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Dear

This letter contains a targeted consultation on proposed changes to the Land Registration Rules 2003 and the Commonhold (Land Registration) Rules 2004, resulting from the coming into force of certain provisions of the Companies Act 2006 and associated secondary legislation on 1 October 2009.

A. Draft Land Registration (Amendment) Rules 2009

The Department for Business, Enterprise and Regulatory Reform ("BERR") has recently completed a consultation on draft regulations relating to the registration with the registrar of companies of certain charges created by overseas companies - the Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009. These regulations ("the Regulations") are likely to be made before both Houses of Parliament rise on 21 July 2009 for the summer recess, and are intended to come into force on 1 October 2009.

As a result the likely regime for registration of overseas company charges from 1 October 2009 is now clear, and it is considered that consequential changes should be made to the Land Registration Rules 2003.

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Land Registry is therefore undertaking targeted consultation on the following proposals—

- To insert a new rule 111A in the Land Registration Rules 2003, relating to the registration of charges created by overseas companies
- To make minor amendments to certain of the forms prescribed by Schedule 1 to the Land Registration Rules 2003 and to a prescribed clause in Schedule 1A.

I attach a draft of the proposed Land Registration (Amendment) Rules 2009 ("the proposed rules") to give effect to these. Following this targeted consultation, the proposed rules will be considered by the Rule Committee, in accordance with section 127 of the Land Registration Act 2002, before being submitted to the Minister for his consideration.

At present, every overseas company that has an established place of



business in one of the three UK jurisdictions is required to register any charges it creates over property in that jurisdiction if that charge would be registrable had it been created by a UK company. On 1 October 2009, all the provisions relating to registration of charges will be replaced by the Companies Act 2006 (“the 2006 Act”).

For UK companies, the 2006 Act restates the existing provisions. It also provides a power to apply, with or without modification, any of the provisions for the registration of charges by a UK company to a registered overseas company. The Regulations are intended to do this.

Under the Regulations, the requirement to register charges applies only to those overseas companies that have in fact registered a UK establishment with Companies House. Unlike the present regime, there will be no requirement to register a charge by an overseas company at Companies House if the company has not registered a UK establishment, even if in fact it has such an establishment. Filing in the so called Slavenburg register will no longer be necessary. For overseas companies, there will be a single UK wide register – it will not matter whether the company is registered in or its charges filed in Cardiff, Edinburgh or Belfast.

All this is explained in greater detail in BERR’s consultation, which, together with the draft of the Regulations, is currently available here: <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/draft/page40411.html>

BERR published the Government’s response to its consultation on 20 May. It is understood that it intends that the Regulations will differ from the draft on which it consulted only so that there is no longer a criminal sanction on a company for failure to register a registrable charge, and to include provisions for late registration of a charge. These changes will not affect the proposed rules. The numbering of the Regulations is likely to change, but this will be reflected in the final version of the proposed rules.

Hitherto, Land Registry has not taken any action, when registering a charge by an overseas company, to check whether any obligation to register the charge at Companies House has been complied with. This is because of the uncertainties in the existing regime, reflected by the existence of the Slavenburg register.

The new regime from 1 October 2009 will greatly reduce that uncertainty. As a result, there no longer seems to be any good reason not to treat charges by overseas companies that require registration at Companies House in a similar way to charges by UK companies.

In both cases, the effect of non registration is the same. The charge is void against the liquidator, administrator or creditors of the company, although it is valid against the company itself until liquidation or administration. It may lose priority against other charges.

In the case of UK companies, Land Registry's practice for many years has been to enter a note in the register when substantively registering a legal charge where evidence of registration at Companies House is not produced. The note is considered to act, where necessary, as a contrary entry for the purpose of rule 101 of the Land Registration Rules 2003 (ranking of registered charges as between themselves), and as a warning that the lender may be unable to exercise its power of sale after the company is placed in liquidation or administration. The entry of the note is currently required by rule 111 of the Land Registration Rules 2003. A new version of rule 111, referring to the relevant provisions of the 2006 Act, was included in the Land Registration (Amendment) Rules 2008, and will come into force with the relevant provisions of the 2006 Act, on 1 October 2009. The new rule 111A, now proposed, generally mirrors this for those overseas company charges that need registration at Companies House. But it also reflects one complication.

It is understood that registered overseas companies will be added to the database available on the Companies House website, which already includes companies incorporated in England and Wales and Scotland, and will be extended to include those incorporated in Northern Ireland. However, it is not feasible for Land Registry to use this database to establish conclusively whether or not an overseas company has been registered in the UK. This is because, in accordance with sections 1047 and 1048 of the 2006 Act, an overseas company may be registered at Companies House under a name other than the name under which it is incorporated in its country of origin and which may be used in the charge document.

The company itself will know whether it has registered a UK establishment and, accordingly, whether a charge created by it has to be registered at Companies House, and lenders will, no doubt, routinely check this. Accordingly, the proposed rule requires the applicant to provide this information to Land Registry.

1. Do you agree with the approach we have taken in new rule 111A? Do you have any comments on the proposal?

Several of the forms prescribed by Schedule 1 to the Land Registration Rules 2003, as substituted in 2008, request the "Registered number in England and Wales including any prefix" in respect of overseas companies, the words "if any" being implicit, though not expressly stated in the form. When the new UK-wide registration system for overseas companies is introduced on 1 October 2009, these words will be inappropriate. Accordingly, rule 4 of the proposed rules amends the relevant forms to substitute "United Kingdom" for "England and Wales".

Rule 5 makes a similar change to clause LR3 of the prescribed clauses for leases. Rule 6 enables the continued use of unamended forms, except where overseas companies are involved in the application.

We considered amending forms AP1, CH1 and FR1 (being those

used in connection with registering or creating charges) to specifically request the information required by rule 111A in respect of the borrower. But to do this would require a substantial redesign of AP1 and FR1, because they do not currently require information about the borrower in cases where it is not also the applicant (as may be the case where the application relates only to a charge and is made by the lender). This cannot be justified so soon after the forms were introduced, and when the vast majority of applications that use the forms do not involve charges by overseas companies. In many cases it will be possible to include the necessary information in the charge document itself. Alternatively, it can be provided by letter.

2. Do you agree with the proposed amendment to the forms, and the prescribed clause LR3, including the provision as to the use of unamended forms? Do you have any other comments on the proposal?

We have not at this stage prepared a formal Impact Assessment, as our view is that the impact of these changes on the private sector will be broadly neutral. BERR, in the consultation impact assessment they prepared in respect of the Regulations, available at <http://www.berr.gov.uk/files/file50873.pdf>, took the view that the new regime for overseas company charges would result in significant savings for business. Our proposed rule 111A would not impose any additional requirement to register charges at Companies House, or for lenders to check the registration status of overseas companies. It would merely require applicants to supply to Land Registry information and evidence of registration that they should already have. The only impact is therefore the marginal cost of supplying the information. Against this can be offset the value of the new rule in acting as a reminder to conveyancers of the need to consider the status of overseas companies and the need to register their charges at Companies House.¹ The minor change to the Schedule 1 forms and the prescribed clauses for leases is necessitated by the implementation of the Companies Act 2006. Rule 6, which means that the unamended forms can continue to be used in all cases where overseas companies are not involved, minimises its impact.

3. Do you agree with our assessment that the impact of the proposed rules will be neutral?

B. Proposed amendments to the Commonhold (Land Registration) Rules 2004

The Companies Act 2006 changes the status of the memorandum of association and has the effect of relocating any objects clauses from the memorandum to the articles of association. This is significant for commonhold, because currently “commonhold land” and “commonhold association” are defined in sections 1 and 34 of the Commonhold and Leasehold Reform Act 2002 (“CLRA 2002”) by reference to the objects clause contained in the memorandum of the commonhold association. It must be an object of the company that the company is to exercise the functions of a commonhold association in relation to specified commonhold land.

It is proposed by the BERR that consequential amendments are made to the CLRA 2002 as a result of the Companies Act 2006. Very broadly these amendments would include substituting references to the memorandum and articles of association with references to the articles of association and would take account of the objects clause being in the articles and not in the memorandum.

It is proposed that, the Commonhold (Land Registration) Rules 2004 ("2004 Rules": SI 2004/1830 – as amended by the Commonhold (Land Registration) (Amendment) Rules 2008 ("2008 Rules": SI 2008/1920)) should be amended (on 1 October 2009) to take account of these changes.

The 2004 Rules (as originally made) are available here: <http://www.opsi.gov.uk/si/si2004/20041830.htm>

and the 2008 Rules are available here: http://www.opsi.gov.uk/si/si2008/uksi_20081920_en_1

What appears to be required is that in the following provisions of the 2004 Rules "articles of association" should be substituted for "memorandum and articles of association" wherever they appear—

- rules 3, 4, 23 and 28, and
- Forms CM1 (panel 6), CM3 (panel 7) and CM6 (panel 4),

and in rule 4(1)(d) and rule 19 of the 2004 Rules those words should be substituted for "memorandum or articles of association". (A new Form CM1 was substituted by the 2008 Rules.)

Section 28(1) of the Companies Act 2006 provides that provisions that immediately before the relevant commencement [planned for 1 October 2009] were contained in a company's memorandum but are not provisions of the kind mentioned in section 8 (provisions for new-style memorandum) are to be treated after commencement as provisions of the company's articles. This provision would not appear to assist where there is a requirement, after commencement, only to lodge a copy of the articles of association (for example, if rules 4, 19 and 23 of the 2004 Rules were amended as proposed) and the objects clause is contained in the memorandum of a Commonhold Association incorporated before commencement. However, paragraph 9 of Schedule 2 to the Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860) provides—

A company whose articles are deemed by virtue of section 28 of the Companies Act 2006 to contain provisions formerly in its memorandum may comply with any obligation to send a person a copy of its articles—

- (a) by appending to a copy of the other provisions of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles, or
- (b) by sending together with a copy of the other provisions of the articles a

copy of its old-style memorandum indicating the provisions that are deemed to be provisions of the articles.

(2) References in sub-paragraph (1) to a company's "old-style memorandum" are—

- (a) in the case of an existing company, to its memorandum of association as it stood immediately before 1st October 2009;
- (b) in the case of a transitional company, to its memorandum of association as it stood on its registration or re-registration (as the case may be) apart from the operation of section 28.

In view of these provisions, our current thinking is that there is *no* need to provide in the rules for a transitional provision, perhaps along the lines that where a Commonhold Association was incorporated before 1 October 2009 a reference in the 2004 Rules to articles of association includes the memorandum and articles of that Association.

Given the very small number of commonhold applications that are made and the nature of the amendments it is not proposed to have a transitional period during which the unamended forms may be used.

Should the Minister (on behalf of the Lord Chancellor) decide to make the rules, he would only do so after receiving the advice and assistance of the Land Registration Rule Committee.

We have not at this stage prepared a formal Impact Assessment because it is considered that the proposed amendments to the 2004 Rules will have a minimal and insignificant effect on business, given the minor nature of the proposed changes, which arise directly from the implementation of the Companies Act 2006, and the very small number of commonhold applications that are made.

- 4. Do you have any comments on the proposed amendments to the 2004 Rules?**
- 5. Do you have any comments as to whether transitional provisions are required?**
- 6. Do you agree with our assessment that the impact of the proposed amendments to the 2004 Rules will have a minimal and insignificant effect on business?**

Targeted consultation ends on 12 June 2009

This targeted consultation closes at the end of **Friday, 12 June 2009**.

We are sorry that the period could not be longer but given that the Regulations and the relevant provisions of the Companies Act 2006 are planned to come into force on 1 October 2009 the amending Rules need also to come into force on that day. For this to happen, after the targeted consultation, the rules need to be considered by the Rule Committee, made by the Minister (if he decides that they should be made) and, ideally, laid before Parliament on or before 21 July

2009.

Yours faithfully

Ian Watson
Registration Change Group

Appendix

Consultees include:

- BERR
 - British Bankers Association
 - Building Societies Association
 - Companies House
 - Council of Licensed Conveyancers
 - Council of Mortgage Lenders
 - General Council of the Bar
 - Insolvency Practitioners' Association
 - Insolvency Service
 - Institute of Legal Executives
 - Law Society
 - Ministry of Justice
 - Notaries Society
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ⁱ The value of such a reminder was pointed out in respect of rule 111 by a respondent to Land Registry's consultation on amendments to the Land Registration Rules 2003 in 2008.