EXPLANATORY MEMORANDUM TO

THE OVERSEAS COMPANIES (EXECUTION OF DOCUMENTS AND REGISTRATION OF CHARGES)(AMENDMENT) REGULATIONS 2011

2011 No. 2194

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Regulations remove a requirement that applies to those overseas companies which have registered an UK establishment with the UK registrar of companies: they will no longer be required to register with the registrar of companies any charge created over UK property. The Regulations also revise the requirements for these companies to keep available for inspection in the UK both a register of these charges and copies of the instruments creating them.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Section 1052 of the Companies Act 2006 provides power to make provision about the registration of specified charges property in the UK by those overseas companies that have registered with the registrar of companies particulars of an establishment in the United Kingdom. For companies registered in the UK, Part 25 of the Companies Act 2006 applies.

4.2 The Companies (Company Records) Regulations 2008 (SI2008/3006) provide the rules for keeping available for inspection a UK registered company's register of charges and copies of its instruments of charges.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 If a company uses its assets as security for its borrowing, it creates a charge over them. Company law requires most charges created by UK companies to be registered with the registrar of companies within 21 days of their creation. A charge that is not registered timeously will not be valid in the event of the company's insolvency – this is commonly known as the "the sanction of invalidity". Subject to the period allowed for registration, the sanction of invalidity provides total assurance that a UK company has not created a charge that is valid other than those on the public record. As this sanction does not directly affect the company creating the charge, in practice registration is normally done by the lender.

7.2 There are currently nearly 10,000 overseas companies that have registered particulars of a UK establishment, ie "registered overseas companies". A registered overseas company is part of an overseas company, a branch or some other connection with the United Kingdom; it is thus fundamentally different to a UK incorporated subsidiary of an overseas company as subsidiaries have independent legal status and will be subject to the Companies Act 2006 as with any other UK incorporated company. At present, registered overseas companies are required to register with the registrar of companies any charges they create over property in the UK at the time the charge is created. The registration process delivering both brief particulars of the charge and a copy of the instrument (together with a certified translation if in a language other than English) to Companies House; the instrument is returned, ie it is not placed on the public record. The sanction of invalidity applies if a registrable charge is not registered within 21 days of its creation.

7.3 As the registration requirement applies only if the property was in the UK at the time the charge is created, the public record does not provide the same assurance for registered overseas companies as it does for UK companies. This is a particular issue for intangible property as its location may be uncertain. Given the severity of the sanction of invalidity, well-informed lenders will seek to register the charge if there is any doubt. However, it may be difficult for a lender to discover whether an overseas company has registered a UK establishment - this is because the name under which it registers a UK establishment may be different to the name under which it is incorporated. This is a particular problem for companies from countries that do not use the Roman alphabet and also for a company that has changed its name. In the light of these problems, the Regulations remove the requirement for charges over UK property created by registered overseas companies to be registered with the registrar of companies.

7.4 Company law also requires UK companies to keep a register with brief details of all its charges and provides that this register and copies of all instruments creating registrable charges must be kept available for public inspection either at the company's registered office or at an alternative inspection location in the same jurisdiction notified to the registrar of companies. Registered overseas companies are subject to similar requirements but the register is restricted to their registrable charges and the location

where the register and the copies of instruments must be kept available for inspection is a location anywhere in the UK that has been notified to the registrar of companies.

7.5 The Regulations revise these requirements so that registered overseas companies are required:

- to keep available for inspection a register of their charges over land in the UK, charges over ships, aircraft and intellectual property registered in the UK ,and floating charges (except any whose terms expressly exclude property in the UK);
- to make available for inspection copies of instruments (an English translation if the original is in another language) that must be entered on their register and of any charge over assets in the UK at any time during a period starting 5 working days before the request to inspect is made and ending with the day of inspection.

The Regulations retain the existing requirement that these documents be kept and be available for inspection at a place in the UK that has been notified to the Registrar. However they also provide for the alternative of electronic inspection.

Consolidation

7.6 The department does not intend to consolidate the relevant legislation.

8. Consultation outcome

8.1 In 2010, the Department for Business, Innovation and Skills consulted over the requirements to register charges created by Companies and Limited Liability Partnerships. The consultation document included a section devoted to overseas companies. Most respondents agreed that registered overseas companies should continue to be required to register at least some charges that they create. The Financial Markets Law Committee and the City of London Law Society argued strongly in favour of abolition of the requirement.

8.2 In April 2011, the Department wrote to those who had responded to the 2010 consultation, seeking their views on a proposal that the requirement relating to inspection of registers of charges and instruments creating charges be retained for charges over land in the UK, fixed assets in the UK, and floating charges. The proposed approach was generally welcomed – though several regretted the decision that the registration requirement is to be removed. There was concern that there should be clarity as to the coverage of any requirement.

9. Guidance

9.1 Companies House will revise the guidance they publish on their website www.companieshouse.gov.uk .

10. Impact

10.1 The impact on business, charities or voluntary bodies is restricted to those restricted to those that are registered overseas companies. There may be a secondary impact on those that provide secured loans to such companies and/or have significant dealings with such companies..

10.2 The impact on the public sector is the need for Companies House to adapt its systems. In particular, Companies House will no longer provide for the registration of charges created by registered overseas companies.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small businesses that are registered overseas companies and their secured creditors.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is not to vary the requirement according to the number employed.

12. Monitoring & review

12.1 It is intended to review the Regulations in 2017 at the same time as the scheme for registration of UK companies' charges is reviewed..

13. Contact

Anne Scrope at the Department for Business, Innovation and Skills Tel: 0207 215 2194 or email: anne.scrope@bis.gsi.gov.uk can answer any queries regarding the instrument.