

CORPORATE LAW AND GOVERNANCE

**GOVERNMENT RESPONSE TO THE
CONSULTATION ON APPLYING THE
REMAINING (NON-ACCOUNTS AND
AUDIT) PROVISIONS OF THE
COMPANIES ACT 2006 TO LIMITED
LIABILITY PARTNERSHIPS.**

May 2009

INTRODUCTION:

In November 2008, the Government published for comment draft Regulations on the application of the remaining (non accounts and audit) provisions of the Companies Act 2006 ("the 2006 Act") to Limited Liability Partnerships ("LLPs"). The broad approach is to apply provisions that mirror those of the Companies Act 1985 already applied to LLPs as well as some provisions that are advantageous to LLPs. The draft Regulations apply to LLPs in Great Britain and Northern Ireland the remaining relevant and material parts of the 2006 Act, with appropriate modifications, in a manner designed to make the LLP legislation more accessible to those directly affected and their professional advisers. The consultation closed on 28 January 2009. This document contains a summary of the responses received and the Government's response to them.

Annex 1 contains the list of the provisions of the 2006 Act that will be applied (with appropriate modifications) to LLPs by the draft Regulations.

RESPONSES RECEIVED:

6 responses were received from:

- The Institute of Chartered Accountants in England and Wales (ICAEW);
- The Association of Partnership Practitioners (APP);
- The Institute of Credit Management;
- The Company Law Committee of the Law Society of England and Wales and of the Law Reform Committee of the Bar Council of England and Wales;
- The Association of Chartered Certified Accountants (ACCA); and
- Mr Peter Graham.

A Working Group made up of interested parties was also set up to consider the draft regulations.

Support was again expressed for the Government approach in not applying to LLPs company law provisions that relate to internal management arrangements, given that LLPs are fundamentally different to companies in nature and structure.

In addition to technical drafting points, specific comments were made on the following main areas:

Format of LLP Regulations

Three respondents expressed a preference for the provisions of the Companies Act 2006 being applied to LLPs to be set out in one Schedule to the Regulations (perhaps numbered sequentially), rather than broken up by regulation numbers, headings and introductory words; and for the transitional provisions to be contained in a second, separate Schedule.

Government Response: The draft Regulations follow the approach taken for the application to LLPs of the accounts and audit provisions of the 2006 Act by the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008 (S.I. 2008/1911). Those regulations came into effect on 1 October 2008. The draft Overseas Companies Regulations also adopt a similar approach when applying specific provisions of the 2006 Act. It is important, because of the nature of the powers being exercised, that specific sections of the 2006 Act are applied and that the 2006 Act numbering is retained- but the draft aims to be as clear as possible by setting out the applied version in full, as modified. However, the Government accepted the suggestion to separate out the transitional provisions and these are now contained in Schedule 1 to the Regulations.

E-communications

The Government proposed to apply sections 1143 to 1148 of the 2006 Act on the sending by or supplying to LLPs of documents or information in hardcopy or electronic form if and to the extent that the members agreed. This would have enabled the members of an LLP to either opt to follow those provisions or agree separately the method of communications.

The respondents to the consultation did not consider that the company communication provisions should be extended to LLPs, since an LLP and its members could agree to use them without the need for provision in the Regulations. Matters affecting the internal affairs of the firm should be determined by the members themselves. This was an approach supported by the LLP Working Group.

Government Response: As a result of the comments received the Government has decided not to apply sections 1143 to 1148 to LLPs. The means by which LLP members and debenture holders communicate will be for them to determine.

Register of members

Sections 162 to 165 of the 2006 Act on the register of directors are to be applied to members of LLPs with modifications. Respondents agreed with the Government's assessment that although this will be a new requirement for existing and new LLPs it will not be overly onerous given that most LLPs currently maintain a list of the names of all members at their principal place of business.

Respondents asked that there be adequate guidance given to LLPs about these new requirements to ensure compliance as from 1 October 2009 (including on the interaction between residential service and confidential addresses).

Respondents expressed concerns that, because LLP members (like company directors) will be required to submit forms providing service addresses (as opposed to residential addresses) as from 1 October 2009, there is likely to be a flood of applications as from that date. They therefore asked that the new forms be available (in final form) at least a week in advance of 1 October 2009, and that Companies House accept online filings from LLPs.

Government Response: Although this is a new requirement the Government shares the view that it will not impose a significant burden on LLPs. In addition, section 1135 of the 2006 Act on the form of company records is being applied to LLPs. This will provide an LLP with some flexibility in the way it keeps its records – including the register of members.

The draft forms will be available on the Companies House website from July, but they will remain in draft until 30 September as they do not come into force until 1 October. The Guidance will also be available on the website at the same time as the forms.

LLP- requirement to have at least two members

Although respondents supported the Government's proposal to re-enact the existing provision that if an LLP carries on business without at least two members for more than 6 months the remaining member is liable (jointly and severally with the LLP) for the debts contracted during the period, they did not agree with the proposal to apply section 156 of the 2006 Act to LLPs to enforce the requirement. Instead it was suggested that the voluntary strike off provisions should be amended to enable a sole remaining member to dissolve the LLP.

Government Response: The Government agrees with the comments made. It has deleted the application of section 156 to LLPs, and has

made provision for the one remaining member of an LLP to make an application under section 1003 as applied to LLPs for the LLP to be struck off.

Trading disclosures

Two respondents commented on the proposed application of the Companies (Trading Disclosures) Regulations 2008 to LLPs. They were concerned that the Regulations appeared to place a greater burden on LLPs by potentially requiring the publication by large LLPs of 100s of members' names. It was suggested that provisions of the Business Names Act 1985 should be re-enacted to the effect that if a member's name is included in a letter, in an LLP of 20 members or less all of the names of the members should be included in the letter; if the LLP has more than 20 members, a statement to the effect that a list of members is available at the registered office should be included.

Government Response: The Government agrees with the comment. Sections 4(3A) and (4A) of the Business Names Act will therefore be re-enacted in section 82 of the 2006 Act as it is to be applied to LLPs. If the LLP has more than 20 members a statement that a list of members is available for inspection at the principal place of business (giving that address) will suffice. As a result, LLPs will be treated like general partnerships.

Administrative Restoration to the Register

Two respondents to the consultation suggested that the new regime enabling applications to the registrar of companies for administrative restoration to the register should be further modified in its application to LLPs so that all those who were members of the LLP when it was struck off should be notified of the

application. This proposal was supported by all the members of the LLP Working Group.

Government Response: The Government agrees and has made provision for this (see section 1025(6) of the 2006 Act as applied to LLPs by regulation 56). It is left to the former member making the application to decide how to notify the others.

Shadow Members

Many respondents commented that the concepts of shadow members or shadow designated members were not meaningful concepts for LLPs.

Government Response: The Government has taken note of these comments and has removed all references to shadow members and shadow designated members from the Regulations. The definition of member of an LLP in section 4 of the Limited Liability Partnerships Act 2000 remains.

Overseas LLPs

In addition to detailed technical comments on the re-enactment of the trading disclosure requirements for overseas LLPs, respondents noted the Government's response to the previous consultation (that in view of the lack of clear support or a clear case for introducing more regulation in the area of overseas LLPs the Government was not proposing to make further proposals at this stage but to keep the matter under review). Respondents want the Government to keep under review the issue of whether the overseas company regime should be applied to overseas LLPs.

If a policy decision is made to extend the regime to overseas LLPs, respondents argued for a wider definition of overseas LLP as the existing

definition (repeated in section 1051 of the 2006 Act as it is applied to LLPs by the Regulations) might create uncertainties or risk excluding entities that have the attributes of a GB LLP, but which (under their local law) do not use an equivalent title.

Government Response: The Government has noted these comments, but is not convinced, based on the evidence it has at this time, that there is a need to legislate further for overseas LLPs and apply broader disclosure requirements. To do so would require further research to establish the scale of any issues and on how to define an overseas LLP. The Government will keep the need to legislate for overseas LLPs under review.

Execution of deeds

A number of detailed comments were made on the application of the 2006 Act to LLPs. In addition, one respondent was concerned as to the operation of the transitional provision for section 47 as applied to LLPs, and whether a power of attorney executed before 1 October 2009 would not be valid for the execution of deeds by such attorney after 1 October 2009.

Government Response: A number of modifications have been made to section 44 as applied to LLPs by regulation 4 of the draft Regulations to take account of the particular nature of LLPs. However modifications have not been made where they would be equally applicable to companies, since this could cast doubt on their application to companies.

The transitional provisions now contained in Schedule 1 to the Regulations (including that for section 47) mirror those for companies. Section 47 of the 2006 Act (both for companies and for LLPs) must be read in conjunction with the saving for section 38 of the Companies Act 1985 and Article 48 of the Companies (Northern Ireland) Order 1986. It does not mean that powers of attorney executed before 1st October 2009

become invalid on that date. Section 38 continues to apply where the power was conferred before 1st October 2009 – so there is no need to have the power re-executed.

Arrangements, Reconstructions and Cross-Border Merger Regulations

In addition to technical drafting suggestions, respondents expressed the view that the Companies (Cross-Border Mergers) Regulations 2007, as they are to be applied to LLPs, should provide for circumstances involving both companies and LLPs. One respondent also asked whether the employee participation provisions of the 2007 Regulations should be applied to LLPs.

The same respondent observed that the regulation applying section 900 of the 2006 Act to LLPs contemplated reconstructions involving only LLPs. In practice, reconstructions could involve both LLPs and companies.

Government Response: The Government has made the necessary changes to reflect respondents' views. However, as previously announced (in the Government Response to the consultation on the Cross-Border Mergers Directive), the Government will not be extending the Directive's employee participation provisions to LLPs as LLPs fall outside the scope of the Directive.

Annex 1

Provisions of the 2006 Act that will be applied (with appropriate modification) to LLPs by the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009:

- Formalities of doing business under the law of England and Wales, Scotland or Northern Ireland (e.g. execution of deeds and documents)
- LLP Names – application of the company name provisions
- Trading disclosures
- LLP Members' Names and Addresses – application of the provisions on company directors' names and addresses
- Debentures
- Annual Returns
- Charges
- Arrangements, Reconstruction and Cross-Border Mergers
- Fraudulent Trading
- Protection of Member against Unfair Prejudice
- Dissolution and Restoration
- The Registrar of Companies¹; and
- Supplementary provisions.

¹. Part 35 of the 2006 Act concerns the operations of the Registrar of Companies. Some of the provisions of Part 35 (as it is to be amended by the draft Companies Act 2006 (Part 35) (Consequential Amendments, Transitional Provisions and Savings) Order 2009) will apply automatically to LLPs. Where this is not the case, certain of those provisions will be applied (with modification) to LLPs by Part 15 of the draft Regulations.

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