bvca The voice of long-term investment

1st Floor North, Brettenham House
Lancaster Place, London WC2E 7EN
T: +44 (0)20 7420 1800
F: +44 (0)20 7420 1801
E: bvca@bvca.co.uk
www.bvca.co.uk

Department for Business Innovation & Skills Revised Scheme for Registration of Charges Consultation Response

General introduction:

The British Private Equity and Venture Capital Association (BVCA) welcomes the opportunity to comment on the Department for Business Innovation & Skills' "Revised Scheme for Registration of Charges created by Companies and Limited Liability Partnerships" published in August 1011.

The BVCA is the industry body for the UK private equity and venture capital industry. With a membership of over 450 firms, the BVCA represents the vast majority of all UK based private equity firms and their advisers. This submission has been prepared by the BVCA's Legal & Technical Committee, which represents the interests of BVCA members in legal, accounting and technical matters relevant to the private equity and venture capital industry.

The BVCA welcomes the proposed simplification of the process for registration of charges including the ability to file electronically and the potential cost savings to the industry.

Specific questions:

(a) **What should the requirements for certification of the copy of the charge instrument be?**

A person interested in the charge or their legal adviser should certify that the copy is a true copy of the original instrument. A tickbox could be included to this effect.

(b) **Would there be an advantage in making it an offence to dispose of property subject to an unregistered charge?**

This does not seem to be consistent with abolishing the criminal sanction for failure to register a charge.

(c) **Views on:**

(i) **proposed definition of "date of creation":**

Section 863A(1) seems to create more uncertainty (both from an English and Scots law perspective) than it solves and is open to interpretation eg what is "has immediate effect on execution" intended to mean in the context of (a) and (b)? According to its terms, the intention of the parties or as a matter of law? We would suggest keeping it simple and therefore that it should just be defined as "the date on which the charge takes effect" (ie the fallback in (d)). This would however mean that there could still be a difference as to when charges would be registerable under English law and Scots law given the differences in those laws as to when a charge may take effect.

With regard to section 863A(2) it is not clear how an instrument could come into effect if all of the parties have not executed it (absent anything to the contrary). However, some instruments do include (for practical reasons eg if there a large number of parties) a provision to the effect that failure to execute the instrument on the date of the instrument does not invalidate its provisions as between those who have executed it. It is therefore difficult to see how

such a provision could work in light of this section. We do not think that this section is necessary and would suggest deleting it.

(ii) **likely reduction in costs for charges created by Scottish companies:**

We think that their could be cost savings but that they would not be significant.

(d) **Whether a special provision for charges created elsewhere is still needed for charges created outside the EEA?**

In our view this should not be necessary given the ability to file electronically. In practice we are aware that some firms (at least) in any event did not rely on the extra time for charges created outside of the United Kingdom because of the uncertainties in relying on the time in which the charge instrument could "in due course of post … have been received in the United Kingdom".

(e) **Is a safeguard for entries of satisfaction and relief needed?**

We think that this would be prudent.

(iii) **If so, would the requirement for the particulars to include the identity of the person filing be sufficient?**

We do not think that including the identity of the person filing the form adds very much to the current requirements given that this could be eg a law firm with no actual knowledge of the underlying circumstances. We think that it would be preferable for the form to include the name and address of the person "making" (eg the company) rather than "delivering" the statement to be included (unless this is what is intended by the reference to "delivering"?). This is not dissimilar to the more onerous requirement in section 403 of the Companies Act 1985 that a statutory declaration be sworn verifying that the debt had been discharged/the relevant property released. However, including this information should not (unlike requiring a statutory declaration) in our view significantly increase the costs in filing the relevant form.

(iv) **Should there also be a requirement for an explanation?**

In light of current practice and section 403 of the Companies Act 1985 historically, statements of satisfaction have been filed by the company. If all of the debt has been repaid there may be no on-going relationship between the company and the person who had been entitled to the benefit of the charge. In those circumstances it may be difficult for the company to obtain the co-operation of the beneficiary in filing the statement of satisfaction and an explanation therefore as to why the statement is not being delivered by the person entitled to the benefit of the charge does not seem to add very much. There may be circumstances where formal deeds of discharge/release are not obtained but the charge has in fact been discharged. Allowing for "evidence" of discharge where it exists will simply raise queries (possibly unfounded) in cases where there is an absence of evidence and this could lead to an increase in overall costs.

The commentary refers to "the new requirement for either supporting evidence … or a public indication of its absence". However, section 872(2) does not appear to refer to attaching supporting evidence to the particulars.

(f) **Views on the costs and benefits in the draft Impact Assessment?**

We welcome the reduction in time, effort and cost that simplifying the form filling process should achieve. Whilst the cost of the familiarisation process may, in our view, have been underestimated, over time the new procedures should inevitably lead to cost savings for the industry.

(g) **Should the amended Part 25 also apply to unregistered companies and/or mutuals?**

We express no view on this question.

Specific concerns:

We have the following specific concerns:

(a) **section 860A(1): statement of particulars:**

The Registrar of Companies will need to make it clear that "a short description of the property charged" really does mean a short description as current practice has been to file lengthy particulars, in effect duplicating the entire charging clause and the meaning of any defined terms used in that clause. The practice resulted from a Registrar statement of some years ago which required forms (then 395 ie the "prescribed particulars") to be in full form.

(b) **section 860A(3): material that may be removed from the instrument of charge:**

Given the requirement to include a statement that there has been no redaction of material other than as permitted by this provision, the provision needs to be clear as to exactly what material is permitted to be redacted. In our view an instrument of charge may include sensitive information in relation to a company (and not just an individual) such as bank account details, insurance policy details etc which should not be made public. This may not be considered to be "commercially" sensitive information but could nonetheless be sensitive. Query also whether this information is "necessary" for the definition of the property charged. The definition of eg bank accounts in a debenture may refer to a schedule where the only details are the account bank, sort code and account number. The account number would at the very least need to be redacted (but possibly the entire contents of the schedule). Further, a charge will typically include a reference to the total amount of the commitments under the facility agreement which may also be sensitive information but we assume that redacting this information would be within section 860A as it is "commercially sensitive" and not necessary for the definition of the property charged or evidencing the statements required by section 860A(1).

(c) **section 861(3): creation of further charges:**

In our view this change is unnecessary and likely to cause uncertainty. If a charge is amended to add further assets not already expressed to be subject to the charge, that clearly amounts to a new charge. The further assets can simply be charged (and often would be) by a further/supplemental charge instrument – which is good practice.

It would be usual for a charge instrument to secure all amounts owing under a facilities agreement from time to time and as referred to above the total amount of the facilities may be referenced. The construction clause will often provide that a reference to an agreement is to that agreement as amended from time to time (so that if the facilities are increased the reference (amongst other things) to the original amount of the facilities does not of itself become incorrect). This suggested provision calls into question whether if the facility agreement itself is amended to increase the total amount of the facilities that is de facto an "amendment" to the charge instrument increasing the amount secured requiring further registration. In our view there is no reason for a new charge to be held to be created merely because the amount secured is increased.