

**GOVERNMENT RESPONSE**

Consultation on Registration of Charges  
created by Companies and Limited  
Liability Partnerships

DECEMBER 2010

## **Government response to consultation on Registration of Charges created by Companies and Limited Liability Partnerships**

Contents:

1. Executive Summary
2. Introduction
  - Background
  - Devolved issues
  - Consultation process

3. Government Response

4. Next Steps

Annex A: Proposals in the consultation document together with the Government Response

Annex B: Draft Impact Assessment

## **1. EXECUTIVE SUMMARY**

1. When a company borrows money or otherwise obtains credit, it is often required to give its creditors some form of security, either a floating charge over all the company's assets or a fixed charge over a particular asset. Provided that the assets have not already been used to secure other borrowing, this security protects the creditor in the event of the company's insolvency before the debt is paid. ..

2. Companies' borrowing has been facilitated for over 100 years by a scheme for the compulsory publicity for use of assets to secure borrowing, ie registration of company charges. The scheme ensures that creditors, both secured and unsecured, know whether the company's assets would be available to pay its debts should it become insolvent. The current scheme is criticised because:

- the procedures for registration are burdensome and incompatible with electronic filing;
- the list of registrable charges has not been kept in line with changes in law and commercial practice;
- there is scope for uncertainty as to several aspects; and
- it applies to charges created by those overseas companies that are registered at Companies House over property located in the UK but this is unworkable for their charges over moveable and intangible property.

Furthermore the current scheme does not fit well with Scots property law. This will be aggravated if certain provisions in the Bankruptcy and Diligence etc (Scotland) Act 2007 (the Scottish 2007 Act) are brought into force: this would necessitate changes to the UK scheme.

3. The Companies Act 2006 (the 2006 Act) provides power to revise the scheme. Following consultation earlier in the year, the Government has revised the proposals to revise the scheme. (Annex A has the proposals that formed the basis of the consultation.) A summary of responses to the consultation was published in October:

<http://www.bis.gov.uk/Consultations/registration-of-charges?cat=closedawaitingresponse> . The Government's revised proposals are described in Part 3 below. A draft Impact Assessment is at Annex B; this was signed by Edward Davey, Minister for Employment Relations, Consumer and Postal Affairs, on 2 December 2010. The revised proposals are expected to bring substantial savings to business of over £15mn a year, primarily because they make electronic registration possible.

## 2. INTRODUCTION

### Background

4. The law relating to registration of company charges is of real importance to capital markets as it helps to guard against fraud and to facilitate commercial borrowing. As noted by Professor Diamond in 1989, and quoted by the Law Commission in 2005:

“... the general requirement for the registration of charges under the Companies Act commands almost universal support and there is no demand for its abolition. Apart from the objective of providing information for persons proposing to deal with the company so that they, or credit reference agencies on their behalf, can assess its creditworthiness, persons considering whether to provide secured credit can find out whether the proposed security is already the subject of a charge; by the same token, a registration system benefits the company itself if it is enabled to give some sort of assurance to a prospective secured creditor that the property it is offering as security is unencumbered. Registration can also ease the task of a receiver or liquidator in knowing whether to acknowledge the validity of an alleged mortgage or charge, and does away with the risk of fraud by inventing a security only when a receiver is appointed or the company goes into liquidation. One can also recognise that, in addition to the use of information by financial analysts and persons considering whether to invest in a company, there is today a general climate of opinion in favour of public disclosure of companies’ financial activities.”<sup>1</sup>.

5. The current scheme for the registration of company charges is set out in Part 25 of the Companies Act 2006 (the 2006 Act). Its main purpose is to make public whether a company has used certain of its assets to secure borrowing. The register does not purport to provide an up-to-date accurate record of a company’s complete indebtedness. What it does provide is an assurance to third parties that any registrable existing charge:

- which is not on the Companies House record will be invalid against liquidators, administrators and creditors in the event of the company’s insolvency (unless it was created very recently);
- which is on the Companies House record will not be invalid for want of registration against liquidators, administrators and creditors in the event of the company’s insolvency.

### Devolved issues

6. The law relating to registration of company charges applies to all companies incorporated in the United Kingdom and limited liability partnerships (LLPs). Regulations under the Companies Act 2006 extend the requirements to register to charges over UK property created by overseas companies that have registered a UK establishment with Companies House.

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<sup>1</sup> A.L. Diamond, *A Review of Security Interests in Property* (1989), HMSO, ISBN 011 514664 4, para 11.1.5 as quoted in the Law Commission’s Report, para 1.3.

7. The requirement to register a charge arises following the creation of a charge. The creation of a charge is an aspect of property law. Property law is devolved. Furthermore UK companies may create charges under the law of other jurisdictions.

8. The Bankruptcy and Diligence etc (Scotland) Act 2007 provides for the creation of a floating charge under Scots law. When these provisions are brought into force, the establishment of a right under a floating charge under Scots law will take place on its registration in the Register of Floating Charges, to be established for this purpose. These provisions apply to all companies, not just those incorporated in Scotland or elsewhere in the United Kingdom. As a result, companies will have to register a floating charge created under Scots law under two separate pieces of legislation

## **Consultation process**

9. In March 2010, the Government consulted over proposals to revise the current scheme for the registration of company charges under the Companies Act 2006. These proposals were based on the 2001 recommendations of the Company Law Review and the subsequent advice of the Law Commission. They involved possible changes to:

- which charges must be registered;
- how charges may be registered, including the introduction of electronic registration;
- the consequences of registering and of not registering a registrable charge.

Consultees' views were sought both on specific proposals and on related questions. The consultation document was placed on the departmental website and links to it were sent to 144 individuals and organisations (listed in Annex E of the consultation document); in addition, some 800 others who have been asked to be on the department's circulation list for matters relating to corporate law and governance were alerted to its publication. An internet discussion forum was set up with threads for each of the main policy areas.

10. The deadline for comments was 18 June 2010. A summary of responses was published on the BIS website in October.

11. The Government is very grateful to all those who responded to the consultation. On the basis of these responses, the Government adapted their proposals, particularly regarding:

- registration procedures;
- registrable charges;
- overseas companies;
- effect on third parties; and
- memorandum of satisfaction.

The Government's response takes account of these further discussions as well as the responses to the consultation.

### 3. GOVERNMENT RESPONSE

12. In the light of all the comments received, the Government intend to revise the scheme for registration of charges created by companies so that there is a single UK-wide scheme that applies to all companies incorporated under the Companies Act 2006 or its predecessors. The changed scheme will also apply to unregistered companies and limited liability partnerships. It will not apply to overseas companies.

13. 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 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 arrangement<sup>2</sup> or a security financial collateral arrangement<sup>3</sup> (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.

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<sup>2</sup> 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.

<sup>3</sup> 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.

14. The Government do not intend to require registration of the crystallisation of a floating charge.
15. The Government intend to abolish the requirement to register charges existing on property acquired.
16. The criminal sanction for failure to register a charge will be abolished. There will not be any change to the sanction of invalidity. This means that, as now, if not registered within 21 days of its creation, a registrable charge will be void (so far as any security on the company's property or any part of it is conferred by the charge) against the liquidator, an administrator and any creditor of the company.
17. 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.
18. It will be possible to register a charge electronically. The requirements for registration will be the filing of the following particulars:
- registered name and number of the chargor;
  - the date of the creation of the charge;
  - whether all assets are covered by the charge and, if not, whether it covers
    - land (in England & Wales, Northern Ireland, Scotland, or elsewhere); and/or
    - intangibles;
- together with a copy of an extract from the charge instrument covering:
- the identities of the chargor and the chargee
  - 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 property covered;
  - in the case of a floating charge, whether there is an automatic crystallisation clause and/or a negative pledge.
- 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.
- If there is no charge instrument, the particulars will have to include a short description of the property charged, the amount of the charge and the names of the persons entitled to it.

19. Companies House will:

- check that:
  - the company named in the particulars is the chargor in the extract from the instrument
  - the registered name and number match;
  - the date of creation in the particulars is the same as 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 filing was made within 21 days of the date of creation in the particulars.
- allocate a reference number linking the extract from the charge instrument to the brief particulars;
- 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;
- update the summary for the company showing the number of charges created and the numbers outstanding or satisfied or part-satisfied;
- issue a Certificate of Registration as regards a charge for which the instrument is on the public record identified by its reference number, which would be **conclusive evidence**:
  - of the identity of the chargor and
  - that the charge was registered within 21 days of its date of creation.

The certificate will also record whether the charge covers all assets or land in England & Wales/Scotland/Northern Ireland/elsewhere and/or intangibles but it would not be conclusive evidence in relation to them. (In the event of a late registration as directed by a court, the conclusive certificate will not be issued until satisfaction of any timing condition provided by the court.)

20. In the event of a late registration as directed by a court, the conclusive certificate will be evidence that:

- any timing condition provided by the court has been satisfied;
- the charge will not be invalid because it was not registered within 21 days of its creation

21. There will also be provision for the chargee voluntarily to file:

- the assignment of the charge and any other changes relating to the person entitled to the charge;
- the addition of a negative pledge; and
- a memorandum of satisfaction or of partial satisfaction or release.



22. The chargor will also be able to file a memorandum of satisfaction or release provided that it is accompanied by a statement explaining why the filing is not by the chargee.

23. Companies will be required to maintain a register only of charges granted orally. As now, this would be required to have a short description of the property charged, the amount of the charge and the names of the persons entitled to it.

24. There would continue to be a public right to inspect copies of all instruments creating charges.

25. Annex A has the Government response to the comments received on each proposal in the consultation document published in March 2010.

### **Specialist registries**

26. The scheme for registration of company charges operates in parallel with requirements under other legislation for the registration of certain specific types of property with the relevant specialist registries. The 2006 Act provides power to make provision that a charge registered in a specialist register is to be treated as if it had been registered with Companies House. This power can only be exercised if the Secretary of State is satisfied that appropriate information-sharing arrangements have been made.

27. The revised proposals do not include any provision so that a charge registered in a specialist register is treated as if it had been registered with Companies House.

28. In the light of favourable consultation responses, BIS is exploring the potential for disapplication of dual registration for standard securities ie charges over land in Scotland.

29. It is commonplace for a charge over land elsewhere in the United Kingdom to be part of a charge over other assets as well, such as plant and machinery. This reduces the potential benefit from removing the requirement for charges over such land to be registered at both Companies House and, subsequently, the Land Registry or the Land Registry of Northern Ireland. Therefore it is not intended to make special provision for land elsewhere in the United Kingdom in the immediate future.

30. The Scottish Government have legislated for the establishment of a Scottish Register of Floating Charges. It is not yet clear when these provisions will be brought into force but it is intended to make provision so there is not a requirement for floating charges to be registered with the Scottish Register of Floating Charges and with Companies House.

## **4. NEXT STEPS**

31. It is intended to bring the changes into force in 2012 or 2013.

32. Draft Regulations will be published in early 2011. Views will be sought on the detail of the draft Regulations.

33. In case of enquiries please contact:

**Enquiries**

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## **Annex A Proposals in the Consultation Document**

The Government response to the comments received on each proposal in the consultation document published in March 2010.

**Proposal A:** Any charge created by a UK company should be registrable unless specifically exempted.

**Government response:** The Government intend to proceed on this basis, with the same rules applying throughout the UK. Noting that companies do not create charges only under the law of the jurisdiction of their incorporation, the revised rules will need to be appropriate regardless of the law under which the charge is created.

**Proposal B:** The only exclusion from the requirement to register charges created by a UK company should be Lloyd's trust deeds other than a Lloyd's deposit trust deed or a Lloyd's security and trust deed.

**Government response:** The Government intend that the requirement to register should 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 the Companies Act or any other statute. A charge is excluded:

- under section 252 of The Banking Act 2002, if the chargee is the Bank of England, the central bank of another country or the European Central Bank.
- under Regulation 4 of the Financial Collateral Arrangements Regulations 2003, if it is a title transfer financial collateral arrangement<sup>4</sup> or a security financial collateral arrangement<sup>5</sup>.

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<sup>4</sup> 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.

<sup>5</sup> 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

The Government intend that the Regulations will exclude charges that are:

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

The Government do not intend to require registration of the crystallisation of a floating charge.

**Proposal C:** The requirement to register charges existing on property acquired should be abolished.

**Government response:** The Government intend to abolish the requirement to register charges existing on property acquired.

**Proposal D:** There should be a definition of date of creation for the purposes of the time limit for registration of a charge.

For a charge created under the law of England, it should be:

- the date of the chargor's signature in the case of a charge created by an instrument in writing; or
- the date when the document takes effect in the case of a charge of land created by an electronic document to which section 91 of the Land Registration Act 2002 applies; or
- the date when the chargor entered into an enforceable agreement in any other case

For a charge created under the law of Scotland, it should be:

- the date of registration in the Scottish Register of Floating Charges in the case of a floating charge (or, if these provisions are not in force, the date the instrument is executed by the chargor); and
- in any other case, when the chargee acquires a real right.

**Government response:** 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.

**Proposal E:** The sanction of invalidity should be modified so that an unregistered charge is ineffective against a liquidator or administrator on insolvency and against execution creditors (under Scots law, creditors who have executed diligence)

**Government response:** The Government do not intend to make any change to the sanction of invalidity. They will not make provision for the situation where insolvency proceedings are begun 21 days or less after the creation of a charge

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- 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.

**Proposal F:**

- (i) A person taking a charge over a company's property should be taken to have notice of any previous charge registered at the time the charge is created.
- (ii) No other person should be taken to have notice of a registered charge

**Government response:** The Government intend to make provision so that

- any person taking a charge over the company's property should be 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 will continue to apply in other circumstances, ie registration is constructive notice to those who should be reasonably expected to search the register. There will not be provision as to when any person other than a person taking a charge over a company's property will be taken to have notice of a registered charge.

**Proposal G:** The required particulars should be:

- (a) The registered name and registration number of the company that created the charge;
- (b) the date of the creation of the charge and, in the case of a Scottish floating charge, the date of registration of any advance notice;
- (c) whether there is an instrument creating or evidencing the charge. If not, how the charge was created (eg by registration in the Scottish Register of Floating Charges);
- (d) the name and address of the person entitled to the charge or his agent with it being disclosed if:
  - (i) an agent for the chargee; or
  - (ii) a trustee for a group of lenders;
- (e) the classes of property charged, say land; ships or aircrafts; other corporeal property; book debts; goodwill or any intellectual property;
- (f) whether the property charged includes after-acquired property and, if so whether it is over all present and after-acquired property.
- (g) in the case of a floating charge, whether there is:
  - (i) an automatic crystallisation clause;
  - (ii) a negative pledge.

**Proposal J:**

- (a) Abolition of the requirement for the instrument (or a certified copy) to be delivered to the Registrar.
- (b) Abolition of the requirement for the instrument (or a certified copy) to be delivered to the Registrar.
- (c) If the charge is not registered within 21 days of its creation, it should be repayable on demand.

- (d) The civil liability for the accuracy of the particulars should lie with the chargor.

**Alternative to Proposal J:**

- (a) Either the instrument creating the charge or a certified copy should be required to be delivered to Companies House for registration of the charge - which is filed being the decision of the person filing.
- (b) Companies House should check the instrument (or certified copy) to ensure that the name of the chargor is the same as that in the particulars filed. The instrument should then be returned to the person who filed the particulars.
- (c) The civil liability for the accuracy of the filed particulars, including the date of creation and the class(es) of property charge, should lie with the chargee at the time of the creation of the charge.
- (d) The criminal sanction for failure to register a charge should be repealed.

**Government response:** Following the consultation, the Government conclude that the procedures for registering a charge should be the filing, by either the chargor or any other person interested in it, of:

- registered name and number of the chargor;
- the date of the creation of the charge;
- whether all assets are covered by the charge and, if not, whether it covers
  - land (in England & Wales, Northern Ireland, Scotland, or elsewhere); and/or
  - intangibles;

together with a copy of an extract from the charge instrument covering:

- the identities of the chargor and the chargee
- 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 property covered;
- in the case of a floating charge, whether there is an automatic crystallisation clause and/or a negative pledge.

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.

If there is no charge instrument, the particulars will have to include a short description of the property charged, the amount of the charge and the names of the persons entitled to it.

Companies House will check that:

- the name of the chargor is the same as that in the particulars;
- the registered name and number of the chargor match;

- the filing was made no later than 21 days after the date of creation in the particulars;
- the particulars include the information required;
- and, if all is in order,
- allocate a unique reference number to the extract of the charge and place it on the public record; and
- update the company's record to show the required particulars, the date on which the documents were placed on the public record (rather than, as now, the date on which Companies House received the documents), and the unique reference number.

Noting that the general false statement offence (section 1112) applies if the filed particulars were to be misleading, false or deceptive in a material particular, there should not be a new provision relating to inaccurate particulars. The criminal sanction for failure to register a charge timeously should be repealed.

**Proposal H:** Registration of a charge should only prevent its invalidity for the classes of property included in both the brief particulars and the instrument creating the charge (if any).

**Proposal I:** Companies House should issue a certificate that is conclusive evidence of

- the identity of the chargor;
- the date of registration of the charge whose brief particulars are on the register;
- that the charge was registered within 21 days of its date of creation;
- of the class(es) of charged property

**Government response:** The Government conclude that the certificate issued by Companies House on registration of a charge for which the instrument is on the public record identified by a reference number should be conclusive evidence of

- of the identity of the chargor;
- that the charge was registered within 21 days of its date of creation;

The certificate would also record the assets covered by the charge according to the filed particulars but would not be conclusive evidence in relation to them.

**Proposal K:** There should be provision so that in the event of a late registration as directed by a court, the conclusive certificate is not issued until satisfaction of any timing condition provided by the court.

**Government response:** The Government considers that there should be.

- statutory underpinning for the current practice in the event of a court setting conditions for late registration; and

- provision, but not a requirement, for a chargee to notify both the assignment of a charge and the addition of a negative pledge.

**Proposal L:** There should be provision for:

- (i) the chargee voluntarily to file changes relating to the person entitled to the charge; and
- (ii) the chargor to be required to file the addition of a negative pledge.

**Government response:** The Government concludes that there should be provision, but not a requirement, for a chargee to notify both the assignment of a charge and the addition of a negative pledge and for these filings to be added to the public record.

**Proposal M:** There should be provision for a memorandum of satisfaction in whole or in part to be filed by the chargee. On satisfaction of the terms of the charge, the chargor should have the right to demand that the chargee files a memorandum of satisfaction. The chargee would be required either to make the appropriate filing within 15 days of the chargor's demand or to commence court proceedings. In the event that neither the chargee has neither made the filing nor obtained a court order has been obtained by the end of 90 days (or such longer period as the court may direct), then the chargor can make the filing.

**Government response:** In general, the Government does not favour double signatures as they consider that such requirements provide a misleading appearance of protection from fraud. They conclude that the filing of a memorandum of satisfaction should generally be by the chargee (ie the party that does not stand to benefit from a fraudulent filing). 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, a chargor should be able to file a memorandum of satisfaction 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.

**Proposal N:** 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.

**Government response:** The Government intend to revise the requirement for a "Register of Charges" as proposed.

**Proposal O:** The requirement for a company to maintain a register of all the charges it has created should be abolished.

**Government response:** The Government conclude that that the requirement for companies to maintain a registers of their charges should be retained only to record the existence of any charge granted orally.



**Proposal P:** Only a company's creditors and members should have the right to inspect instruments creating a company's charges.

**Government response:** The Government intend to keep unchanged the public right to inspect the instruments creating a company's charges at the company's registered office or "single alternative inspection location".

**Proposal Q:** The requirement to register charges should be the same for all UK companies, including unregistered companies.

**Government response:** The Government intend to amend the Unregistered Companies Regulations 2009 (SI 2009/2436) so that the requirement to register charges applies to companies subject to those Regulations. This would not affect those unregistered companies not subject to any of the provisions of the Companies Act 2006.

**Proposal R:** LLPs should continue to be subject to the same rules relating to registration of charges as apply to UK companies. Any amendments made as a result of this consultation should, therefore, be applied to LLPs.

**Government response:** The Government intend that the revised provisions relating to registration of charges should also apply to LLPs.

## **Annex B Draft Impact Assessment**

Signed by Edward Davey, Minister for Employment Relations, Consumer and Postal Affairs, on 2 December 2010.

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**URN 10/1319**