge;
 - (c) the amount secured by the charge;
 - (d) the name and address of the person entitled to the charge;
 - (e) short particulars of the property charged; and
 - (f) in the case of a floating charge created by a Scottish company, any negative pledges.

The form must also include both the registered name and the registration number of the company; if either the name or number is missing or if they do not match the Companies House record, then the form will be rejected.

8. Companies House check that the filing is within 21 days of the creation of the charge, check the required particulars are consistent with the instrument, enter these particulars in the register, and return the instrument to the presenter. They issue to the presenter a certificate, commonly described as the “conclusive certificate”, that is sufficient evidence for the courts that the requirements for registration have been satisfied. If they have not been satisfied, the security conferred by the charge is invalid against a liquidator, an administrator or any creditor – this penalty is known as the “sanction of invalidity”. The conclusive certificate is an essential part of the scheme as it is evidence that the charge will not be subject to the sanction of invalidity.

9. Any addition to the property charged or change in the nature of the charge results in the creation of a new charge to which the requirement to register will apply. There are no requirements relating to other changes to a registered charge but there is provision for such changes to be filed. A memorandum of satisfaction, in whole or in part, may also be filed.

10. This scheme also applies to overseas companies that have registered a UK branch or place of business but for these companies the requirement to register applies only to charges over their property located in the UK. (UK subsidiaries of overseas companies are treated the same as other UK companies.) The scheme applies without modification to LLPs. It does not apply to unregistered companies though it appears that, in practice, their lenders register the charges they take from these companies.

11. Limited companies are required to keep a register with basic information for every charge over their property, whether or not the charge is registrable at Companies House. There is a public right to inspect both this register of charges and, for all companies, copies of the instruments creating the charges. The detailed rules relating to inspection of these documents is the same as for other company records for which there is a public right of inspection.

Historical Context

12. There are two reasons why it is necessary to have a statutory scheme for registration of company charges:

- First, the statutory sanction is extremely effective at ensuring registrable charges are registered as soon as they are granted. If a registrable charge is not registered within 21 days of its creation, it is not valid against a liquidator, an administrator or any creditor. This “sanction of invalidity” means that the lender has a very strong commercial interest in ensuring the charge is registered timeously. Without this statutory sanction there would be a real risk of any lender who is connected to the company (for example, a director) not registering the charge.
- Second, a statutory scheme means that all those who might benefit from information about a company’s charges have access to it. A non-statutory scheme, say one operated by the banks, would only serve their purposes. Furthermore disclosure of the information would then be prevented by the Data Protection Act.

The current scheme is effective. It is necessary that a statutory scheme continues to exist as it helps to guard against fraud and facilitates commercial borrowing. However there are some issues with the current scheme which are described below in the “Problems under Consideration” section.

13. The independent Company Law Review consulted over changes to the scheme in 2003. However, no change was made to the existing scheme in the Companies Act 2006 (the 2006 Act). Rather the 2006 Act provides power to alter, add or repeal its provisions relating to the registration of charges.

Problems under consideration / Rational for Intervention

C The current scheme for registration of company charges is basically the same as introduced in 1900 for companies registered in England or Ireland. Piecemeal minor changes were made to the scheme during the 20th century but the more thorough changes included in the Companies Act 1989 were never brought into force - primarily because of the Land Registry’s concerns.

14. The scheme is said by users to be outdated, slow and laborious; it is incompatible with electronic filing. The information filed and placed on the public record may be inaccurate and seriously mislead third parties but those who filed are protected from the consequences of their mistakes.

15. The categories of registrable charge are out-of-date. They have been extended piecemeal by companies legislation, plugging gaps as they arose. Several problems result:

- There has been uncertainty as to whether the requirement to register applies to, for example, charges over the benefit of a bank account or to rent deposit deeds or to overseas trust deeds created by corporate members of Lloyds. Unless there is a market practice which has developed as a result of which the particular type of charge concerned is not registered (and there is such a practice currently in certain markets in relation to security over insurance policies), it is common practice to register all charges created by companies so as to avoid the sanction of invalidity if it were to be decided that a charge was registrable.
- There are anomalies: for example, a charge over a bond is registrable, but not a charge over a share; a charge is registrable when to the benefit of a charterparty but not a charge over an insurance policy. There is no commercial justification for such distinctions. Charges over trust deeds created by corporate members of Lloyds are registrable although their registration serves no useful purpose.
- Certain charges are not chargeable if created by a company incorporated in Scotland but would be chargeable if created by a company incorporated anywhere else in the United Kingdom.
- The language is unhelpful – for example it requires registration of “a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale”.
- There is no effective means of ensuring that charges over acquired property are registered;

16. The scheme is also criticised because the criminal sanction against a company for failing to register a charge is unnecessary: the sanction of invalidity ensures that the lender registers the charge timeously. Another criticism is that the effect of registration on third parties is not clear – ie what is the position of a person who, in good faith, buys property from a company that is subject to a charge?

17. There are particular problems in the application of the scheme to overseas companies resulting in legal uncertainty over its application to charges, including floating charges that extend to intangible assets. The sanction of invalidity means that the decision whether or not the charge is registrable must be taken at the time the charge is created. But it is not possible at that time to know what property law would determine the location of the assets in the event of the company's insolvency. On the other hand, the scheme does not apply to unregistered companies – although in practice, their charges are often registered.

18. There are other existing specialist registers, eg the Land Registry; the Shipping Register. These are registers of assets, not of their owners but with electronic registers it may be possible to develop information-sharing arrangements so that charges over assets for which there is a specialist register do not have to be registered both at Companies House and the specialist register. The proposed Scottish Register of Floating Charges will be a new specialist register. When sections 37-47 of the Bankruptcy and Diligence etc (Scotland) Act 2007 are brought into force then, unless some special provision is made, floating charges will have to be created by registration at the new Register of Floating Charges in order to ensure that they are recognised under Scots law; and subsequently registered at Companies House so that they are valid against a liquidator, administrator or any creditor. The Companies Act 2006 (the “2006 Act”) provides the means to avoid such “double registration” requirements. It provides power:

- to amend the current scheme; and
- to treat as if registered under the 2006 Act charges that have been registered in a special register if there are satisfactory information-sharing arrangements between the registers so that third parties do not suffer.

In 2007, there was consultation over the use of the latter power so that charges created by registration at the proposed Scottish Register of Floating Charges would be treated as if registered under the 2006 Act. There was strong support for avoiding any requirement for dual registration provided that this would not increase costs for either those registering Scottish floating charges or for those checking on companies.

19. In a consultation document published on 12 March 2010, views were sought on options to address the criticisms of the current scheme, on more general questions relating to the nature of the scheme, and on the scope for treating charges registered in a special register as if registered under the 2007 Act. Following this consultation and further discussions with those who responded, the Government have developed proposals.

Options

20. There are 4 aspects of the scheme that might be updated, each with separate sub-options:
- which charges are registrable;
 - the procedures for registering a registrable charge;
 - the application of the scheme to overseas companies; and
 - the effect on third parties of registering – or of failing to register – a registrable charge.

Options for change under each of these aspects are considered below.

21. The current scheme does not determine the priority of a charge. Several other common law jurisdictions operate “notice-filing” schemes for the registration of company charges. Under these schemes, the priority of a charge is determined by its date of registration. Primary legislation would be required to replace the current scheme with one based on “notice-filing”. Therefore this option has not been considered.

Registrable charges

Option 1: no change.

22. Under this option there would continue to be separate lists of registrable charges for companies registered in Scotland and for those registered elsewhere in the UK. There would be no change in the obligation for corporate members of Lloyds. Companies would continue to be required to register any existing charges over property they acquire. Overseas companies would be required to register any charge over property in the UK.

Option 2: update the list of registrable charges

23. Under this option, the list would be amended following the provisions of the 1989 Act (which were not brought into force). This would meet the main criticisms of the current scheme. The main changes would be

- to apply the requirement to register to charges over tangible moveable property rather than to "a charge created or evidenced by an instrument which, if executed by an individual would require a bill of sale".
- to make clear that book debts include those assigned to the company;
- to make clear that the requirement to register a floating charge applies to all floating charges, including those on only part of the company's property;
- to provide a definition of intellectual property for the purpose of a charge over intellectual property;
- to make clear that a shipowner's lien on subfreights is not chargeable;

The list of registrable charges would be kept under review in case any other type of charge should be made registrable. Section 894 provides power to amend the relevant provision.

Option 3: Make all charges registrable unless explicitly excluded.

24. For UK companies, the proposed exclusions would be:

- premium trust deeds entered into by corporate members of Lloyds; and
- rent security deposits.

The exclusion for Lloyds premium trust deeds is because their registration serves no useful purpose. The exclusion for rent security deposits would remove the uncertainty that arises because whether or not they are registrable depends on technical details.

25. The list of exclusions from registrable charges would be kept under review and amended from time to time. A change to the list could not be retrospective. This means that the sanction of invalidity would continue to apply until any change to the list comes into force.

26. Under both Option 2 and Option 3:

- the criminal sanction for failure to register a registrable charge would be abolished;

- there would be no requirement to register existing charges over property acquired with a charge attached; and
- for registered overseas companies, the requirement to register would apply only to charges over:
 - land in the UK, whether or not registered at the Land Registry for England & Wales or Scotland or Northern Ireland;
 - ships and aircraft registered in the relevant UK registers;
 - registered intellectual property;
 - tangible property in the UK either when the charge is created or when it is registered; and
 - floating charges.

Costs and benefits

27. The benefit of Option 1 is that it would avoid any transitional costs. This option has been rejected because it does not address the problems described in paragraph 16 above. Furthermore it would mean that it would not be possible to prevent a double-registration requirement when the relevant sections of the Bankruptcy and Diligence etc (Scotland) Act 2007 are brought into force.

28. Under both Options 2 and 3, the criminal sanction for failure to register a charge would be repealed. This will make the decision to register a purely commercial decision for the lender. The sanction of invalidity will be retained. This means an unregistered registrable charge is not valid against a liquidator, administrator or any creditor. A decision not to register is likely to be taken for short-term charges, for example over goods in transit.

29. The main benefit from both Options 2 and Option 3 would be the reduction in uncertainty. There have been several court cases where whether or not a charge was registrable has been an important element. There has also been uncertainty over the requirement to register applies to rent deposit deeds and of overseas trust deeds created by members of Lloyds. The options should reduce the need to register charges "just in case". Either option would provide a more coherent scheme than at present. Also, under both Options 2 and 3, corporate members of Lloyds would no longer be required to register premium trust deeds. The savings to corporate members from registration fees alone would be about £17,000 a year (based on the average number of registrations in the 3 years to 2009). In addition there would be an annual saving of about 100 hours of staff time. Assuming costs of £50 per hour, this would bring total annual savings to £22,000 a year. There would be no transitional costs.

30. Neither Option 2 nor Option 3 is expected in general either to increase or to reduce ongoing costs. There would be transitional costs, particularly for lenders' legal advisers; these are subsumed into those relating to changes in procedures (see paragraph 57 below).

Risks and Assumptions

31. The principal assumption is that lenders will continue to require security for their loans to companies.

32. It is also assumed that whether Option 2 or 3 is adopted will not in practice affect whether or not a particular charge will be registered. This assumption has been adopted because, in practice, virtually all charges are registered as

(a) most charging documents include charges that are definitely registrable as well as those which are not; and

(b) the sanction of invalidity means that lenders take a cautious approach, registering if in doubt as to whether or not the charge is registrable.

33. A key difference between these three options is how they accommodate changes in commercial practice as to the types of assets used as security. The inconsistencies of the current list is a result of piecemeal changes. Recent examples of new types of charge are those over receivables such as income from projects funded under the Private Finance Initiative (PFI) and over North Sea petroleum licences and Joint Operating agreement. We understand that nevertheless the former are generally registered but that the latter are registered only if combined with charges over other assets.

- Under options 1 and 2, future changes would be additions to the list of registrable charges with the sanction of invalidity applying to the added category of charge when the change came into force;

- Under option 3, future changes would be additional exclusions with the sanction of invalidity continuing to apply to the deleted category until the change came into force.

Under options 1 and 2, if new types of charge are adopted by companies and their lenders then it would take time for these to become registrable if that were considered appropriate. Under option 3, it would take time for new types of charge to be made unregistrable if that were to be considered appropriate: the sanction of invalidity would continue to be applicable until any new exclusion came into force. The arguments in favour of Option 3 are technical but, given the sanction of invalidity, of great commercial significance. However, as it is proposed to abolish the criminal sanction for failure to register a charge, the decision whether to register a registrable charge will be a commercial decision for the chargee.

Administrative burden

34. The list of registrable charges does not result in an administrative burden.

Conclusion

35. Option 2 is the preferred option.

Option 2 or Option 3?

36. Views are sought through this consultation on whether Option 2 or Option 3 is to be preferred and on whether either would increase or reduce costs.

Procedures for registering charges

37. Option 4: no change (see paragraphs 6-11 above). This option was rejected because it requires those filing to compile brief particulars and Companies House to make a judgment as to whether these brief particulars are an adequate description of the charged property. Furthermore, under current law the certificate issued by Companies House on filing (the “conclusive certificate”) is sufficient evidence for the courts that the requirements of the 2006 Act for the registration of a charge have been satisfied. This means that the validity of the charge is protected by registration even if the filing has a seriously inaccurate description of the assets covered by it.

38. Under Option 4 it would not be possible to develop information-sharing arrangements between Companies House and specialist registers so that charges do not have to be registered at both places (see paragraph 19).

39. Option 5: An extract from the charge instrument (if any) to be placed on the public record. Under this option, there would be a requirement to file extracts from the charge instrument together with specified particulars.

40. The extract from the instrument would be required to include:

- the date that purports to be the date of the charge or, in the case of a charge of land created by an electronic document, the date when the document takes effect;
- the identity of the chargee
- the property covered;
- in the case of a floating charge, whether there is an automatic crystallisation clause and/or a negative pledge. (Generally a floating charge cannot be enforced until the appointment of a receiver or upon the commencement of liquidation; an automatic crystallisation clause provides for other circumstances under which it automatically becomes enforceable. A negative pledge prohibits the company from granting any other security interests over the charged property which might have equal or higher priority.)

Provided that it did not exceed a specified size (say 50 A4 sides if a paper document), it would be possible to file the complete instrument: whether or not to do so, would be for the filer to decide. It would also be possible to redact commercially or personally sensitive information in the filed document provided that the required information is kept visible. The existing requirement for the company to make the instrument available to public would be revised so that it applies only to the redacted document.

41. The required particulars would be only:

- the registered name and number of the chargor (currently required under the authentication requirements);
- the date of the creation of the charge;

- whether all assets, including those not yet acquired are covered by the charge. If not, whether it covers land and/or intangibles; and
- in the case of an oral charge only (which is extremely rare):
 - a statement that it is an oral charge;
 - the amount secured by the charge;
 - the name address of the person entitled to the charge; and
 - a memorandum with the information equivalent that which must be include in the filed extract of the instrument for charges so created. if there had ben were no instrument short particulars of the property charged.

These particulars would still be needed as Companies House would not extract information from the charge instrument for populating the chargor's record. But

42. The filing requirements under option 5 would make it possible to develop information-sharing arrangements between Companies House and other registers. Discussions are continuing with a view to making provision so that a standard security registered with Registers of Scotland can be treated as if registered under the Companies Act. The intention is to ensure that those who inspect a company's record at Companies House are able to see:

- the date of the creation of the charge;
- that the charge covers land in Scotland;
- the charge instrument.

It is also intended to make similar provision for floating charges registered with the Scottish Register of Floating Charges when this Register is established.

43. It is intended to retain the existing provision for voluntary filing of changes to a charge and of a memorandum of satisfaction with new safeguards against fraudulent filing. Various options were considered, such as restricting the ability to file a memorandum of satisfaction to the chargee with the chargor having a statutory right to demand its filing. Such options were rejected following consultation as the enforcement of such rights would be high cost and there would need to be provision to cover situations such as the chargee being a "Special Purchase Vehicle" that ceased to exist on repayment of the loan . Noting that 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, it is proposed to restrict a chargor's ability to file a memorandum of satisfaction to be dependant on the filing of an explanation, which would be placed on the file, of why the filing is not being made by the chargee. So as to avoid any confusion, whether or not malicious, as to which charge is covered by the memorandum of satisfaction, a unique reference number will be allocated to each charge on its registration; this will have to be cited in the memorandum.

44. Electronic filing would be possible. This would require Companies House to design, construct and implement appropriate electronic filing systems to enable people to deliver charges electronically. This could be either through specific software or possibly via the Companies House website. There would need to be revisions to the requirements for the form, authentication and manner of delivery of charges information and changes to guidance and internal procedures. Companies House would initiate a communications programme to inform customers of the changes in the requirements. Those wishing to file electronically would have first to register for this purpose: this would cost £10.

45. Under this option, Companies House would:

- check that the requirements for registration have been satisfied, ie that:
 - the filing is within 21 days of the creation of the charge,
 - the required particulars (see paragraph 41) are consistent with the instrument,
- allocate a unique reference number to the charge;
- enter the required particulars in the register;
- place the extract of the instrument with its unique reference number on the register; and
- issue a certificate with the unique reference number that would be conclusive evidence as to:
 - the identity of the chargor;

- the date on which the charge was entered on the public record; and
- the charge having been registered within 21 days of its date of creation;

The certificate would also record whether the charge covers all assets or land and/or other assets but would not be conclusive evidence in relation to them.

46. The filer – or any other person – would be able to buy a copy of the filed extract from Companies House through either Webcheck or Companies House Direct. This would be necessary if, for example, the charged assets include registrable land. The current fee for copies of filed documents is £1.

47. Under this option, the requirement for limited companies to keep a register of their charges would be abolished.

48. Option 6: all-electronic filing. This option is the same as Option 5 except that Companies House would only accept electronic delivery of documents to register a charge. This is not expected to affect companies as registration of charges is handled by the lender or the lender's lawyer which would have access to electronic delivery.

49. Option 7: abolition of requirement to file the instrument, safeguarded by a requirement that the filing be made by the company. This option was proposed in the 2010 consultation document. It was rejected by the vast majority of respondents. It has not been considered further.

Costs and benefits

50. Companies House also faces costs, including staff salaries, overheads, etc for the team that handles registration of charges. In total the costs to Companies House are around £400,000 per annum. As Companies House operates as a trading fund, it is assumed that all costs and benefits to it are passed on to its users through the fees it charges.

Current situation

51. Under Option 4 there would be no change. Some 75,000 charges are registered a year and whilst there is a registration fee applicable to charges (costing £13 per charge) this is not the main cost associated with filing of charges. Legal and administrative costs involved in preparing the brief particulars for filing form the majority of the costs. The total cost associated with the current requirements is estimated to be about £300 per charge registered (including the registration fee of £13) and this equates to £22.5m in total per annum. The assumed cost per charge was informed through engagement with stakeholders.

52. As Companies House operates as a trading fund these costs are recouped through the fees charged for filing.

Total Costs for Businesses (for filing charges): 75,000 Charges x £300 a charge = £22.5m

Benefits

53. *Benefits to Businesses from new filing procedures*: The changes in procedures under Option 5 are expected to reduce the costs associated with submitting a charge for registration by about £100; with the savings being doubled if the filer opts to file electronically. In 2010, 6 lenders accounted for about two-thirds of lending to UK companies, it is assumed these will opt to file electronically. It is likely that the value of the loans provided by these 6 lenders is significantly higher than the average. For this Impact Assessment, it is assumed that 6 lenders account for the registration of about 25,000 charges and that these will all file electronically. Noting that Companies House report that a significant element of secured commercial loans are given by individuals, it is assumed that the remaining 50,000 charges will be split so that about 1,000 law firms file 40,000 loans all of whom are assumed will opt to file electronically; and that 5,000 law firms file 10,000 loans of whom half are assumed would opt to file electronically as soon as possible: in total, it is assumed that 70,000 filings will be made electronically.

Cost Savings (electronic filing): 70,000 filings x £200 Cost savings/filing = £14m

Cost Savings (non-electronic filing): 5,000 filings x £100 Cost savings/filing = £500k

Total Cost Saving to Businesses (from new filing procedures): £14.5m

The benefit from the abolition of the requirement for limited companies to keep a register of charges is expected to be insignificant.

54. *Benefits to Businesses from reducing the number of filings rejected*: The changes are also expected to significantly reduce the number of filings rejected. In the 10 months to January 2010, 2,168 (nearly 3% of filings) were rejected because they were made more than 21 days after the date of

creation and a further 14,037 for other reasons (eg missing information). The cost consequent to a late registration is assumed to be about £500 and for re-submission of filing rejected for other reasons about £100. Under Option 5, the number of late filings is estimated to be reduced by 50 per cent of filings with a saving of about £650kpa. The number rejected for other reasons is estimated to be reduced by 10,000 a year, in which case the saving would be £1m.

Cost Saving from reducing the number of late filings:

2,602 Estimated annual late filings x £500 x 50% = £650,400

Cost Savings from reducing the number of rejections for other reasons:

10,000 Reduction in rejections x £100 = £1m

Total Cost Saving from reducing the number of late and other rejected filings: £1.7m

55. **Benefits to Companies House:** It is estimated that Option 5 would reduce the operational costs for Companies House by 25-30 per cent, ie yields savings of £100k-120k per annum.

Operational Cost Saving for Companies House:

25% reduction of annual costs (£400k) = £100k

30% reduction of annual costs (£400k) = £120k

56. *Benefits from special provisions for Scotland:* If it is possible to make special provision for land in Scotland, then this would affect some 3,500 registrations a year of standard securities. The main savings would arise from the lenders' solicitors not having to request the Keeper of Registers of Scotland to confirm the date of registration there; then registering it with Companies House and subsequently filing with the Keeper the conclusive certificate issued by Companies House. Assuming this would reduce costs by about £50, the saving would be £175,000pa. There would be further savings if it were also possible to make special provision for floating charges registered in the proposed Scottish Register of Floating charges.

Cost Saving to Scottish solicitors: 3,500 registrations x £50 saving per registration = £175,000

57. Under Option 6, electronic filing would be compulsory. However this would not bring the cost savings normally associated with all-electronic filing as Companies House would still have to check that the requirements for registration have been satisfied before issuing the conclusive certificate. Therefore this option has been rejected.

Costs

One off- Transitional Costs – Option 5

58. There would be transitional costs for law firms and banks, in familiarising themselves with the new requirements and procedures and a one-off registration fee (probably £10) for filing electronically. We assume one-off costs in the range of £1,000 for the largest lenders making most filings (6 lenders accounting for 25,000 charges); £500 for the firms who make many filings a year (1,000 law firms account for 40,000 charges registered); and £250 for each firm making only a few charges (5,000 firms accounting for 10,000 registered charges).

Familiarisation Costs: 6 Largest Lenders x £1000 = £6,000

1,000 firms x £500 = £0.5m

5,000 firms x £250 = £1.3m

Total Familiarisation Costs = £1.8m

59. **One off costs to Companies House:** There would be substantial one-off costs of the order of £200k-£500k for setting up the system.

One off costs to Companies House: £200-£500k

Table 1 - Summary Table of Costs and Benefits from Option 5

Costs – Transitional Costs	
Familiarisation Costs to Businesses	£1.8m
One-off costs to Companies House	£0.2-£0.5m
Total Transitional Costs	£2 – £2.3m
Benefits – Annual Cost Savings*	
Total Cost Saving to Businesses from new filing procedures	£14.5m
Benefits to Businesses from reducing the number of filings rejected	£1.7m
Cost Saving to Scottish Solicitors	£0.2m
Total Benefits to Businesses	£16.3m
Cost Saving to Companies House	£0.1m
Total Benefits	£16.4m
Net Present Value (over 10 years)	£130m

*Note: Annual benefits undiscounted. Totals do not add exactly due to rounding.

Risks and assumptions

60. Key difference between the options are the information filed; what is placed on the public record; and the consequences of filing. Under Option 4, the required particulars include “short particulars of the property charged” and that the registration certificate is sufficient evidence for the courts of compliance with all the registration requirements – ie that lack of registration will not render it invalid against a liquidator, administrator or any creditor. Under Option 4, no part of the instrument is placed on the public record. (There is, however, a public right to inspect the instrument at the company.) Under Options 5 and 6 an extract from the instrument detailing the property covered must be filed and this will be placed on the public record. Under these options, the registration certificate would be sufficient evidence for the courts that the charge was registered timeously – ie that it will not be rendered invalid against a liquidator, administrator or any creditor by reason of not having been registered within 21 days of its creation. The other main difference is that:

- under Option 4, all filing must be in hard copy with the original (in Scotland, a certified copy) of the instrument creating the charge being delivered to the Registrar and, after checking, being returned to the filer;
- under Option 5, filing may be in hard copy or by electronic means;

The key assumptions relate to the costs associated with the different forms of filing.

61. The broad estimate of development costs for Companies House is based on current knowledge of the high level requirement. It assumes that all development will be carried out by staff at Companies House (ie that there will not be a need for more expensive contractors) and that there will not be any

significant new authentication procedures will need to be introduced for electronic filing. It does not contain any element for the data sharing arrangement with Registers of Scotland.

Conclusion

62. Option 5 is the preferred option.

Overseas Companies

Option 8: Changes as for UK companies only

63. Under this option, the requirement to register charges created by overseas companies would continue to apply to charges created by those overseas companies that have registered a UK place of business. The scheme for overseas companies would be as for UK companies except that the requirement to register the charge would apply, as now, only if the property subject to the charge is situated in the UK when the charge is created.

Option 9: revise the list of registrable charges

64. Under this option, the requirement to register charges created by overseas companies would only apply to charges over specified assets. Consultation has been on the basis of making the registrable charges be:

- land in the UK;
- ships and aircraft registered in the relevant UK registers
- intellectual property registered at the UK Intellectual Property Office;
- tangible property in the UK, possibly restricted to such property in the UK both when the charge is created or when it is registered; and
- possibly, floating charges.

Option 10: exclude overseas companies from the scheme

65. Under this option, there would not be any requirement to register charges created by overseas companies. This is the preferred option.

Costs and benefits

66. Options 9 and 10 would both provide similar savings as the changes for UK companies. There are nearly 10,000 such companies. 742 charges created by them were registered in the period between 1/10/2009 and 21/09/2010. The savings would therefore be about 1/100th of those for UK companies, ie £0.1m (see para 50). Under Option 10 the savings would be £300 x 750 pa, ie £0.2m.

67. Option 8 would not address the problems peculiar to overseas companies, ie that the decision whether or not the charge is registrable must be taken at the time the charge is created but it is not possible at that time to know what property law would determine the location of the assets in the event of the company's insolvency. The benefits to third parties from registration is less than for a UK company: for overseas company's the information is primarily useful as regards to whether a specific asset that is clearly located in the UK is the subject of a charge. Third parties will not know whether the absence from the public record of a charge over moveable property or over intangible property means that there is no such charge or whether it is because the charge is not registrable because the property was not in the UK at the time the charge was created. (For a UK company the requirement applies regardless of the location of the assets and therefore the public record gives a better picture of the company's total secured debt.)

68. Option 9 is a partial solution to the problem. But for assets for which there is a UK register, the benefit to third persons is only from the information being available from Companies House in addition to at the specialist register. If floating charges are registrable, the problem remains.

69. Option 10 would mean that Companies House would no longer hold information on any charges created by overseas companies after the Regulations come into force. This would mean a significant reduction in information readily available to third parties. However, this information is significantly less useful than the equivalent information for UK companies. In particular, the absence of a charge over particular property on the public record of an overseas company does not mean that there cannot be a valid charge over that property.

Conclusion

70. Option 10 is the preferred option.

Effect on third parties

71. Option 11: no change. Under common law, registration is constructive notice to those who should be reasonably expected to search the register. Other third parties are not affected by the registration of a charge or by failure to register it. In the case of assets for which there are specialist registers, the position of third parties may be affected by the rules of the specialist registers.

72. Option 12: constructive notice. Under this option, there would be provision so that:

- any person taking a charge over the company's property is deemed to have notice of any previously registered charge.
- a buyer of property subject to an unregistered charge takes free of the charge with an exception for property subject to the rules of a specialist register.

The common law would continue to apply in other circumstances.

73. Option 12 is not expected directly to affect any costs. The greater legal certainty is expected to be welcomed.

Conclusion

74. Option 12 is the preferred option.

Wider impact

75. The wider impact was described in the rationale for intervention above. If companies are to be able to use their assets to secure their borrowing, then there needs to be easy access for their creditors and potential creditors (including suppliers and customers through, for example, credit reference agencies) to basic details about the extent to which its assets have been encumbered. For over a century, the public availability of this information has limited the impact of companies' insolvency and thus facilitated the availability of loans to companies.

Implementation plan

76. It is intended to make all the changes to the scheme for companies at once, so that they apply to all charges created on or after a specified date. This date will not be until 2012. It is intended to publish draft Regulations in early 2011.

77. It is intended to apply the provisions with the revised scheme to LLPs and unregistered companies on the same timescale.

78. If changes are also needed so as to reduce the costs associated with provisions of the Bankruptcy and Diligence etc (Scotland) Act 2007, the intention is that these would come into force when the Register of Floating Charges is established.

Specific Impact Test

Statutory Equalities Duties

79. The proposed changes are not expected to have any impact.

Economic impacts

80. There will be no competition effects associated with this policy. Small firms are not expected to be disproportionately affected.

Environmental Impacts

81. Electronic filing will allow some environmental benefits – however these are negligible and not estimated in this impact assessment due to the disproportionate costs of calculating this benefit.

Social Impacts

82. The proposed changes are not expected to have any impact.

Sustainable Development

83. The proposed changes are not expected to have any impact.

One In, One Out

84. Under the 'One In, One Out' rule, whereby a measure that has a net cost to business must have a measure or measures of equivalent cost removed in order to be implemented, the net benefit of Registration of Charges is £130m over the ten year period. This represents a saving to business and is therefore a One Out.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added to provide further information about non-monetary costs and benefits from Specific Impact Tests, if relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review];

We will review the operation of the new scheme for registration of company charges 5 years after the proposed changes come into force.

Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

The review will examine whether the new procedures are easier. It will also cover:

- whether the new procedures balance the needs of those who file information and those who use the information on the public record.
- whether there are any uncertainties or anomalies that need to be addressed;
- whether there should be more provision for recognition of registration in registers for specific assets, eg aircraft.

Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

We will develop the methods that are most appropriate to the evaluation. This is likely to be structured idiscussions with lenders and their legal advisers, credit reference agencies, insolvency practitioners, and specialist registries.

Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured]

In 2010, 1.7 per cent of filings were rejected because they were late; 11.3 per cent were rejected for other reasons.

Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

Reduction in the percentage of filings rejected either because they are late or for other reasons.

Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]

Companies House collect these statistics.

Reasons for not planning a PIR: [If there is no plan to do a PIR please provide reasons here]

Not applicable.