

|   |  |  |  |
|---|--|--|--|
| <b>Title:</b><br>Registration of Charges<br><b>IA No:</b> BIS0136<br><br><b>Lead department or agency:</b><br>Business, Innovation & Skills<br><b>Other departments or agencies:</b><br>Companies House | <b>Impact Assessment (IA)</b>          |  |  |
|   | Date: 23/03/2012                       |  |  |
|   | Stage: Final                           |  |  |
|   | Source of intervention: Domestic       |  |  |
|   | Type of measure: Secondary legislation |  |  |
| <b>Contact for enquiries:</b><br>Rachel.Armstrong@bis.gsi.gov.uk<br>0207 215 6644   |  |  |  |

**Summary: Intervention and Options**
**RPC Opinion:** Awaiting Scrutiny

| Cost of Preferred (or more likely) Option |                            |  |   |
|---|----------------------------|--|---|
| Total Net Present Value                   | Business Net Present Value | Net cost to business per year (EANCB on 2009 prices) | In scope of One-In, Measure qualifies as One-Out? |
| £192.69 m                                 | £192.88 m                  | £-21.15 m  | Yes   OUT   |

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

Secured borrowing by a company involves the creation of a charge over the secured asset. The existing schemes for registration of company charges are intended to ensure that companies cannot conceal from creditors, suppliers and customers the extent to which their assets are charged to other parties as security for their borrowing. They are criticised, primarily because the procedures are cumbersome and preclude electronic filing. Other criticisms include that the procedures use out-of-date definitions to determine the application of the requirement and that companies incorporated in Scotland are treated differently.

**What are the policy objectives and the intended effects?**

The objective is to ensure that (a) companies' access to finance, whether or not secured, is not hampered by uncertainty as to whether their assets are encumbered and firms who need to access information can do so (b) to reduce uncertainty as to what charges must be registered; (c) to improve procedures by reducing costs for those putting information on the public record, in particular by enabling electronic filing. Intended side-effects are the replacement of the two current schemes with a single scheme for all UK companies and an improvement in the quality of information about security given by companies.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 1: Retain the current scheme i.e. 'do nothing'

Option 2: Create an improved scheme that is fit for purpose and reduces cost to those using the register

Under a revised scheme there were two further options relating to the summary information or 'particulars':

2A: A compromise which improved the particulars but less radically reduced them thus ensuring that lending to business and assessments of credit-worthiness remained uninhibited

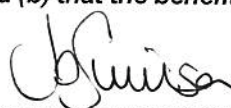
2B: A greater reduction in the amount of summary data 'particulars' provided with each charge. This would create greater benefits for those legal and financial firms that file charges, but would add significant costs of c. £9m to those who use the information and could adversely affect the ability of companies to access finance.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 10/2023

|   |                     |             |                     |                      |                     |
|---|---------------------|-------------|---------------------|----------------------|---------------------|
| Does implementation go beyond minimum EU requirements?  |                     |             | N/A                 |                      |                     |
| Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.                          | <b>Micro</b><br>Yes | < 20<br>Yes | <b>Small</b><br>Yes | <b>Medium</b><br>Yes | <b>Large</b><br>Yes |
| What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions?<br>(Million tonnes CO <sub>2</sub> equivalent) |                     |             | <b>Traded:</b>      |                      | <b>Non-traded:</b>  |

*I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.*

Signed by the responsible SELECT SIGNATORY:



Date:

14 March 2013

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Updating scheme so that all charges are registrable unless expressly excluded, electronic filing is possible with the charge instrument being placed on public record together with key details.

## FULL ECONOMIC ASSESSMENT

| Price Base Year   | PV Base Year | Time Period                             | Net Benefit (Present Value (PV)) (£m)              |                               |                       |
|---|--------------|---|--|-------------------------------|-----------------------|
|   |              |   | Low: Optional                                      | High: Optional                | Best Estimate: 192.69 |
| <b>COSTS (£m)</b>   |              |   |  |                               |                       |
|   |              | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value)    |                       |
| Low   |              | Optional                                | Optional   | Optional                      |                       |
| High  |              | Optional                                | Optional   | Optional                      |                       |
| Best Estimate   |              | 1.0                                     | 0  | 1.0                           |                       |
| Description and scale of key monetised costs by 'main affected groups'  |              |   |  |                               |                       |
| <p><b>Only major cost will be transitional costs for presenters in first year of implementation (2013) estimated to be 30minutes of internal legal professional time in each of the firms that present charges to the registrar. Companies House estimate there are 9000 active 'presenters' of charges. Based on the median wage rate for legal professionals of £22.65ph this totals £203,000. Companies House will also incur set up costs of £760K, recouped through efficiency savings over 4 years.</b></p> |              |   |  |                               |                       |
| Other key non-monetised costs by 'main affected groups'   |              |   |  |                               |                       |
| <p><b>It is assumed that junior staff will be required to familiarise themselves with the method of electronic filing of company charges. Given the system will prompt users and direct them to the appropriate data fields it is assumed that costs of familiarisation will be negligible. Stakeholders who use the public information for financial assessments have not provided information about transition costs, although they have about costs of a revised system.</b></p>                               |              |   |  |                               |                       |
| <b>BENEFITS (£m)</b>  |              |   |  |                               |                       |
|   |              | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |                       |
| Low   |              | Optional                                | Optional   | Optional                      |                       |
| High  |              | Optional                                | Optional   | Optional                      |                       |
| Best Estimate   |              | 0                                       | 24   | 192.9                         |                       |
| Description and scale of key monetised benefits by 'main affected groups'   |              |   |  |                               |                       |
| <p><b>For the preferred option (2A) the key benefits will be: the reduced time taken to complete Companies House forms to file the charge and related information, including legal advice on whether to file and details to include and postage savings from ability to file electronically.</b></p>  |              |   |  |                               |                       |
| Other key non-monetised benefits by 'main affected groups'  |              |   |  |                               |                       |
| <p><b>Improved accuracy of information on charges filed at Companies House benefitting lenders and other information users. Making full details available for public access through placing the charge instrument online. Reduced levels of rejection rates due to mistakes because of electronic filing (mandatory fields and greater use of 'tick boxes'). Making satisfaction or partial satisfaction of a charge clear on public record.</b></p>  |              |   |  |                               |                       |
| Key assumptions/sensitivities/risks   |              |   |  |                               | Discount rate (%)     |
| Assumptions about cost and time savings used in the analysis are based entirely on evidence from stakeholders.  |              |   |  |                               | 3.5                   |
| Costs and benefits are assumed to impact from 2013 onwards for the following 10 years.  |              |   |  |                               |                       |

## BUSINESS ASSESSMENT (Option 1)

|   |                |           |                   |                      |
|---|----------------|-----------|-------------------|----------------------|
| Direct impact on business (Equivalent Annual) £m: |                |           | In scope of OIOO? | Measure qualifies as |
| Costs: 0  | Benefits: 21.1 | Net: 21.1 | Yes               | OUT                  |

## Evidence Base (for summary sheets)

- No. Legislation
- 1 Sections 860-894, Companies Act 2006  
[http://www.opsi.gov.uk/acts/acts2006/ukpga\\_20060046\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060046_en_1)
  - 2 Sections 93-107, Companies Act 1989 (not brought into force)  
<http://www.legislation.gov.uk/ukpga/1989/40/contents>
  - 3 Sections 37-47, Bankruptcy and Diligence etc (Scotland) Act 2007  
[http://www.opsi.gov.uk/legislation/scotland/acts2007/asp\\_20070003\\_en\\_1](http://www.opsi.gov.uk/legislation/scotland/acts2007/asp_20070003_en_1)
  - 4 The Companies (Particulars of Company Charges) Regulations 2008 (S.I. 2008/2996)
  - 5 The Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (S.I. 2009/1917)
  - 6 The Overseas Companies (Execution of Documents and Registration of Charges) Amendment Regulations 2011 (S.I. 2011/2194)
  - 7 The Financial Collateral Arrangements (No 2) Regulations 2003 (S.I. 2003/3226)  
Publication <http://www.bis.gov.uk/Consultations/registration-of-charges?cat=closedwithresponse>
  - 8 Consultation document: Registration of Charges created by Companies and Limited Liability Partnerships (March 2010)
  - 9 Summary of responses: consultation on registration of charges created by companies and limited liability partnerships (September 2010)
  - 10 Government response: consultation on registration of charges created by companies and limited liability partnerships (December 2010)
  - 11 Registration of company charges: issues to be resolved before preparation of draft regulations (March 2011)
  - 12 Revised scheme for registration of charges created by companies and limited liability partnerships: proposed revision of part 25, Companies Act 2006 (August 2011)

### IA Structure

#### Main document:

1. Background
2. Options
3. Option 1: Maintain the current scheme
  - Description of current scheme
  - Costs of current scheme for those filing charges for registration and those accessing information about charges
4. Option 2 (2A and 2B): Create an Improved Scheme
  - Description of the improvements under a revised scheme
  - Option 2A description (revised scheme with fuller particulars)
  - Option 2B description (revised scheme with brief particulars)
  - Costs of both revised schemes for those filing charges for registration and those accessing information about charges
5. Recommendation

#### Annexes:

- A Detailed breakdown of costs and benefits
- B Summary of stakeholder consultation and problems with the current system
- C Further considerations

# 1. Background

## **The Importance of a System to Register Charges**

1. A charge is the security against which a company is able to access finance from lenders.
2. A system of registering charges is necessary in order for the financial system to operate with confidence. It is also vital that businesses are able to access credit in order to grow. Furthermore increasing loans to business is at the heart of Coalition growth policy.
3. A system of registration of charges prevents fraud and supports transparency:
  - The publicity of registrable charges prevents companies concealing the extent to which their assets are encumbered and helps to guard against fraud. It has thus facilitated the availability of loans to companies and limited the impact of insolvency.
  - In addition, a statutory scheme means that all those who might benefit from information about a company's charges have access to all the filed information about charges through the public record at Companies House as well as to full information through the company's own records.
4. Raising and registering a charge has advantages for business and lenders. 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). Businesses often prefer to offer securities in this way to access credit at more favourable terms. Also a company with such a lending arrangement will continue to have the use of the charged assets.
5. The 2011 World Bank Report<sup>1</sup> assessed regulations affecting domestic firms in 183 economies and ranks the economies in 10 areas of business regulation including *getting credit*. With regard to *getting credit*, they noted the importance of collateral and reported, "*that in developed economies borrowers with collateral get 9 times as much credit as those without it. They also benefit from repayment periods 11 times as long and interest rates up to 50% lower.*"
6. They considered the laws relating to collateral to be crucial including clear priority rules between secured creditors when a debtor defaults. The statutory schemes for registration of company charges contribute to the UK being rated equal first (with Malaysia and South Africa) in the section on *getting credit* for the strength of legal rights and credit information systems; followed by Hong Kong, New Zealand, the United States and Latvia. The Report considers that the key elements of an effective regime include:
  - a centralised collateral registry;
  - the availability of credit information

## **Description of a Charge**

7. A charge may be "fixed" or "floating".
  - a. A fixed charge is linked to a particular asset which the company cannot dispose of without the agreement of the lender. If a company goes into liquidation or a receiver or administrator is appointed, then lenders with loans secured against specific assets have first call on those assets.
  - b. A floating charge may be over all or part of 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. A floating charge over all or most of a company's property enables the holder to appoint an administrator or administrative receiver under the Insolvency Act 1986 without the need for an order of the court.
8. Under the law of England & Wales and of Northern Ireland, 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.
9. In general, the law on rights in security in Scotland is a devolved matter. However, the law on the registration of charges created by companies is reserved to the UK Parliament (being an aspect of

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<sup>1</sup> The Report by the World Bank and the International Finance Corporation, *Doing Business 2012: Doing Business in a more transparent World*, published in October 2011

the regulation of companies, reserved by the Scotland Act 1998). As explained by the Scottish Law Commission in their 2002 discussion paper on registration of rights in security by companies, security over corporeal moveables without a change in possession was unknown in Scotland until the introduction of the floating charge in 1961. In general, under Scots law, creation of real rights must be attended by due publicity: this means that an asset cannot be effective security for a loan unless and until the granting of the security has been publicised. For some types of assets (e.g. land, ships, aircraft), specialist registers provide the required publicity. For intangible property such as book debts, the required publicity may be more problematic: under Scots law, an assignation in security of incorporeal property is made effective only by intimation to the account debtor. The Bankruptcy and Diligence etc (Scotland) Act 2007 (the "2007 Act") provides that a floating charge will only be recognised under Scots law once it has been created by registration at the Scottish Register of Floating Charges. Commencement of these provisions in the 2007 Act has been deferred.

10. All UK companies, regardless of the law under which they have used their assets as collateral for their borrowing, are subject to the requirements of the Companies Act 2006 as regards the registration of these charges on their assets. These requirements are described below (see paragraphs 12-21).
11. The UK also has certain specialist registers for recording the ownership of certain assets, i.e. land, ships, aircraft, patents, trademarks and registered designs. All changes of ownership of these assets must be reported to these registers, as must their use as security; these requirements apply regardless of the owner (e.g. whether or not it is a company). In the case of land, failure to register affects the priority of the charge and it will not take effect at law until the Land Registry's registration requirements have been met.

### **The Current Schemes**

12. The current schemes for the registration of charges arises from some serious incidents in the late 19<sup>th</sup> century involving companies securing loans against assets that had already been used as security; whereby the bankruptcy of these companies resulted in uncertainty over the rival claims to these assets. As a result, in 1900 a requirement was introduced to register at Companies House any charge created over specified assets by companies incorporated in England & Wales or Ireland. The current scheme for registration of company charge is substantially the same as that introduced in 1900.
13. Since 1961, a similar scheme has applied to Scottish companies but it applies only to the types of securities that may be created under Scots law, and does not apply to pledges or securities created by law (e.g. liens).
14. Under the UK schemes, the requirement to register a charge arises after its creation under whatever law applicable to it: it is a "transaction-filing" scheme. Registration does not affect the relative priority of charges but a charge is not valid against a liquidator, administrator or other creditors if it was not registered. The schemes will also apply to LLPs, but does not apply to unregistered companies (e.g. those formed under Royal Charter) or to mutuals (i.e. those formed under the Industrial and Provident Societies Act).
15. The system of registration of charges is important both to those that need to register the charge and to those that need to access information about the charges created by a company. It is important therefore that the consideration of any revisions to the existing scheme take account of the relative costs and benefits for both parties. To note, lenders and legal firms may need both to file and to access information on charges.
16. More comprehensive details of registering a charge and accessing information about a charge under the current scheme are set out as 'option 1' later in this document.

### **Rationale for Intervention**

17. As stated above there are clear benefits to having a statutory scheme for the registration of charges. These include benefits to UK competitiveness, public access to data, business access to finance, confidence amongst lenders.

18. The current scheme has been described as out of date, slow and unclear by stakeholders. Over the last 40 years there have been several reports and consultations on how to improve the system (see Annex B for details of the consultation and the problems a revised scheme would seek to address).
19. One city law firm, in a circular to clients in January 2011, commented "

"Lenders, corporate borrowers and their lawyers can celebrate a new era where registering a charge becomes quicker, easier and cheaper. . . . . The overhaul of our existing, antiquated procedures - which are largely unchanged since 1900 - is long overdue and very welcome."

## 2. Options

### Scope

20. The principal alternative type of scheme for common law countries is “notice-filing”, under which what is filed is a notice that indicates that the chargee has taken or intends to take security over the specified assets. Under notice-filing schemes, the relative priority of registered charges is determined by their dates of registration. Notice-filing was adopted in 1952 by Article 9 of the Uniform Commercial Code for the United States and is now used throughout the United States, Canada and New Zealand.
21. To note: Company law relates only to the registration of a charge or security. How the charge or security is created and their relative priority is outwith company law. This means that the options considered exclude any that affect the relative priority of charges. Therefore consideration has not been given to:
- providing for late registration without application to a court; or
  - providing for constructive notice of the information on the public record; or
  - replacing the current scheme with one where the priority of a charge is determined by its date of registration, i.e. notice-filing.
22. The policy 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. We therefore recommend the retention of a scheme for the registration of charges created by UK companies and LLPs. Given the benefits of such a scheme we have not included an option to abolish the scheme.

### Options considered

23. The two options are:
- a. **Option 1:** Retain the current scheme i.e. 'do nothing'
  - b. **Option 2:** Create an improved scheme that is fit for purpose and reduces cost to business, lenders and credit reference agencies

### **3. Option 1: Maintain the Current Scheme**

#### **Description of the current scheme for registering charges**

24. Part 25 of the Companies Act 2006 (the “2006 Act”) retains the requirement for the following two pieces of information to be delivered together to Companies House within 21 days of the creation of the charge :

- a. brief particulars of a registrable charge to be delivered to Companies House
- b. the instrument creating the charge (a certified copy of the instrument for charges created by companies registered in Scotland)

Failure to file is a criminal offence for the company that created the charge. In the event that the filing is not made within 21 days, registration can only be made under a court order.

25. The requirement to register applies to fixed charges over specified classes of assets and to floating charges. The specified classes of assets for Scottish companies are slightly different: in effect, they are specifically required to register; floating charges, security over incorporeal moveable property, and fixed charges over those fixed assets for which there is a specialist register.

26. 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. a short description of the property charged; and
- f. in the case of a floating charge created by a Scottish company, any negative pledges (ie any restriction of the power to grant further securities or to make a ranking provision).

27. These particulars must be delivered to Companies House on the form for this purpose together with the charge instrument (or, in Scotland, a certified copy). If it is in a language other than English, a certified translation into English must also be delivered to Companies House. Under authentication requirements, the form must also include both the registered name and the registration number of the company that created the charge (i.e. the “chargor”); if either the name or number is missing or if they do not match the Companies House record, then the form will be rejected. It is a criminal offence for a person knowingly or recklessly to deliver or a document that is misleading, false or deceptive in a material particular.

28. Companies House check that the filing is within 21 days of the creation of the charge or, in accordance with a court order permitting late registration. For Scottish companies, different checks are required for the different types of security; for other UK companies, checking that the filing is in time is generally straightforward. Companies House also check that the right form was used, the required particulars were all provided and that they appear to be consistent with the instrument. Companies House then enter the particulars on the public register, and then return the instrument to the presenter: the instrument is not placed on the public record. Companies House also enter the brief particulars (except the description of the instrument) on a separate statutory register of charges for the company.

29. If all is correct, Companies House 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.

30. Certain alterations to a floating charge created under Scots law must also be registered. Apart from this, there is no provision to file changes to any of the particulars. There are no requirements relating to other changes to a registered charge. 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.

31. There is no requirement to file a statement of satisfaction or discharge. However companies may do so if they wish. This is likely when the continued presence on the public record of a charge that has been satisfied in whole or in part (or if property has been released from the charge) adversely



affects assessments of the company's credit-worthiness. The statement of satisfaction or discharge of a floating charge for Scottish companies includes a compulsory statement by the creditor:

I, being the creditor or person authorised to act on behalf of the creditor, am entitled to the benefits of the floating charge and verify that the particulars above relating to the charge and its satisfaction are correct.

32. A company is also required to register a charge if one exists on property that it acquires. This is subject to a criminal sanction. Companies House enter both the date of acquisition and the date of creation on the public register and on the register of charges for the company.
33. The scheme applies without modification to Limited Liability Partnerships (LLPs). It does not apply to unregistered companies though it appears that, in practice, their lenders sometimes register the charges they take from these companies. Since 1 October 2011, there has not been a requirement to register at Companies House any charges created by overseas companies.
34. Registration of charges at Companies House operates in parallel with requirements under other legislation for the registration of certain specific types of property (land, ships, aircraft, and intellectual property) with the relevant specialist registries. The Companies Act 2006 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, i.e. to end double-registration of these charges.

### **Description of the current system for accessing information about company charges**

35. Basic company details and a "company mortgage index" are available free through both Companies House Direct and Companies House Information Centres; a fee of £1 is charged for further mortgage details. The basic company details includes the total number of charges registered broken down into outstanding, satisfied, and part-satisfied. The company mortgage index is a list of the company's registered charges with for the following information for each taken from the brief particulars filed:
  - a. description (e.g. floating charge, debenture, legal charge). For those inspecting the register online, there is a link to the "Mortgage Details" (see f-h below);
  - b. person(s) entitled;
  - c. status (i.e. outstanding or part-satisfied or satisfied);
  - d. date of creation;
  - e. date of registration.The further mortgage details are:
  - f. amount secured;
  - g. brief description of the charged assets;
  - h. forms registered against the charge (e.g. memorandum of satisfaction);
  - i. acquisition date (for property subject to a charge acquired by the company)
36. The company details and company mortgage index are also available free across the internet through WebCheck. However the details on WebCheck at present do not include a summary of the company's charges. It is possible to order copies of filed documents, at £1 each, from a chronological list. A company report, also costing a £1, is also available which includes the information in the company mortgage index. Information about charges is included in the daily download supplied by Companies House to those with whom it has a bulk download contract.
37. The availability of information about a company's charges through Companies House Direct, Companies House Information Centres and WebCheck has been developed by Companies House in response to its users.
38. This is separate from the statutory Register of Charges for each company (see paragraph 15) which may be inspected, in hard copy only, at the branch of Companies House where the company was incorporated; hard copies can be provided by paper or fax. In practice, users use the more informative company mortgage index rather than the statutory Register of Charges.
39. Limited companies are required to keep available for inspection registers of their charges with a short description of the property charged, the amount of the charge, and the names of the chargees;

this applies to all charges including any that are not registrable. They are also required to keep available for inspection the instruments creating registrable charges. There is a public right to inspect both companies' own registers of charges and copies of the instruments creating registrable 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.

40. Overseas companies are also required to keep registers of charges they create over land in the UK, over ships, aircraft or intellectual property registered in the UK and floating charges over their property or undertaking in the UK. They are also required to allow inspection both of these registers and of the copies of the instruments creating the charges. These documents must be kept and be available for inspection in the UK. There is provision so that this requirement to allow inspection can be satisfied electronically.

### **Costs of the current scheme**

The section sets out the costs of a) filing a charge for registration and b) accessing information about company charges under the current system. Costings in this document are based on evidence from stakeholders and have been tested with stakeholders).

#### **Cost of filing a charge for registration**

41. In the 12 months ending August 2011, 100,129 applications to register charges created by UK companies were received (this includes charges created by corporate members of Lloyds who registered 1041 charges in the 12 months to July 2011).
42. The registration fee, £13, is not the total cost of registration: Stakeholders have advised that there are significant internal legal and administrative costs of preparing the required particulars within the prescribed time period. These vary widely depending on the type of charge, which we shall call simple; standard and complex charges.
43. In the draft Impact Assessment published in December 2010, it was assumed that the total costs associated with the current requirements is about £300 per charge registered, including filing fee and cost of delivery. This can be considered the cost of filing a **standard charge**.
44. Stakeholders have since provided further details of minimum costs in two sorts of cases for which this assumption is not appropriate:
- Simple charges** handled in-house by substantial lenders: In such cases the administration takes about 30 minutes of a person at £12-£13 per hour with half of this time spent on preparing the information that must be filed. Therefore the cost of filing a simple charge is £6. However in the case of Lloyds the average cost per charge created by corporate members of Lloyds in 2010/11 was £5.
  - Complex charges**, for example those that are part of bespoke financing packages and/or where a single charge instrument creates fixed charges over multiple classes of assets. (In Scotland, a fixed security is generally over a single class of asset.) Legal firms that handle such cases advised that the minimum time involved is:
    - 6-8 hours at £190 per hour of legal trainee time to read into the underlying facility and security document to pick out the right clauses and to decide which definitions to include etc. (they noted that a complicated refinancing may involve considerably longer) (8 x £190 = £1,520) and
    - 45 minutes for separate reviews by both an associate (at £290 per hour) and either a managing associate or partner (at £495 per hour) (£217+£371 = £588). Therefore the cost of filing a complex charge is £2108, we will round to £2000 for subsequent calculations.

#### **Costs Associated with Delivery**

45. There are also delivery costs. At present, all charge documents are delivered to Companies House in hard copy; there is no alternative.
46. Based on information from the Companies House post-room it is estimated that total delivery costs would be £2 per charge for 90 per cent of cases sent by first-class post or DX; £18 each for 9 per

cent sent by the Royal Mail's special delivery; and £120 each for 1 per cent sent by motor cycle courier. The total delivery costs to presenters of charges are estimated at £462,000. More detail of how this estimate is derived is to be found in Annex A.

### Cost of Filing and Accessing information via the Companies Own Register

47. The cost for companies of entering charges into their own registers of charges is estimated at £3 per charge (15 minutes at £12ph). Abolition of this requirement is expected to bring savings of £300,000 per year. See Annex A for more detail.

**Table 1: The Total Cost to business through filing or accessing the public register of the current scheme (£50.2m per annum)**

| Cost Description   | Unit cost | Frequency (pa) | Total Cost (pa)    |
|--|-----------|----------------|--------------------|
| Preparing the Charge for filing<br>(Lloyds, simple, standard, complex) | £5        | 1,000          | 5,000              |
|  | £6        | 40,000         | 240,000            |
|  | £280      | 40,000         | 11,200,000         |
|  | £2000     | 19,000         | 38,000,000         |
|  |           | =100,000       | = 49,445,000       |
| Delivery of charges to the registrar<br>(Companies House)              | £2        | 45,000         | 90,000             |
|  | £2        | 45,000         | 90,000             |
|  | £18       | 9000           | 162,000            |
|  | £120      | 1000           | 120,000            |
|  |           | = 100,000      | = £462,000         |
| Filing instruments on Companies Own registers                          | £3        | 100,000        | £300,000           |
| <b>TOTAL COST</b>  |           |                | <b>£50,207,000</b> |

48. To note the cost of filing a charge (£13 for 100,000 charges = £1,300,000) has not been included as this is expected to remain constant under any revised scheme. The revised scheme is explained in more detail in later sections.

### Costs of accessing information about charges from the Public Register

49. Under all options the basic company details, including the number of charges (outstanding, part-satisfied, and satisfied) are available at no cost from Companies House.

50. Further information about a company's charges costs £1. In October 2011, 100 purchasers spent over £20,000 on purchasing direct from Companies House information relating to charges, which equates to £240,000 p.a.

51. Coincidentally the number of downloads per year is also 240,000.

52. One of these customers gave us a breakdown of their associated labour costs.

- Downloading the information typically takes 3 minutes at £12ph (equals 60p each).
- Analysing the information takes about 10 minutes at £15ph (equals £2.50 each).

53. **Applying these costs (£3.10 per charge) to 240,000 downloads a year, give expenditure of £744,000 on analysing information about charges; with the purchase, it comes to £984,000.**

54. This analysis excludes information bought from Companies House under bulk purchase contracts. 15 companies, primarily credit reference agencies, have such contracts under which they get a daily download of all information filed at Companies House. Information about charges is an important element of the credit analysis undertaken by these agencies.

## 4. Option 2: Create an Improved Scheme

### Description of the improvements offered by a revised scheme

55. Under this option, the aim is to modernise the existing system of registering charges in order:
- To streamline procedures and reduce costs for those putting information on the public record, in particular by enabling electronic filing; and
  - To reduce uncertainty as to what charges must be registered.
  - To replace two current schemes with a single scheme for all UK companies;
  - To improve the quality of information about security given by companies;
  - To improve access to instruments creating companies' charges; and
  - To make it easier at some later date to use the power to treat as if registered under the 2006 Act charges that have been registered in a special register.
56. The table below sets out the key policy aims of a revised scheme and the actions required in order to deliver an improvement

**Table 2: Policy aims and actions to be taken under a revised scheme to deliver benefits**

| No.   | Policy Aim   | Action  |
|---|--|---|
| <b>Measures that have an impact on costs and benefits</b>   |  |   |
| 1   | Create a scheme with a registration mechanism that supports electronic filing, though also allows hard copy filing where preferred   | Companies House to build and deliver a system compatible with electronic filing   |
| 2   | To improve access to the full details of the charge  | Companies House to place a certified copy of the charge instrument on the public record (available online)  |
| 3   | Continue to make searching and finding headline information simple for credit reference checks   | Make the 'particulars' i.e. the short explanation of the Charge easier to search and improve accuracy   |
| 4   | That there are no duplicative requirements on companies  | If information about a charge is provided on the public register the company will not be required to also hold the same documents on their own register for public inspection   |
| 5   | To reduce uncertainty about what should be registered, to address the piecemeal amendments to types of registrable charge and ensure that the new system is future-proof and clear | Rather than list all different types of charge that currently exist, the new system will just list those that are exempt. This will reduce uncertainty and cost, remove anomalies and create consistency across the UK. |
| 6   | To exclude the registration of charges where it would serve no purpose   | Exclude rent security deposits, charges relating to the underwriting of corporate members of Lloyds. (explanation given in below)   |
| <b>Measures that do not impact costs and benefits and are not set out in detail in this impact assessment but are nonetheless key policy aims</b> |  |   |
| 7   | Prevent identity fraud   | Make legal provision that allows signatures, personal information such as individual addresses and bank account numbers to be removed or redacted   |
| 8   | Make the system fit for purpose given the global operation of companies  | Require an English language translation of documents to be available on the public record   |
| 9   | Remove the unnecessary criminal sanction   | Remove the criminal sanction and create a power to register. The criminal sanction was a blunt tool that was unnecessary as if a lender doesn't register their charge it isn't recognised under insolvency.             |
| 10  | To have clarity over the time limit for registering a charge   | It will be made clear that what the 21-day time limit applies to is the delivery of the necessary documents to Companies House.   |

It will be made clear when is the start of the 21-day time limit for every type of registrable charge and howsoever created. There will no longer be extra time to register charges over property overseas.

### Description of the impact on those that file charges for registration

57. The key cost differences for those that file charges for registration are:
- a. The ability to file electronically which reduces delivery costs
  - b. Reducing the need for costly internal legal analysis of whether a charge needs to be filed
  - c. Removable of duplicate requirements for Companies' own registers
  - d. Changes to the particulars (to be discussed in more detail in options 2A and 2B)

### Electronic Filing

58. The move to electronic filing will obviously enable companies to file charges for registration without incurring postage or delivery costs. Stakeholders, including Companies House have provided details of the current delivery mechanisms and the costs incurred. A breakdown of these costs is set out in Annex A. In summary, by enabling electronic filing under the revised scheme the cost of delivery will be significantly reduced. It is envisaged 80% of presenters will shift to electronic filing a **cost reduction in excess of £400,000.**

### Clarity on whether a charge is filed for registration

59. In the 2010 consultation Stakeholders advised that unnecessary time is taken considering whether a charge fits within the current list of types of registrable charge. This requires legal analysis and places an unnecessary (internal) cost burden on presenters of charge. This recommendation was emphatic with 87% of stakeholders who responded to the consultation on this matter argued that a shorter list of clear exclusions would be a welcome simplification.
60. More detail is provided in Annex A. In summary, the shift from a scheme where lawyers had to review types of charges that could be registered to an exclusion based system will greatly reduce legal time and uncertainty.
61. Shifting to an exclusion based scheme raised concerns that new types of charges would be brought into scope for registration, which could create costs burdens and negate the impact of improvements. However stakeholders have advised this will not have a cost burden as, given the incentives to register a charge, in most cases; charges where there is uncertainty have been registered in order to avoid invalidity under insolvency. The number of additional charges registered is therefore assumed to be negligible. Furthermore, we propose to replace the requirement to file, with a power to file, consequently it will be up to the company to make the decision whether their charge needs to be filed. In reality due to the above point we do not anticipate a significant change in the volume of registrations. Furthermore the Lloyds exclusion (see below) will also reduce cost.
62. Following consultation and further discussions with stakeholders, the proposed exclusions are:
- a. Cash taken or held by a landlord to secure liabilities of a tenant under a lease, i.e. rent security deposits. The exclusion for rent security deposits would remove the uncertainty as to whether or not they are registrable. As those who handle rent security deposits are generally not familiar with the requirements to register company charges and as they are only registrable if the tenant is a UK company, it is believed that those that are registrable are not always registered.
  - b. a charge that secures the underwriting obligations of corporate members of Lloyds. If there were not an exclusion for corporate members of Lloyds, the registration requirement would be very much more onerous than at present. When Lloyds first accepted corporate members in 1994, they had a project team that dealt solely with corporate members' compliance with the requirement to register charges. This was estimated to cost over £10mpa. More recent legal advice is that the application of the current scheme to charges created by corporate members of Lloyds is much narrower than previously believed: it now costs about £5kpa to register their charges. Under a revised scheme, an explicit exclusion would be needed either to avoid all their charges being made registrable or to keep the application as at present. Noting that corporate members of Lloyds are not permitted to undertake any other business, both options exclude them from the application of the scheme.
  - c. In addition, the existing exclusion of pledges and liens will be retained

63. The list of exclusions would be kept under review and might be amended from time to time using the power provided by Section 894. 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 came into force.

#### Removal of duplicative requirement for companies own registers

64. The cost for companies of entering charges into their own registers of charges is estimated at £3 per charge (15 minutes at £12ph). Abolition of this requirement is expected to bring savings of £300,000 per year (see Annex A).

#### Changes to the filing of particulars

65. In addition to the changes set out above, stakeholders had differing opinions on changes to the required particulars (or information summary that appears on the public record). Decisions on the required particulars would affect the overall cost implications of a reformed system as the majority of the cost involved in filing a charge is involved in deciphering and analysing the legal information that should provide a summary of the charged instrument.
66. One of the key benefits of a revised system under option 2 is that it enables electronic filing. Due to this change the full instrument of the charge is to be submitted to Companies House and made available on the public register. This means those accessing public information about a company will have all the information available, not just information which is contained in the particulars (as is the case in the current system).
67. Consequently some stakeholders, primarily those who file charges for registration argued there was only a need for **brief particulars** that simply linked a company to a charge but provided limited details about the charge itself, as this would be fully available on the public record. (This would provide cost savings to those who filed charges).
68. However those stakeholders that rely upon the information provided in the particulars to make assessments across multiple companies argued that they required **fuller particulars** and that being required to access the full instrument in each case would increase their costs significantly of accessing and analysing financial data, making it more difficult to make timely decisions about business lending.
69. In both cases, stakeholders argued that improved quality would provide cost savings and that information errors could be reduced through electronic filing.
70. In order to assess the costs and benefits to business of a revised scheme we have divided the proposal into options 2A and 2B; whereby 2A retains fuller particulars (although improves information fields) and 2B provides only brief particulars which simply link a company to a charge. Although this is a seemingly minor difference to a revised system, the drafting of the particulars is expensive for those filing charges, whilst the availability of particulars is critical for those analysing information on company charges. Consequently the different impacts on costs and benefits are perhaps surprising given such a seemingly minor alteration.

## Option 2A Description

### **Option 2A: Fuller particulars**

71. Under Option 2A, the required particulars would be:
- the registered name and number of the company that created the charge;
  - the name(s) of the person(s) entitled to the charge or their security agent or trustee. If more than 4 persons are entitled, the first 4 names to be provided together with an indication that more persons are named in the instrument;
  - the date of creation of the charge;
  - whether there is an instrument creating the charge;
  - whether the charge is expressed to be a floating charge and, if so, whether it covers all the property or undertaking of the company;

- f. whether the terms prohibits or restricts the company from creating other charges (e.g. a negative pledge);
  - g. a brief description of any land, ships, aircraft or intellectual property registered in the UK subject to a fixed charge –
  - h. whether there is a fixed charge or security over any other tangible or corporeal assets;
  - i. whether there is a fixed charge or security over any other intangible or incorporeal asset.
72. In the case of an oral charge (which is extremely rare), descriptions of the assets, the type of the charge and the secured obligation would always be required together the names of all the persons entitled to the charge.

### Costs of filing a charge

73. Based on findings from the consultation, compared to the current requirements (i.e. Option 1), there would not be a requirement to provide:
- a description of the charge,
  - the amount secured; or
  - a description of any charged assets other than land, ships, aircraft or intellectual property registered in the UK;

but there would be a requirement to indicate whether:

- it is a floating charge and, if so, whether it covers all the company's property
  - there is a negative pledge;
  - there is a fixed charge over tangible or corporeal property other than land, ships or aircraft registered in the UK;
  - there is a fixed charge over any intangible or incorporeal property other than intellectual property registered in the UK.
74. As a result of these changes, the opportunity to provide 'free text' would be reduced considerably and the majority of fields would be restricted to a 'tick box' system, drastically reducing the level of legal analysis required by providing more clarity of the information required. This will also make the system easier to access and search.
75. Our working assumption is that the cost of meeting the revised requirements for information in the particulars would be about half the cost of providing the information currently required. Stakeholders have advised that our assumptions on costings are reasonable overall. We have however, sought further information on whether this reduction would be reasonable in the case of complex charges as well as standard and simple charges (see below).

*'Under the current system 70-80% of the time spent by lawyers on the filing of MG01s [the Companies House form for the purpose of filing charges] relates to the drafting of Continuation Sheets describing the charged property and restrictive covenants, sometimes at considerable length. If you remove the requirement (and the possibility) for filers to describe the charged property in any detail in the forms, time spent on filing multi-asset debentures will be very considerably reduced... I therefore think your estimate of a 50% saving for filing a multi-asset debenture [complex charge] is quite reasonable.'*

**James Bell**, (Senior Professional Support Lawyer, Shearman & Sterling (London) LLP)

76. **The costs per charge of filing would therefore be £3, £150 and £1,000 for simple, standard and complex charges respectively.**
77. It is not been possible to separate out the cost of legal analysis of whether a charge is registrable with the legal cost of the completion of the particulars. Stakeholders have advised that the revised system as set out above together with the proposed changes to the particulars under option 2A would provide savings to presenters of charges of approximately **£23m** (£49,445,000-£26,120,000), which is the difference between the cost of preparing the charges for filing under the current scheme (option 1) and option 2A (see Annex A for more details).

### Costs associated with accessing and analysing information on company charges

78. Under option 2A (the revised scheme with fuller particulars) the proposals would not greatly affect the costs of assessing companies' credit-worthiness. On the one hand, the type of charge and the amount secured would no longer be included in the summary (as stakeholders argued this information was unhelpful); on the other hand, the summary would contain searchable fields, confirm whether it is a floating charge and whether there is a negative pledge. As for the charged assets subject to a fixed charge or security, a description would only be required of assets for which there is a specialist register; there would also be an indication as to whether there are other tangible or corporeal assets and if there other intangible or incorporeal assets.
79. **Costs are therefore assumed to be £984,000** (£3.10 per charge x 240,000 downloads a year, give expenditure of £744,000 + the initial purchase cost of £240,000), which is the same as under option 1.

## Option 2B Description

### **Option 2B: Minimal particulars**

80. Under Option 2B, the particulars would only be:
- the registered name and number of the company that created the charge;
  - the date of creation of the charge;
  - whether there is an instrument creating the charge;
  - whether the terms prohibits or restricts the company from creating other charges (e.g. a negative pledge);

(In the case of an oral charge, the required particulars would be as under Option 2A).

### **Costs of filing a charge for registration**

81. There would be a significant cost saving in relation to option 2A as fewer detailed particulars need to be filed. This negates the need for internal legal costs in many cases and enables filing of charges to become a simple administrative task.
82. Under Option 2B, the minimal particulars to be filed would not require the presenter to analyse the underlying facility and security document. Apart from the company's name and number, the date of creation would have to be provided and a box ticked if there is a negative pledge.
- For a simple charge, it is assumed that this would take no more 5 minutes and cost approximately £1 (17 per cent of the cost under the current system set out as 'option 1').
  - It is assumed that the cost for a standard charge would also be 17 per cent of the current cost, i.e. £51. (Cost savings may in fact be closer to those under a complex charge, however we felt it more prudent to underestimate cost-savings).
  - For other charges, the date of creation may be complicated by the charge not having immediate effect or being delivered into escrow. Furthermore it may not be immediately clear whether there is a negative pledge. Stakeholder discussion has led us to assume that for a complex charge this would typically involve 15 minutes of a legal trainee, 5 minutes of an associate, which would cost £100 in total (i.e. 5 per cent of the current cost).
83. **The costs per charge of filing would therefore be £1, £51 and £100 for simple, standard and complex charges respectively.** As standard, stakeholders were invited to comment on these assumptions. Those who had given advice about their costs under the existing scheme agreed that the assumptions seemed reasonable.
84. Again it is not been possible to separate out the cost of legal analysis of whether a charge is registrable with the legal cost of the completion of the particulars. Stakeholders have advised that the revised system as set out above together with the proposed changes to the particulars under option 2B would provide savings to presenters of charges of approximately **£45.4m** (£49,445,000-£4,080,000) which is the difference between the cost of preparing the charges for filing under the current scheme (option 1) and option 2B (see annex A for more details).



## Costs of a revised scheme (2A and 2B) for those filing charges for registration and those accessing information about charges

85. The cost for companies of entering charges into their own registers of charges is estimated at £3 per charge (15 minutes at £12ph). Abolition of this requirement is expected to bring savings of £300,000 per year.
86. As stated previously, it is envisaged 80% of presenters will shift to electronic filing, providing savings in excess of £400,000, in comparison to option 1.
87. The revised scheme as set out above together with the proposed changes to the particulars under option 2A would provide savings to presenters of charges of approximately £23m. By adding the savings achieved through electronic filing and the removal of the requirement on companies own registers total savings under 2A compared to option 1 are £24.1m.
88. The revised scheme as set out above together with the proposed changes to the particulars under option 2B would provide savings to presenters of charges of approximately £45.4m. By adding the savings achieved through electronic filing and the removal of the requirement on companies own registers total savings under 2B compared to option 1 are £46.1m.
89. The table below sets out the revised costs of preparing and delivering charges under the revised schemes.

**Table 3: Costs of Filing a Charge under a revised scheme (options 2A and 2B)**

| Cost Description  | Unit cost |          | Frequency (pa) | Total Cost (pa)    |                    |
|---|-----------|----------|----------------|--------------------|--------------------|
|   | 2A        | 2B       |                | 2A                 | 2B                 |
| Preparing the Charge for filing (simple, standard, complex)                                   | £3        | £1       | 40,000         | £120,000           | £40,000            |
|   | £150      | £51      | 40,000         | £6,000,000         | £2,040,000         |
|   | £1000     | £100     | 20,000         | £20,000,000        | £2,000,000         |
|   |           |          | =100,000       | £26,120,000        | £4,080,000         |
| Delivery of charges to the registrar (Companies House)  | £2        |          | 10,000         | £20,000            |                    |
|   | £2        |          | 10,000         | £20,000            |                    |
|   | £18       |          | 0              | 0                  |                    |
|   | £120      |          | 0              | 0                  |                    |
|   |           | = 20,000 |                | = £40,000          |                    |
| Filing instruments on Companies Own registers   | £3        |          | 0              | 0                  |                    |
| <b>TOTAL COSTS</b>  |           |          |                | <b>£26,160,000</b> | <b>£4,120,000</b>  |
| <b>TOTAL NET BENEFITS (savings compared to option 1 which had total costs of £50,207,000)</b> |           |          |                | <b>£24,047,000</b> | <b>£46,087,000</b> |

90. Our assessment of a revised scheme makes an assumption that the number of registered charges will remain at approximately 100,000 per annum even though Lloyds' charges would cease and the scheme has brought more charges into scope. This is based on evidence from consultation with stakeholders who have argued that they had previously taken a risk averse approach to registering charges given the sanction of invalidity in insolvency. If this clarification creates any increase in the number of charges filed it is expected to be extremely small and therefore it is suggested that the 1000 charges filed by Lloyds would more than absorb this. Consequently we have assumed that the number of charges filed will remain at 100,000 pa.

### **Costs associated with accessing and analysing information on company charges**

91. As stated at the outset of this impact assessment, the purpose of a register of charges is to create transparency around the existing debt securities that a company has over its assets. This allows lenders to have confidence in making finance available to companies and to each other. It is therefore important to assess the impact of any revised scheme on the overall availability and the costs of accessing information about company charges through the register.
92. Under option 2A there would be no significant savings or additional costs.
93. Under option 2B (the revised scheme with brief particulars) proposals would significantly affect the cost of assessing companies' credit-worthiness. One of the big 6 lenders estimates that the cost would increase from £3.10 to £18 per company – and that because the information in the particulars would no longer allow companies to be sifted out prior to assessment, approximately double the number of companies would need to be assessed. This information was tested with stakeholders and trade associations and was considered reasonable.
94. Standard information about company charges is free. Further information about a company's charges costs £1. In October 2011, 100 purchasers spent around £24,000 on purchasing direct from Companies House information relating to charges, which equates to £240,000 p.a. Coincidentally the number of downloads per year is also 240,000.
95. **Applying these costs (£18 per charge) to 480,000 downloads a year (double the current number), give expenditure of £8.64m; with the purchase, it comes to £8.88m.** In addition, users of the bulk information downloads from Companies House might also face additional costs of analysing charges under option 2B but it is not possible to monetise these costs.

**Table 4: Costs Associated with accessing and analysing company charge information**

| Scheme Option          | Cost Description               | Unit Cost of assessment | Frequency (downloads pa) | Base Cost                   | Total Cost (Unit cost of assessment x frequency + base cost) |
|------------------------|--------------------------------|-------------------------|--------------------------|-----------------------------|--|
| 1 (Current Scheme)     | Assessing Companies for Credit | £3.1                    | 240,000                  | £240,000 (£20,000pc m x 12) | £984,000   |
| 2A (Full particulars)  |                                | As above                | As Above                 | As Above                    | As Above   |
| 2B (Brief Particulars) |                                | £18                     | 480,000                  | £240,000                    | £8,880,000   |

#### Transition Costs of moving to a revised scheme

96. The costs associated with transition will equate to roughly 30minutes of a senior lawyer across each of the 9000 presenters. This is  $9000 \times £22.65ph = £203,850$ .<sup>2</sup> This is likely to be an overestimate, but allows flexibility to take account of any additional costs incurred by presenters due to the complexity of the charge filed. Stakeholders have not provided details of transition costs incurred by those who analyse company charges information; these are thought to be negligible. Companies House will also face development costs of £760K which will be recouped over 4 years through efficiency savings. More detail is provided in Annex A.

<sup>2</sup> This is based upon ASHE data for the median hourly wage of legal professionals available at <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tc%3A77-256648>

## 5. Summary and Recommendation

97. Option 1, i.e. no change, has been rejected because it does not address the problems raised by stakeholders through the consultation and outlined at Annex B and it fails to realise potential cost savings.
98. Option 2; a revised scheme is recommended.
- Option 2A presents savings to presenters in addition to a range of non-monetised benefits, but without creating additional costs and the risk of negative impacts on business lending. This is therefore the preferred option.
  - Although option 2B presents greater savings to presenters of company charges, however it risks undermining the very purpose of a public register and is therefore rejected.

### Costs and benefits of option 2; a revised scheme in relation to filing charges for registration

99. By enabling electronic filing under the revised scheme the cost of delivery will be significantly reduced. It is envisaged 80% of presenters will shift to electronic filing a **cost reduction in excess of £400,000**.
100. Companies have previously been required to retain the instrument of charge on the companies own register and have this available for public inspection. Now that the full instrument of charge will be available on the public register there is no longer any need for this requirement, which would be abolished under the revised scheme **saving companies £300,000**.
101. Legal and administrative costs are considerably reduced under the revised option in both 2A and 2B because the time taken to prepare the particulars and the level of legal analysis will be significantly reduced. The shift from a scheme where lawyers had to review types of charges that could be registered to an exclusion based system will greatly reduce legal time and uncertainty. The Lloyds exclusion will also reduce cost. **The savings in legal and administrative costs is £23m in option 2A and £45m in option 2B**.
102. **Option 2A will generate savings for those filing company charges of £24m** (legal & admin savings + delivery savings + companies own register savings). These savings are achieved through enabling electronic filing, providing clarity about what is registrable so lessening legal analysis and removing duplicative requirements to file registrable charges in the companies own register (see table below).
103. **Option 2B presents greater savings to business of £38m** (£46.1m savings to presenters – £7.9m additional cost to those accessing information), it could undermine the purpose of a system for the registration of company charges. The system exists for the benefit of those using the register to access information. By seeking to reduce the burdens upon those who must register with it, it would seem perverse to prioritise cost reduction of filing over ease, accessibility, transparency and cost to those seeking to make use of the register.

#### Key stakeholders made the following comments on the implications of adopting 2B

*'The costs of analysing information available about charges will rise significantly and add to the time taken to process new lends thus impacting UK plc and the SME sector in particular'*

*'The answer is to avoid a short-term gain in ease of registration at the expense of long-term good sense in being able to search the register efficiently'*

104. It is our assessment that if option 2B was selected this could have the following negative impacts on the system which could out-weigh the benefits of a revised system:

- To make it difficult and costly for organisations such as credit reference agencies to make timely assessments of company finances.
- Limiting the ability of lenders to provide finance to companies.
- The added costs to lenders (in the order of £8m) could also be passed on to companies wishing to access credit.
- Reduce lending which could have a detrimental impact on the economy, and
- Disproportionately impact on small business given 'quick checks' are more likely to form the basis of minor lending decisions.

**Table 5 Benefits under options per annum**

|  | OPTION 1<br>£ | OPTION 2A<br>Difference from current<br>system (option 1) in £ms | OPTION 2B<br>Difference from current<br>system (option 1) £ms |
|--|---------------|--|---|
| Benefits                                       |               |  |   |
| Legal & administrative costs                   | 0             | 23.3   | 45.4  |
| Delivery costs <sup>3</sup>                    | 0             | 0.4  | 0.4   |
| Making entry in own register @ £3<br>per entry | 0             | 0.3  | 0.3   |
| <b>Total Annual Benefit</b>                    |               | <b>24</b>  | <b>46.1</b>   |
| Costs  |               |  |   |
| Costs of accessing company<br>information      | 0             | 0  | 7.9   |
| Familiarisation costs for presenters           | 0             | 0.2  | 0.2   |
| <b>Net Annual Benefit</b>                      | <b>0</b>      | <b>23.8</b>  | <b>38</b>   |

### Non-monetised benefits

105. It should be noted that both schemes 2A and 2B have a range of benefits that can not be easily monetised but will address the criticisms of the current schemes:

- **Creating consistency across the UK:** there will be a single scheme for all UK companies and LLPs;
- **Modernising the system;** electronic filing will be possible.
- **Reducing uncertainty;** all charges would be registrable unless expressly excluded
- **Increasing transparency;** the charge instrument would be placed on the public record, not just summary information.
- **Increasing accuracy of information;** required fields and tick boxes will reduce errors and missed information creating a more accurate public record
- **Providing clarity on each charge;** Making satisfaction or partial satisfaction of a charge easier to identify/file by providing each charge with a unique electronic reference number
- **Lower long-term rejection rate;** through electronic prompts built into the system

### Costs and benefits of option 2; a revised scheme in relation to accessing information on company charges

106. 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) access to basic details about the extent to which its assets have been encumbered. For over a century, registration of charges has ensured that the public

<sup>3</sup> We assumed delivery costs will be smaller in year 1 (see para 124 for information)

availability of this information has limited the impact of companies' insolvency and thus facilitated the availability of loans to companies.

107. The revised scheme will increase the transparency and detail available for individuals who want to review the charges registered by a company. For those who routinely assess companies' credit worthiness they tend to do so by a review of the information contained within the particulars. Whilst providing fuller particulars (option 2A) would have a cost neutral impact on such firms, providing minimal particulars (option 2B) would greatly **increase the costs of accessing this information by creditors by at least £8m.**

### Summary

108. Discussion of the relative merits of these options has revealed a very strong difference in opinion between those presenters who are themselves lenders, and those who advise on bespoke financing packages. The former group would not greatly benefit from the savings in legal and administrative costs arising from Option 2B; the consequential extra costs for their assessment of companies' credit-worthiness is around £8m. It is apparent that Option 2B could adversely affect major lenders' readiness to lend to small and medium-sized enterprises. Option 2A, by contrast, while bringing lesser savings does not materially affect the cost of assessments. **Option 2A (revised scheme with fuller particulars) is therefore preferred.**
109. The cost to presenters is less under Option 2B than under Option 2A. However as stated above, Option 2B would significantly increase the cost of a basic assessment of a company's credit-worthiness. As regards Option 2A, the costs of assessing particulars are not sufficient. In these circumstances it will be possible to access the instrument on the public record at Companies House under Option 2A – this is not possible at present, i.e. under Option 1 (the current system).

### Stakeholders views:

110. Option 2A is favoured by those who use the public register to assess information on company charges. However with regard to presenters of charges Option 2A is a compromise between the views of those who present simple charges versus complex charges.
111. On the one hand presenters who file simple and routine charges have a preference for no changes to the particulars. They consider it is simple to provide a brief description of charged assets. These presenters, as lenders, rely heavily on this information, both directly and indirectly through credit reference agencies, etc. Their systems are based around the information currently available. They argue that the quality of the information so provided is sufficient for their purposes. In any event, they require sufficient information to be able to filter cases so that they do not scrutinise the charge document in the vast majority of cases.
112. On the other hand, those who file charges that are part of bespoke financing packages consider the brief description of charged assets to be an expensive trap for the unwary. Their strong preference is for Option 2B. The Land Registry also prefers this option because, in their experience, there are often errors when several properties are covered by a single charge which requires formal rectification so as to avoid legal uncertainty.
113. Stakeholders generally recognise the competing views and welcome the development of a compromise proposal as outlined in option 2A.

### Implementation Plan

114. The intention is 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. The target date is 6 April 2013.
115. It is intended that secondary legislation is made by Summer recess 2012 in order to allow Companies House to develop a system for electronic filing and for presenters and users of the public register to amend their systems before the changes go 'live'.
116. As stated earlier, the costs associated with transition will equate to roughly 30minutes of a senior lawyer across each of the 9000 presenters. This is  $9000 \times £22.65\text{ph} = £203,850$ .<sup>4</sup> This is likely to be an overestimate, but allows flexibility to take account of any additional costs incurred by presenters due to the complexity of the charge filed. Stakeholders have not provided details of transition costs incurred by those who analyse company charges information; these are thought to be negligible.

<sup>4</sup> This is based upon ASHE data for the median hourly wage of legal professionals available at <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-256648>

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

### **Sunsetting provision**

118. It is not intended to include a sunsetting clause as the proposals represent an 'out'. It will be possible to revise and improve the scheme further, for example if in future electronic filing becomes possible on other public registers.

### **Micro companies**

119. Secured loans are generally on much better terms than unsecured. The scheme for registration of charges ensures the effectiveness of the security and thus facilitates the availability of loans to all those businesses that are subject to it.

120. Companies are generally unaffected by the detailed procedures for registering a charge as this is normally handled by the lender (or his agent).

121. Exempting micro companies from the Regulations would mean that the current schemes would continue to apply to these companies: their lenders would not benefit from the reduction in costs from the Regulations. Indeed, the cost of lending to them would probably increase as lending to them would be subject to different registration requirements to those that apply to all other companies.

122. In view of these considerations, it is not proposed to exclude micro companies from the Regulations.

### **Unregistered companies**

123. The scheme would not, at least at the outset, be extended to those unregistered companies subject to the Companies Act provisions.

### **Direct Costs and Benefits to Business calculation including OIOO considerations**

124. Both the identified cost and benefits of the preferred option (2A) would fall directly on those businesses filing charges or accessing information filed. The overall direct net benefit to business is therefore £24m per annum producing an EANCB of -£21.15m.

125. Costs and benefits are assumed to impact from 2013 following implementation and for the following ten years. A full breakdown of these costings and underlying assumptions are set out in **Annex A**.

## Assumptions and Detailed Breakdown of Costs and Benefits

### Number of charges by type of charge

126. In the 12 months ending August 2011, 100,129 applications to register charges created by UK companies were received. We will round this to 100,000 for the purpose of further calculations.
127. Of the c.100,000; 1041 charges were created by corporate members of Lloyds who registered 1041 charges in the 12 months to July 2011).
128. Companies House analysed the presenters at Cardiff in the 12 months to May 2009. The majority were law firms. Where presenters have several offices/branches, each office/branch was treated as a different presenter - this means that substantial lenders and lawyers with a wide geographical spread of offices were counted several times.
129. Companies House do not currently monitor filings by type of charge e.g. simple, standard or complex. Companies House staff further estimate that nationwide the percentage of charges that are complex charges will be approximately 15-20% of all charges.
130. In the light of evidence from those that process filings and from the Companies House study of presenters, it has been assumed that:
- charges filed by presenters who are not lawyers are simple charges; Companies House estimates this will be approximately 40 per cent of the total (excluding Lloyds);
  - charges filed by presenters that are complex charges will be 20 per cent of the total (excluding Lloyds)
  - the remainder, 40 per cent (excluding Lloyds), will be standard charges
131. Our assessment of a revised scheme makes an assumption that the number of registered charges will remain at approximately 100,000 per annum even though Lloyds' charges would cease and the scheme has brought more charges into scope. This is based on evidence from consultation with stakeholders who have argued that they had previously taken a risk averse approach to registering charges given the sanction of invalidity in insolvency. If this clarification creates any increase in the number of charges filed it is expected to be extremely small and therefore it is suggested that the 1000 charges filed by Lloyds would more than absorb this. Consequently we have assumed that the number of charges filed will remain at 100,000 pa.

### Costs of filing a charge, per charge

132. Stakeholders have advised that the costs of filing a charge under the different proposed systems are as follows:

**Table 6: Cost of filing a charge under options 1 and 2 (2A and 2B)**

| Type of Charge | Current System<br>(option 1) | Revised System<br>(option 2A) | Revised System<br>(option 2B) |
|----------------|------------------------------|-------------------------------|-------------------------------|
|                | Cost of Filing               |                               |                               |
| Simple         | £6                           | £3                            | £1                            |
| Standard       | £300                         | £150                          | £51                           |
| Complex        | £2000                        | £1000                         | £100                          |

133. A breakdown of the comparison of the costs per charge by type of charge is provided below:

**Table 7: Assumptions: legal and administrative costs**

| NUMBER OF CHARGES REGISTERED   |   | OPTION 2A    |             | legal & administrative<br>OPTION 2B |             | OPTION 1<br>Current System |             |
|--|---|--------------|-------------|-------------------------------------|-------------|----------------------------|-------------|
|  |   | £ per charge | total £k pa | £ per charge                        | total £k pa | £ per charge               | total £k pa |
| created by corporate members of Lloyds – forms prepared in-house by Lloyds | 1,000   | 0            | 0           | 0                                   | 0           | 5                          | 5           |
| simple – forms usually prepared in-house by major lenders                  | 40,000  | 3            | 120         | 1                                   | 40          | 6                          | 240         |
| standard – forms usually prepared by chargor's solicitors for lender       | 40,000  | 150          | 6,000       | 51                                  | 2,040       | 280                        | 11,200      |
| complex - forms usually prepared by City lawyers                           | 20,000<br>(19,000 under the current system i.e. option 1) | 1,000        | 20,000      | 100                                 | 2,000       | 2,000                      | 38,000      |
| <b>TOTAL COSTS</b>   |   |              | 26,120      |                                     | 4,080       |                            | 49,445      |
| <b>Net Benefit</b>   |   |              | 23,325,     |                                     | 45,365      |                            | 0           |

134. The savings in legal and administrative costs under Options 2A (revised scheme with fuller particulars) and 2B (revised scheme with brief particulars) are not evenly distributed. It is therefore of greater benefit to those who file charges to select the revised scheme with brief particulars (2B) to deliver the greatest savings. Table 8 has a breakdown.

**Table 8: Savings in legal & administrative costs under Options 2A and 2B by type of charge**

|   |                  | OPTION 2A                    | OPTION 2B                   |
|---|------------------|------------------------------|-----------------------------|
|   |                  | (Fuller Particulars)<br>£kpa | (Brief Particulars)<br>£kpa |
| savings in legal & administrative costs | simple charges   | 120                          | 200                         |
|   | standard charges | 5,200                        | 9,160                       |
|   | complex charges  | 18,000                       | 36,000                      |

### Costs Associated with Delivery

135. There are also delivery costs. At present, all charge documents are delivered to Companies House in hard copy; there is no alternative.

136. No record is kept of the method of delivery but the post room staff report that:

- nearly half are sent by first-class post (45%),
- nearly half by DX (45%), and that a significant proportion are packaged with other charges.
- about 10 per cent are sent by some sort of special delivery (9%);
- a much smaller percentage being delivered by courier (estimated 1%).

137. For large letters weighing 500-600 grams (the typical weight of the packet containing a single charge instrument and particulars):

- first class business post is £2.07 and would average at £1.50 for each in a pack of 6;



- b. DX prices depend on the contract: according to the advertisement it is less than second class postage (which would be £1.76).
  - c. The Royal Mail's special delivery (by 9am the next day) costs £16.09-21.38 (depending on the level of compensation).
  - d. A motor cycle courier from London to Cardiff costs at least £120.
138. There is also the cost of packaging. It has been assumed that:
- a. under Option 1, total delivery costs would be £2 per charge for 90 per cent of cases sent by first-class post or DX; £18 each for 9 per cent sent by the Royal Mail's special delivery; and £120 each for 1 per cent sent by motor cycle courier.
  - b. under the revised scheme (option 2 - the variation in particulars will not impact on delivery costs therefore A and B are not separated in this section), noting that presenters are almost invariably the lender or a lawyer acting for the lender, it is expected that 80 per cent of filings would be made electronically at no cost and that the remainder would all be at £2 each, i.e. that electronic delivery would always be preferred to special delivery or motor cycle courier.

**Table 9: Delivery Costs**

| Delivery Method             | Unit cost | Frequency of use          |                           | Costs                     |                           |
|-----------------------------|-----------|---------------------------|---------------------------|---------------------------|---------------------------|
|                             |           | Current System (Option 1) | Revised System (Option 2) | Current System (option 1) | Revised System (option 2) |
| First Class                 | £2        | 45%                       | 10%                       | £90K                      | £20K                      |
| DX                          | £2        | 45%                       | 10%                       | £90K                      | £20K                      |
| Royal Mail Special Delivery | £18       | 9%                        | 0                         | £162K                     | £0                        |
| Courier                     | £120      | 1%                        | 0                         | £120K                     |                           |
| Electronic filing           | 0         | 0%                        | 80%                       | £0                        | £0                        |
| <b>Total</b>                |           | <b>100%</b>               | <b>100%</b>               | <b>£462K</b>              | <b>£40K</b>               |

139. Electronic filing through the revised scheme would save **£422K** a year for those that file charges.
140. In year one, however, under a revised scheme we anticipate a smaller number of electronically filed charges, based on experience of Companies House in the introduction of similar electronic filing systems.
141. Based upon the assumption that Companies House electronic receipts of charges would account for 50% of charges received in the first year; benefits in year one would be in the region of £180k pa (of which we have assumed is comprised of 22.5% first class £45k; 22.5% DX £45K, 5% Special delivery £90k).

### **Cost of Filing and Accessing information via the Companies Own Register**

142. The cost for companies of entering charges into their own registers of charges is estimated at £3 per charge (15 minutes at £12ph). Abolition of this requirement is expected to bring savings of £300,000 per year.
143. Inspection of companies' records of charges is rare as regards going concerns. The availability of the instruments creation charges from the public record is likely to make it even rarer. The benefit therefore, of allowing the obligation to be satisfied electronically is not expected to yield significant savings.

## Assumptions for transitional costs

144. It is expected that transitional costs will be negligible. The major change will be presenting charges via electronic filing and this will not take significant time for presenters to adjust to. The wider changes to the regulations will require legal understanding; but the thrust of the changes have been towards simplification and clarity therefore reducing the need for detailed legal analysis in many cases; a good example of this is the move from listing all types of registrable charge to an exclusion based system.
145. As noted previously, Companies House did a study of the presenters of charges in the 12 months to May 2009. This study showed the top 227 presenters accounted for 35 per cent of filings; the remainder were filed by 8,851 presenters (each office of presenters with a wide geographical spread of offices was counted separately), i.e. 9,078 in all.
146. We assume that transitional costs will comprise:
- Each presenter having at least one senior person who understands the changes. As this person will already understand the existing scheme, this is likely to take less than 30 minutes.
  - A junior member of staff familiarising themselves with the electronic filing process when they submit a charge electronically for the first time. This is likely to be self-explanatory and unlikely to create anything other than negligible costs for presenters of charges.
147. As also noted previously, the rate of take-up of the option of electronic filing will also affect the timing of the benefits from the introduction of the revised scheme. Experience of take-up of the electronic filing option for Change of Name and of LLP Annual Returns, transaction where those involved were already familiar electronic services provided by Companies House before the introduction of the specific service, leads to a prediction of 50% in the first year, rising to the 80% over the next two years. The rate of take up of electronic filing is expected to be faster for charges for the following reasons:
- the requirement to file a certified copy of the instrument makes paper filing unattractive;
  - the sanction of invalidity increases the importance of speedy delivery; and
  - the pressure from presenters over the last 10 years for electronic filing to be introduced.
148. We therefore predict that 50 per cent filings will be electronic within the first year, then stabilising at 80 per cent after 12 months.
149. **The costs associated with transition will therefore equate to roughly 30minutes of a senior lawyer across each of the 9000 presenters. This is  $9000 \times \text{£}22.65\text{ph} = \text{£}203,850$ .**<sup>5</sup> This is likely to be an overestimate, but allows flexibility to take account of any additional costs incurred by presenters due to the complexity of the charge filed. Companies House will also incur development costs of £760K, they will be recouped through efficiency savings over an estimated period of 4 years.
150. Those accessing information on company charges have not provided details of any transition costs they would face; it is assumed these would be negligible.

### Cost Reduction: Rejections and Erroneous Filings

151. An avoidable cost is that resulting from a filing being rejected. Under all options, a filing would be rejected not only if it is late but also if the instrument is not signed or not filed or if required particulars are incorrect or missing, or if the charge was not created by a UK company.
152. In the two years to end-October 2011 approximately 1.6 per cent of filings were rejected because they were received after the deadline. Less than 1 per cent of registrations are after 21 days: the great majority under a court order but a few under the extra time permitted if the property is situated and the charge was created outside the UK. Together these statistics suggest that of those charges where the filings were rejected because they were received after the deadline about half were replaced by a new charge being created: this is generally a cheaper remedy than an application to a court for late registration.

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<sup>5</sup> This is based upon ASHE data for the median hourly wage of legal professionals available at <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-256648>

153. A further 10 per cent of filings are rejected for other reasons. For the 25 months to October 2011. The commonest mistakes were:
- Providing incorrect information in the form (13,019 occurrences)
  - Information missing in the form (6,107 occurrences)
  - Use of wrong form (5,622 occurrences)
  - Failure to deliver the deed together with the form (3,367)
154. It is expected under the new charges regime (option 2) that rejection rates would decline over time as a result of the simplified filing procedure and electronic filing. However stakeholders were unwilling to provide costings related to erroneous filing therefore we have been unable to make a reasonable assessment of the monetised benefit of reductions in rejections and errors.
155. The rejection rate is likely to be higher in the first year as presenters will not be immediately familiar with the new requirements – these being the first significant change for over 100 years. The expected long-term average rejection rates are 2.5 per cent and 4 per cent for Options 2A and 2B respectively. Extrapolating from Companies House experience with Annual Returns and noting that it is assumed that the proportion of electronic filing will rise from 40 to 80 per cent in that year, it is assumed that the rejections rates in the first year will be double the long-term average.

**Table 10: A: Changes to information available from Companies House – no fee**

|  | OPTION 2A  | OPTION 2B               | OPTION 1        |
|--|--|-------------------------|-----------------|
| description (e.g. floating charge, debenture, legal charge). | NO   | NO                      | ✓               |
| person(s) entitled   | Up to 4 plus an indication if there are more   | as in charge instrument | filer's wording |
| status (ie outstanding or part-satisfied or satisfied)       | ✓  | ✓                       | ✓               |
| date of creation   | ✓  | ✓                       | ✓               |
| date of receipt by Registrar                                 | ✓  | ✓                       | ✓               |
| date entered on public record                                | ✓  | ✓                       | NO              |
| amount secured   | NO<br>Indication if <ul style="list-style-type: none"> <li>a floating charge and if so, whether over all the company's property</li> <li>there's a negative pledge</li> </ul>  | NO                      | ✓               |
| brief description of charged assets                          | Brief description of UK land, registered ships, aircraft or intellectual property subject to a fixed charge<br>Indication if a fixed charge over <ul style="list-style-type: none"> <li>other fixed assets</li> <li>other intangible assets</li> </ul> | NO                      | filer's wording |
| forms registered   | ✓  | ✓                       | ✓               |
| acquisition date of property subject to existing charge      | if filed   | if filed                | ✓               |

156. As Companies House operates as a trading fund, their development costs (£760k) are recouped through the fees charged for filing: these are included in the estimated total costs for business above. It is estimated that in the longer term Options 2A and 2B would reduce the operational costs for Companies House by 25-30 per cent, i.e. yields savings of £100k-120k per annum. While, ultimately any savings will be passed on to businesses in the shape of lower registration fees, development costs must be recovered in the short to medium term (estimated 4 years). Therefore the likely future reduction in fees has not been included in the calculation of savings for business.

## **Consultation and problems that a revised scheme would seek to address**

157. Over the last 40 years, there have been several reports, following consultation, on the registration of company charges: *The Report of the Committee on Consumer Credit*, 1971, chaired by Lord Crowther; *Report by Working Party on Security Moveable Property*, 1986, chaired by the Scottish Law Commission; *A review of Security Interests in Property*, 1989, chaired by Professor Diamond; *Final Report* (Chapter 12), 2001, the Company Law Review Steering Group; *Report on Registration of Rights in Security by Companies*, 2003 by the Scottish Law Commission; and *Company Security Interests*, 2005, by the Law Commission.
158. The Companies Act 1989 implemented changes recommended by Professor Diamond. In particular, it provided for filing of the charge instrument under a single UK-wide scheme with an updated list of registrable charges. It also provided that the Certificate of Registration would not be conclusive evidence that the requirements for registration had been satisfied. However, the Land Registry relies on the conclusiveness of the certificate. Therefore the 1989 Act's provisions were never brought into force.
159. On the basis of the responses to the consultation over the economic impact of the Law Commission's 2005 proposals for a notice-filing regime, no substantive change was made to the existing transaction-filing scheme in the 2006 Act. Rather the 2006 Act provides power to alter, add or repeal its provisions relating to the registration of charges. While this power cannot be used to introduce a notice-filing system or otherwise provide for priority rules, it can be used to address many imperfections of the present transaction-filing scheme.
160. In 2010, the Department for Business Innovation and Skills (BIS) consulted over proposals based on those put forward by the Company Law Review in case their recommendation in favour of notice-filing was rejected. The proposals also take account of Professor Diamond's 1989 recommendations and the 2005 recommendations of the Law Commission. In September 2010, a summary of responses to the consultation was published on <http://www.bis.gov.uk/Consultations/registration-of-charges?cat=closedwithresponse>
161. Following the 2010 consultation, the Government published a summary of responses and a draft Impact Assessment in December 2010: these formed the basis for further discussions with stakeholders throughout 2011. There has been a high level of engagement with key stakeholders throughout: they have appreciated the open nature of the consultation.
162. BIS is extremely grateful to all those who have contributed to the development of the proposals, the assessment of their impact, and the drafting of the regulations. Especial thanks are due to Professor Hugh Beale, QC, FBA, who as Law Commissioner, led the team that submitted the Law Commission's 2005 Report and who has continued to give generously of his time and advice; and to Geoffrey Yeowart of Hogans Lovell International LLP and Dr Hamish Patrick of Tods Murray LLP, whose joint contribution has made a UK-wide scheme possible.

### **Problems under consideration (arising from above stakeholder consultation)**

163. Companies, lawyers and academics have pointed to opportunities to modernise this scheme. These include:
- a. The scheme is said by those who file charges, i.e. presenters, to be outdated, slow and laborious
  - b. The procedures are not readily compatible with electronic filing
  - c. The interaction of Scots property law with the provision that the Certificate of Registration as conclusive evidence that the charge was registered within 21 days of its creation also inhibits electronic filing across the UK

- d. There is uncertainty on what is the start-date of the 21 day delivery period<sup>6</sup>.
- e. Presenters of complex charges, e.g. those that cover multiple types of assets and/or are part of bespoke financing packages, argue that the filing of particulars is burdensome, particularly the provision of a brief description of the charged assets.
- f. There is no explicit requirement for the brief particulars to make clear whether the charge is a qualifying floating charge, i.e. one that enables the holder to appoint an administrator or administrative receiver although this information is of particular importance to third parties.
- g. 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:
- It is common practice to submit for registration all charges created by companies so as to avoid the sanction of invalidity if it were later to be decided that a charge was registrable. 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 certain charges created by corporate members of Lloyds.
  - 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 arising under Lloyd's trust deeds created by its corporate members are registrable although their registration serves no useful purpose as these companies are not permitted to undertake any other business.
  - Certain charges are not registrable if created by a Scottish company but would be registrable if created by a company incorporated anywhere else in the United Kingdom. For example, a fixed charge over vehicles or plant and machinery or other moveable property created under the law of England (or any other jurisdiction) is registrable if created by an English company but not if created by a Scottish company. There is considerable ignorance of this anomaly.
  - The language is unhelpful – for example, for companies incorporated in England, Wales and Northern Ireland, 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”.
- h. It is not clear whether a charge is registrable when created over property for which the company is acting trustee. However, in the case of land, if the bare legal estate is vested in the company then a charge over it is registrable under the Land Registration Act 2002 and the Land Registration Rules 2003 require the conclusive certificate of registration issued by Companies House (ie the conclusive certificate) to be lodged with the Land Registry.
164. Misunderstanding that the conclusive certificate means that the particulars on the public record are correct: it does not. The case law is clear: In *National Provincial and Union Bank of England v Charnley* (CA 1923 Nov 15), Bankes LJ said:
- “ . . . once the registrar has given his certificate that the registration is complete , and that the mortgage or charge was created by an instrument, identifying it, in my opinion you have to go to the instrument to see what was actually charged, there being nothing in the statute which says that once registration has taken place the register shall be the evidence of the extent of the charge.”*
165. If the charge is not in English, there is no right to inspect a translation.
166. There is a requirement for a company to register an existing charge on property it acquires but this is unenforceable. Such transactions usually relate to property for which there is a specialist register. In such cases, as noted by the Law Commission in their 2005 Report, the transfer of ownership requires the agreement of the chargee who normally takes a new charge against the acquiring company; this new charge is registrable. The Law Commission considered that it was not sensible to have a special provision for the few instances where this is not the case.

<sup>6</sup> There is uncertainty if the charge is delivered into escrow. For standard securities (ie security over land in Scotland) and, for companies incorporated in Scotland only, security over other assets for which there is a specialist register, the start-date is the date of registration in that other register. For assignments by Scottish companies, if all the parties have not signed the deed, the start-date is the date of intimation (ie the date on which the debtor was informed) – for this Companies House accept evidence, such as postal stubs, for the date of creation.

167. The voluntary filing of statements of satisfaction and release is problematic. In particular, where a company has more than one charge registered on a particular date (not a rare occurrence), it is not always evident which charge is the subject of the satisfaction or release. It is also not necessarily clear which assets are no longer subject to the charge when the statement is partial.
168. 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.
169. The requirements under other legislation for the registration of certain specific types of property with the relevant specialist register operate in parallel with the requirement to register charges, leading to double registration requirements where there is a fixed charge over an asset for which there is a specialist register. The Companies Act 2006 provides the means to end double-registration of charges that have been registered at a specialist register. Provided that the Secretary of State is satisfied that there are appropriate information-sharing arrangements between the registers, regulations can be made so that charges registered at a specialist register are treated as if also registered under the Companies Act. In particular, this has been taken to mean that the information-sharing arrangements must not increase the costs either for those who register charges or for those who use the information at Companies House. It would be simpler to set up such information-sharing arrangements if both registers were able to accept electronic filing. It would also be easier if Companies House were not required to place the information on companies' charges on the separate statutory register of charges (rather than simply to place the information only on the main register).

## **Further considerations**

### **Abolition**

170. Stakeholders consider the rationale for intervention (see paragraph 8) to be overwhelming. Abolition of the scheme would be extremely controversial: no one has recommended this approach. It would result in an increase the cost of borrowing for companies and restrictions in the availability of finance to them. If there were not a statutory scheme, it is likely that the main lenders would develop an alternative. But a non-statutory alternative would be less effective and more expensive. It would also be a barrier to entry for new lenders. This option was rejected by the Company Law Review; it has not been considered further.

### **Abolition of the requirement to file the instrument,**

171. This was proposed in the 2010 consultation document but was rejected by the vast majority of respondents, primarily because it would be susceptible to fraud. It has not been considered further.

### **Requiring an extract from the instrument to be filed**

172. Under the options considered in the draft Impact Assessment, published in December 2010, extracts from the charge instrument would be put on the public record rather than the instrument in its entirety. This option would require a careful definition of what must be included and what may be excluded and a decision on the consequences if the extract is not compliant with the requirement. In subsequent discussions, presenters have made clear that they would prefer to file the complete instrument: they were particularly concerned at the costs associated with any decision as to precisely what would be included in the filed extract. They strongly prefer the option of filing the complete instrument. Once the technical objections to filing the complete instrument were overcome, the option of filing extracts was no longer pursued.

### **Redaction of commercially sensitive information from the instrument to be filed**

173. Under this option, there would be provision so that commercially sensitive information could be redacted from the filed instrument provided that none of the following were redacted:

- a. the date of creation;
- b. a description of the instrument
- c. the amount secured,
- d. the name of the person entitled to the charge (the address may be concealed)
- e. so much of the description of the property or undertaking charged as necessary to identify the charged assets

If any of this specified information were redacted, then the charge would have been invalid against a liquidator, administrator or a creditor of the company.

174. This option was proposed to stakeholders. Various concerns were raised. In particular, it would result in continuing uncertainty as to whether or not a charge was valid. It might also lead to extensive – and expensive – negotiations between the contracting parties as to what information should be redacted.

### **All-electronic filing.**

175. This would be the same as Option 1 or 2 except that Companies House would only accept electronic delivery of documents to register a charge. This option would not bring all the cost savings for Companies House normally associated with all-electronic filing as it would still be necessary to check that the requirements for registration have been satisfied before issuing the

conclusive certificate. As filing is normally made by the lender (or its agent) rather than the company on whose record the charge will be entered, safeguards will be needed to prevent malicious filings, in particular those filing electronically will have to have a chargee authentication code. In the few instances where the secured loan is an arrangement with an individual or another company, this pre-requisite for electronic filing would add to the costs. This option was therefore rejected.

### **Brief description of charged assets**

176. Option 1 provides for a description primarily by tickboxes with text only to describe land, ships, aircraft and intellectual property registered in a UK specialist register. Option 2 does not include any description of the charged assets. Option 3 (no change) requires a description of the charged assets. The option of retaining the requirement brief description relates to all charged assets was rejected because of the high costs for complex charges.

### **Registrable charges**

177. The option of updating the list of registrable charges rather than, as proposed, making all charges registrable that are not excluded (see paragraphs 57-60) was included in the draft Impact Assessment. It has been rejected because it would require further Regulations if developments in commercial practice were to create new forms of charges. The existing list of registrable charges is outdated.

### **Effect on third parties**

178. 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. Consideration was given to making provision so that:
- a. any person taking a charge over the company's property is deemed to have notice of any previously registered charge.
  - b. a buyer of property subject to an unregistered charge takes free of the charge (i.e. the lender would have no claim over the assets following their sale by the company)]with an exception for property subject to the rules of a specialist register.
179. Following further discussion with stakeholders, this option has been rejected because any useful provision would affect property rights – and thus not be possible under the powers to amend Part 245 of the Companies Act 2006.