



CORPORATE TRANSPARENCY AND REGISTER REFORM: POWERS OF THE REGISTRAR

Issued 26 February 2021

ICAEW welcomes the opportunity to comment on the consultation *Corporate Transparency and Register Reform: powers of the registrar* published by Department for Business, Energy and Industrial Strategy on 9 December 2020, a copy of which is available from this [link](#).

We support the objectives of improving reliability of information on the register and reducing use of UK companies for criminal purposes.

We agree that Companies House should adopt a more proactive approach in detecting and removing incorrect information and sharing intelligence with law enforcement authorities (and have increased powers to do so where necessary).

However, it is important for the UK economy that businesses remain able to incorporate companies reasonably easily and with a high degree of certainty regarding outcomes. A balance therefore needs to be struck, and this will need to be explored further as the proposals are developed.

ICAEW

Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0)20 7920 8100 F +44 (0)20 7920 0547 icaew.com

The Institute of Chartered Accountants in England and Wales (ICAEW) incorporated by Royal Charter (RC000246)
Registered office: Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK

This response of 26 February 2021 is made by ICAEW's **Business Law Department** and reflects consultation with its Company Law Panel and other expert groups

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KEY POINTS

1. We understand that government will be considering the powers of Companies House alongside the powers of other bodies having responsibility for enforcement of company law, including the new Audit, Reporting and Governance Authority (ARGA) and the Insolvency Service. We think that a joined-up approach is important to make it easy for directors and other stakeholders to understand who is responsible for enforcement of company law and to raise standards of corporate conduct and reporting.
2. As regards the powers of Companies House, we support initiatives designed to reduce criminal activity and increase reliability of the information on the register, including steps that will lead to better sharing of information between relevant authorities. However, the measures should be proportionate to avoid unnecessary burdens on business.
3. It is not clear to us whether some of the problems identified arise from lack of powers under the Companies Act 2006 (the 'Act') or the way in which Companies House currently exercises its powers or limited resource available to it. As the proposals are developed it would be helpful to see what amendments are proposed to the Act and the reasons for them.
4. The questions and commentary on querying powers raise some questions of principle which we think will be important to explore before detailed proposals are formulated and we comment on those in general terms below (rather than under the specific questions).

Initiating a Query

5. We agree that queries relating to suspicion of criminal activity should be made on a risk-based approach. However, where required information has been wrongly filed, it should be corrected (regardless of risk assessment).
6. If the consequences arising from exercise of the querying power (eg where a company fails to reply to a query) are significant, the powers should be defined and rules of justice should apply. The powers suggested in para 16 of the consultation paper are broad and may need further definition (eg, what is meant by 'suspicious'?).
7. The regime should provide as much certainty for legitimate business as possible so that areas left to discretion or judgment of Companies House should be carefully defined. The power to query should relate to matters where Companies House would ultimately have power to remove information (or initiate court processes that might lead to removal).
8. Government should consider how these powers would fit into the wider anti-money laundering regime, including suspicious activity reports and the prohibition against 'tipping off' (ie whether raising queries might alert those involved that they are being investigated). It will also be important that Companies House is required to share its suspicions with the National Crime Agency and other relevant authorities.

Time for response

9. The proposed 14 days period to respond to a query seems reasonable in general terms, but related questions will be equally important to address, eg:
 - Relaxation of any deadline in appropriate cases, eg sickness and perhaps holidays (this being of particular concern for smaller companies);
 - what constitutes an adequate reply (and would an inadequate reply count as a reply at all);
 - how long will Companies House have to respond to follow-up questions; and
 - what evidence might be required (from a company or from Companies House).

Companies House duty to file information

10. While a query is in progress, we believe that Companies House should generally continue to be required to register information that meets the statutory requirements (from time to time) for proper delivery and to reject filings that do not. However, any corrections required should be made as quickly as possible and we support reforms designed to achieve this.
11. However, if Companies House has grounds for believing that a relevant filing (eg, to incorporate a new company) is being made for a criminal purpose, it may be appropriate for it to decline to accept the filing pending resolution of its queries. The circumstances when this power arises should be carefully defined so that the balance between preventing crime and facilitating legitimate business does not depend solely on the practice of Companies House from time to time.
12. A mechanism will be required to catch the egregious cases in a way that would avoid risk of delay and uncertainty for legitimate business.

Annotating the register on status of queries

13. If the register is to be annotated to show that a query has been raised (or raised and unanswered), government will need to consider whether this will be automatic or a matter of discretion for Companies House. If annotation is intended to infer fault on the part of the company (other than for having failed to respond to a query) the implications will need to be considered (eg right to reply, liability for loss arising).

Undisputed matters

14. We believe that Companies House should generally have power to remove information that is incorrect if the filer agrees or that should not have been registered (because it did not meet statutory requirements). However, where there is a dispute (or action taken by Companies House might cause loss or damage by its actions), we believe that the matter should be subject to court order (or similar).

Disputes

15. A query may lead to a dispute between the company and Companies House and it is important that an appropriate dispute resolution mechanism is included in any reforms. The existing complaints procedure would not be appropriate for this purpose (which is concerned with the exercise of quasi-judicial powers).
16. If Companies House is to be given powers previously exercised by a court (or the Company Names Adjudicator), there will need to be appropriate checks and controls to ensure that companies are given a fair hearing and there is a route to appeal to the courts where appropriate.
17. Companies House will also need to have staff with appropriate skills and experience to deal with any disputes, including gathering (and providing) evidence and may need associated powers (eg to call witnesses). It is not clear to us that this would ultimately be more efficient or more likely to promote trust in the register than relying upon the courts.

ANSWERS TO SPECIFIC QUESTIONS

A risk-based Approach

Question 1. Do you agree that the querying power should be exercised on a risk-based approach? If you disagree, please explain your rationale.

18. Yes, we believe that the proposed risk-based approach on querying information is reasonable, but a number of questions arise from this - see Key Points above.
19. It is important that use of the powers does not result in undue delay for legitimate businesses wishing to form companies or to make required filings. In that context, there may need to be a statutory timeframe for questions to be raised by Companies House (and mechanism for resolution within a fixed timeframe).
20. Companies House should have the power to raise queries where a company has requested it to do so in connection with an incorrect filing (eg where a person has filed information without the agreement of the company).
21. The consultation on the *quality and value of financial information* considers whether certain additional information should be registered at Companies House and we have responded separately to that consultation. However, we note here, that if the legal responsibility of Companies House to publish information is to be broadened, then the querying power may need to extend to relevant additional filings. The October 2013 Red Tape Challenge paper suggested that information published by Companies House could be extended to a broad range of information, including website address, contact details or trading name on the register. Resource implications should be considered if companies are to be required (or allowed) to file more information than is currently the case (as the risk of misleading or incorrect information being filed will increase).

Querying power: potential scenarios

Question 2. Are there specific circumstances under which you consider the querying power should be exercised? Please give reasons for your answer.

22. The examples given concerning striking off, change in registered office and incorporation filing appear reasonable. We suggest the following additional examples where we believe Companies House should raise queries (and have power to do so if it does not already):
 - Accounts naming auditors who deny having done the audit;
 - Companies being established whose directors are also directors of a large number of other companies in circumstances that might indicate criminal activity (eg not being part of same group);
 - Companies seeking to use a name similar to that of an insolvent company and with same directors involved (risk of phoenix companies and tax avoidance); and
 - Financial statements that are manifestly non-compliant (eg the figures in a balance sheet don't add up).
23. However, we believe that the requirements of Part 15 of the Act should otherwise be outside the scope of the new power. This is because there is no need to create the complexity of an overlapping power; the existing power in Chapter 11 of Part 15 of the Act already strikes an appropriate balance and is effective (although more resources may need to be devoted to its use); and we would emphasise that accounts exist independently of filing, and defective accounts are not chiefly a filing problem.

Application of the new querying power to company names

Question 3. In what circumstances do you think the power should be used in the context of company names? Please provide reasons for your answer.

24. See Key Points above for general comments on the querying power.
25. Where intelligence from other agencies, eg HMRC, indicates a pattern predicting criminal purpose, it would seem appropriate for Companies House to make enquiries (we have in mind company names being used in connection with payroll fraud).

26. Some of the examples cited in the consultation need further consideration. For example, ‘where a name might give a veneer of legitimacy to criminal activity’ it is unclear why the concern should be limited to the company name rather than the criminal activity itself. It would be important for Companies House to share its concerns with the National Crime Agency or other appropriate law enforcement bodies (as the AML regulated sector is required to do under the SAR regime).

Question 4. Do you agree that this is an appropriate use of the querying power? Please provide reasons for your answer.

27. We agree that power to query names should apply both in relation to pre and post-formation in cases of alleged fraud, but the resulting sanctions will require careful consideration. The costs and disruption of changing name could be very significant and even before registration, significant costs may have been incurred on branding advice etc and it may be important for international groups to have consistency where possible.
28. We agree that the relationship between Companies House and the Company Names Adjudicator will require further consideration. It would be helpful if the relevant body were to publish information about cases it has determined, the rationale for decisions and anything else that might make the process as predictable and certain as possible.

Question 5. Is it appropriate to place the onus on the company and/or the applicant to demonstrate that a name is being registered or was registered in good faith?

29. The company (respondent) may already be required to demonstrate good faith under s69(4)(d) of the Act (where relevant grounds for challenge to use of the name exist) but there are other defences open to the company (respondent). There may also be other remedies available to an applicant (eg damages). The provision appears primarily to be designed to address competing commercial interests in a name and it is not clear to us why Companies House should seek to intervene in these matters (beyond suspected criminal use).
30. If the concern relates to use of a company for criminal purposes, we believe that investigations would for the most part be best directed towards the activity concerned rather than only the name of the company (ie a company should not be able to evade enquiry merely by changing its name).
31. The consultation suggests that the issue arises in relatively few cases. It is important that any solution to difficulties arising does not impede businesses from incorporating UK companies quickly and efficiently or stifle creativity (eg in use of names).

Question 6. Do you agree that the ‘sensitive words and expressions’ regulations should be amended to capture circumstances such as that described above?

32. We believe that the regulations should be updated as and when necessary to address any abuse, but businesses need to be clear in advance what names can or cannot be used. Predictability of outcome is important and so discretion given to Companies House should be suitably defined and not unduly broad.
33. As regards foreign languages, government should consider whether the approach should be applied equally to all languages irrespective of how widely they are understood in the UK (and the practical implications of this).

Other company name loopholes

Question 7: Do you agree that we should close this gap in the way we propose? Are there any other gaps that we should consider?

34. We agree that Companies House should have power to decline to register a name where the applicant has been prohibited by a court order or other legal requirement from applying to register that name; indeed, it should have the duty to do so.

The querying process and annotation of the register

Question 8. What sanctions do you consider are most appropriate to incentivise compliance with the new requirement to respond to a query raised by the Registrar?

35. See Key Points above. We think that the proposals will need to be developed further for this issue to be considered fully. For instance, if failure to respond results in a filing being withdrawn or an annotation being made on the register, this may be sufficient sanction (or incentive). Failure to reply may result in Companies House raising concerns with relevant crime fighting authorities (and this might be the most appropriate outcome).
36. It may be appropriate to apply a civil penalty for failing to respond to a query, but we are not convinced that applying criminal sanctions for what are, in essence, regulatory purposes, is necessarily the best approach (see Law Commission papers on this subject). See also Key Points above regarding disputes.
37. Government might consider whether having a specific offence of filing with fraudulent intent would assist in the fight against crime (eg if there are gaps in the legal regime that this would fill).

Legal effect documents

Question 9. Do you agree that the removal of most documents which have legal effect by virtue of registration at Companies House should be a matter for the courts?

38. Generally yes. We think that any proposal to change this position in respect of any given document would require the potential consequences to be considered in the context of that document.

Question 10. We propose that the Registrar should be able to remove certain filings which in future, will give legal effect such as director appointments. Do you have any views on whether the Registrar should have any other role in respect of legal effect filings?

39. See Key Points on querying powers above.

What information will be published?

Question 11. Do you agree that the evidence provided as a result of the Registrar's queries should not be published unless it comprises information that would normally be published? Please give reasons for your answer.

40. We agree that evidence should not generally be published.

Transparency on the use of the querying power

Question 12. The Registrar will provide an explanation about why the query is being made. What other information would you expect the query to contain?

41. The explanation required may depend upon the nature of the query (and potential sanctions connected with the query), but explanation should be provided as necessary to help companies identify what is required of them and provide appropriate responses in a focused way to avoid unnecessary work on their part (the commentary at para 53 of the consultation is perhaps too general in nature to address this issue fully).

Question 13. What kinds of evidence do you think it would be appropriate for the Registrar to request in support of a response to a query?

42. This will depend upon the nature of the query (and potential related sanctions).

Question 14. What guidance on the Registrar's use of the querying power would you expect Companies House to publish?

43. We would like to see more fully developed proposals before commenting in more detail on this. However, guidance should be designed to provide as much certainty to business as possible and draw on practical experience from time to time.

Complaints

Question 15. Do you agree that complaints should be handled using the same process as the current Companies House complaints process? If not, please include reasons for your answer.

44. If Companies House has broader powers with potentially significant impact on business, it will be important that it responds quickly and effectively to questions that might arise from its conduct, ideally to prevent harm arising. By the time an issue becomes a complaint, it is too late.

Removal of information

Question 16. Do you agree that the Registrar should have greater powers to remove information? Do you have suggestions for other approaches we could take?

45. We are aware of cases where information should not have been filed, or if it was filed, should have been removed due to errors.

46. It is not clear to us whether this is because the Registrar does not currently have relevant powers or whether this is due to current practice, but we support measures intended to address this. In particular, where a company is correcting its own filing (or consents to a correction) and there is unlikely to be a significant impact on other users of the register, a streamlined approach would be helpful.

47. See also Key Points and other comments above concerning the balance to be struck between providing certain and fair outcomes for business and procedures aimed at deterring or reducing criminal activity.

Rectification of registered office address

Question 17. Do you agree that the Registrar should close this loophole or are there circumstances where remaining at the default address, or moving to the default address more than once, is warranted?

48. We agree that the loophole should be closed.

Question 18. Do you agree that the amount of time a company (or other entity) can be defaulted to the Companies House address be limited to a specified period, e.g. 12 months?

49. Yes, but the consequences for default would need to be defined.

Question 19. What action do you consider should be taken if a company remains at the default address for longer than 12 months?

50. Perhaps Companies House could levy a fee for continued use (increasing sharply over time) and then petition to wind up the company if the fee is not paid.

Speeding up processes

Question 20. Do you agree that it is appropriate to reduce the 28-day period? If not, what period do you consider is appropriate and why?

51. The issue relating to directors being appointed by companies without their consent appears to result directly from the changes to the procedure for appointment made following consultations on simplifying company filings in 2013. We commented as follows at the time (Rep 166/13).

‘The underlying concern is stated to be that directors are registered by companies as directors when, in fact, they are not directors. Removing the requirement for a form evidencing director consent cannot possibly alleviate that concern. If a person has not agreed to be a director, presumably he has not signed the consent form. In that case, a person sending the form (with a completed consent) has acted illegally. The remedy to this issue seems to be to enforce the current law more effectively’.

52. One possibility would be to reverse those changes, but we wonder if the issue might not alternatively be addressed through the new director identification proposals (ie through the verified account at Companies House established for each director/filer).

Question 21. Do you agree that Companies House should have the ability to remove the name or address of the affected individual while a response is awaited from the company?

53. See Q20 above.

Power to require delivery by electronic means

Question 22. Do you agree that the power to require (or mandate) delivery by electronic means should be conferred from the Secretary of State to the Registrar?

54. We think that how the powers are exercised is more important than who exercises them and can see a case for more flexibility. However, Companies House should act within defined parameters (and that would include defining what is meant by ‘electronic filing’).

55. We comment more fully on electronic filings in the context of our response to the consultation on *Improving the quality and value of financial information on the UK companies register*.

Rules governing company register

Question 23. We intend to remove the requirement for companies to keep and maintain their own Register of Directors. Do you have any concerns about this approach?

56. We do not support the proposal that the Companies House register should determine whether a person has been appointed legally as a director of a company (ie it will be the definitive register). Various concerns arise in that context, including how the register will be accurate if directors cease to be directors (eg resign or die).

57. We do not believe that requiring companies to keep a register of directors is a significant burden. Companies should typically keep the information involved anyhow and the requirement to keep this register, rather than being a burden, encourages good practice. This would not be a persuasive reason for making the Companies House register the definitive record of director appointments.

Question 24. What impact would changes to the requirement to keep any of the registers in the list above have?

58. Our comments on the various registers highlighted are:

- **Secretaries** The same reasoning would appear to apply to the register of secretaries (if any) as for directors.

- **Register of directors' usual addresses** Companies will need to keep this information to communicate with their directors so we think the benefit of removing the requirement would be marginal.
- **Members** This register is a record of legal entitlement and a change in the regime could have wide ranging practical and legal implications and we do not believe there is a reason (or sufficient reason) to do this, for reasons outlined in the consultation. In addition, some companies (eg listed companies) process many thousands of share transactions a day and it is unclear why government would wish to assume responsibility for this in place of registrars operating (effectively we believe) in the private sector.
- **People with significant control** We do not believe this register usually serves any useful purpose for the company itself so the responsibility for keeping it (and determining on what basis any non-public information should be made available) could be moved to Companies House.
- **Register of charges** No comment.

Question 25. We may also consider further changes to the election regime for private limited companies which was introduced in 2016. How useful is the election regime for private limited companies?

59. We understand that the election regime has not been widely used. This may in part be because it required public disclosure of day of birth (so increasing concerns of identity theft/fraud), but is also like to reflect the perspective outlined above, ie that companies need to keep this information anyhow.