Transparency and Trust

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25 September 2013

Dear Sir or Madam

Introduction to the National Federation of Property Professionals

The National Federation of Property Professionals (NFOPP) comprises a number of divisions which are professional bodies/self regulatory organisations that represent and regulate agents conducting a wide variety of property work. Agents join the divisions of NFOPP voluntarily and some members belong to more than one division. The aim of all of NFOPP's divisions is to support members by promoting the highest standards of professionalism and integrity, and to encourage the public to proactively choose our members.

NFOPP comprises:

- National Association of Estate Agents
- National Association of Valuers and Auctioneers
- Institution of Commercial and Business Agents
- Association of Residential Lettings Agents (ARLA).

Members of all divisions must meet various requirements in order to initially obtain and subsequently maintain their membership. These requirements are designed to protect consumers.

Transparency & Trust: Enhancing the transparency of UK company ownership and increasing trust in UK business

Our interest in Part A of this discussion paper arises from a number of perspectives:

- We estimate that approximately 70% of our members who are Principals, Partners, or Directors (PPDs) are directors of limited companies, and that another 5% are partners of limited liability partnerships. For this reason we regularly use information available from Companies House as part of our regulatory activities. Historically our interest has been limited to the directorships and partnerships, but for the reasons outlined below we may develop an interest in beneficial ownership.

- Some of our members are subject to the Money Laundering Regulations (2007) (MLR), or put another way they are regulated entities. The majority of our members who are covered by the MLR are estate agents. However we may also have members who are high value dealers, and there is also a small chance that some of our members are accountancy service providers.

  Our members tell us that they find it difficult to comply with the beneficial ownership element of the MLRs, in particular:

  (i) the requirement to make checks on ultimate beneficial owners at the end of a chains of companies;
  (ii) establishing whether beneficial owners are holding shares on a third party's behalf;
  (iii) how to establish who controls a company.

Our responses to the questions posed in Part A and Part B of the discussion paper are enclosed.

Yours faithfully

ELIZABETH RICHARDS

CONSULTATION LEAD

enc. Part A & Part B.

Table of client money protection scheme claims, 6 August 2013.

Part A: Enhancing the transparency of UK company ownership

A central registry of company beneficial ownership information

We welcome these proposals as we always found it difficult to accept the view that Companies House is merely a filing cabinet for information to be stored.

If the proposed new register is made public it will assist our members with the MLR. The discussion paper refers to the problems encountered by law enforcement and the tax authorities; regulated entities share many of these frustrations.

The proposal is also in the wider public interest because if transactions cannot proceed because of problems with customer due diligence a number of parties are damaged; the customer, the innocent counterparties to aborted transactions and the regulated entity which loses the business.

Publically available information would also assist us if we are appointed as an anti money laundering (AML) supervisor.[1] We are concerned that the UK may not be fully complying with Financial Action Task Force (FATF) Recommendation 28 which requires anti money laundering supervisors to prevent criminals or their associates from being the beneficial owners of regulated entities, or from managing regulated entities. The availability of more information about beneficial owner would assist with Recommendation 28, provided law enforcement is able to share information.

We also support greater focus on companies reporting information about their subsidiaries. A key element of our regulatory work is to try and keep track of our PPD members' directorships and partnerships. We are aware that some property firms are structured so that subsidiary companies are actively trading whilst the parent company is effectively dormant.

(1) The information to be held in the registry

The proposed definition of beneficial ownership and its application in respect of information to be held by a central registry?

We welcome a broad definition. In any event the definition must at least cover the definition in the AML legislation which applies to regulated entities. Companies should know who controls over them. It is illogical to expect regulated entities to obtain information if companies are not expected to provide the same information.

If more information is made available we envisage greater application of simplified due diligence (SDD), MLR 13. The logic and justification behind SDD is that listed companies disclose information to the Financial Conduct Authority. The same logic would apply if there was greater disclosure to a centralised register. Better regulatory principles cannot be compatible with requiring regulated entities to collate information which has already been collated in the context of a centralised registry.

(2) Companies within scope of the registry

The types of company and legal entity that should be in scope of the registry?

[1] We have submitted a formal application to HM Treasury.

Overseas companies are a relevant consideration for the property sector because:

- Overseas companies may be caught by the MLR if they do relevant business in the UK. Although we have made it clear in our application to become an AML supervisor that we do not intend supervising overseas, other UK supervisors have responsibilities in relation to overseas companies. For example, at present the Office of Fair Trading (OFT) has this responsibilities in relation to overseas property companies who are doing relevant business in the UK.
- Our members may act for overseas companies, and therefore will need to make checks on their beneficial owners.

For these reasons, we urge the UK government to continue to press for coordinated action at the European Union and global level.

Whether there should be exemptions for certain types of company? If so, which?

We are relaxed about public companies listed on a regulated market being exempt. Our members' companies tend not to fall into this category, and if our members act for public listed companies their obligations as regards customer due diligence are limited to SDD.

(3) <u>Obtaining information on beneficial ownership</u>

Extending Part 22 of the CA06 to all companies as an aide to beneficial ownership identification by the company?

We agree that Part 22 should be extended. We are unable to identify any particular risks associated with such an extension.

Placing a requirement on the company to identify the beneficial ownership of blocks of shares representing more than 25% of the voting rights or share in the company; or which would give the beneficial owner equivalent control over the company in any other way?

Regulated entities would benefit from this proposal as their customers will be able obtain the information they need for the MLR.

Placing a requirement on beneficial owners to disclose their beneficial ownership of the company to the company?

Regulated entities would benefit from this proposal as their customers will be able obtain the information they need for the MLR.

Whether there are additional or other requirements we could apply to ensure that information on all companies' beneficial ownership is obtained? If so, what?

No response.

Requiring the trustees of express trusts to be disclosed as the beneficial owners of a company?

Regulated entities would benefit from this proposal as their customers will be able obtain the information they need for the MLR.

Whether it would be appropriate for the beneficiary or beneficiaries of the trust to be disclosed as the beneficial owners as well? Under what circumstances?

Regulated entities would benefit from this proposal as their customers will be able obtain the information they need for the MLR.

Extending the investigative powers in the Companies Act 1985 to specified law enforcement and tax authorities?

We do not object, but we would like to point out that the problems that law enforcement and the tax authorities face are also encountered by regulated entities who do not have any investigative powers or the same level of resources. The requirements on regulated entities should be reduced as the information is available to the authorities from another source.

(4) <u>The central registry</u>

Using the requirements that apply in respect of a company's legal owners as the model for beneficial ownership information to be provided to the company and the registry?

If not, what additional information we might require? How?

The information will only be of assistance to regulated entities if it is kept up to date. We are unsure about the level of compliance with the requirement to keep Companies House up to date. For this reason we have concerns about what level of compliance there might if the same requirement if it is applied to beneficial ownership.

If a company is unable to identify any of its beneficial owners, it should be required to declare that fact to Companies House and to regulated entities. Companies House should have a clear remediation or enforcement strategy which applies in these circumstances.

Whether there is a need to introduce additional or other measures to ensure the accuracy of the beneficial ownership information that is filed with Companies House and retained on the register?

If so, what? To what extent would the benefits of these measures outweigh the costs and other impacts?

The benefits of making the register public are overwhelming. As indicated above, it may be possible for regulated entities obligations to be reduced to that of SDD, MLR 13.

Whether companies should be required to update beneficial ownership information at fixed intervals or as the information changes?

These two options are not mutually exclusive.

Whether beneficial owners should be required to disclose changes in beneficial ownership information proactively to the company?

Yes. The information held by Companies House and by the company itself should be identical at all times.

The appropriate timeframes for notification of changes to the company or Companies House?

No response.

The broad possible costs and benefits of a policy change to the annual return

The NFOPP group includes multiple companies and we would welcome a single consolidated update. We also think this change would help our members comply.

(5) Making information publicly available

Whether information in the registry should be made available publicly. Why? Why not?

If not, whether the information should be accessible to regulated entities. Why? Why not?

Beneficial ownership information should be made publicly available. This will ensure maximum benefit for investors, regulated entities, and law enforcement and tax authorities.

Although some of our members are not covered by the MLR, in particular lettings agents, we advise them to voluntary comply with the MLR as a matter of best practice. For this reason, the information should be widely available.

Whether a framework of exemptions should be put in place? If yes, which categories of beneficial owners might be included? How might this framework operate?

Exemptions for vulnerable people should be explored in relation to beneficial ownership, but there should not be exemptions for company directors.

Beneficial owners or their representatives should be able to apply for an exemption, and decisions should be made by Companies House with reference to the individual's particular circumstances. Exemptions should not be automatic for certain categories of companies such as animal testing. It may be sensible for law enforcement to be part of the decision making process in some cases. If an exemption is granted it should be regularly reviewed rather than being granted indefinitely.

The broad possible costs and benefits of a policy change to the registers of members?

No response.

Whether beneficial ownership information held by the company should be made publicly available. How?

Our main concern is that the information is available and is accurate. We are less concerned about whether it is made available from the company or from a central registry, or both. Having said that companies may give greater focus to the accuracy of the information if they are required to disclose it to Companies House, and if there are penalties for failures to provide up to date information and in relation to keeping the information up to date. If the information is publicly available then errors are more like to be identified and rectified.

Should any framework of exemptions in relation to information held by the registry also apply to information held by the company?

No. The justification for exemptions are safety concerns arising from making information public. Those considerations do not apply to information held by the company, or if register isn't made publically available.

(6) The impact of reform

The costs and benefits of this policy change for companies, beneficial owners, regulated entities and other organisations

In particular our views on:

- **The link between the proposals and crime reduction;**
- **The link between the proposals and the incentives to invest;**
- **The numbers of companies affected;**
- **The amount of time it would take to obtain, collate and report data on beneficial ownership- for both simple and more complex ownership structures;**
- **Costs to the regulated entities;**
- **The changes which regulated entities might make to their actions;**
- **The number of beneficial owners;**
- **The degree of publicity and guidance required;**
- **Likely compliance;**
- **Potential unintended consequences; and**
- **The varying impacts of the alternate options.**

See above.

Abolition of bearer shares

We have no particular views on this area.

Nominee directors

Whether we should more widely communicate the application of directors' statutory duties to all company directors and whether we should- alternatively or in addition- require nominee directors to disclose their nominee status and the name of the beneficial owner on whose behalf they have been appointed. Why? Why not? If yes, should that disclosure be made available on the public record?

We agree there should be greater communication about directors' duties. This may prevent the role being assumed without any understanding of the potential consequences. In fact we would welcome some form of testing before people can become directors. We are aware of disqualified directors using friend or family members so that they can continue to work as usual despite their disqualification, effectively these family and friends are used as nominee directors.

We also agree that nominees who have divested themselves of the power to direct the company should disclose this fact. Although this would be a duplication, it may be possible for the same requirement to apply to the beneficial owner who they have appointed. Given the risks involved, again we would like to urge that information about these situations is made public.

Whether we should make it an offence for a director to legally divest themselves of the power to run the company. Why? Why not?

No response.

Whether there are additional or other measures that we might take?

No response.

Views and estimates on the costs and benefits of this policy change.

No response.

Corporate directors

Whether we should prohibit UK companies from appointing corporate directors. Why? Why not?

Stopping corporate directorships would help our members when they have to conduct customer diligence on corporate customers. It would reduce the cost of compliance with the MLRs, although we are unable to provide estimates of these savings.

If yes, what transitional arrangements might be appropriate?

No response.

Whether there are additional or other measures that we might take?

No response.

The costs and benefits of this policy change?

No response.

Part B: Increasing trust in UK business

Clarifying the responsibilities of directors in key sectors

The merits of strengthening responsibilities of banking directors by amending the directors' duties in the CA06 to create a primary duty to promote financial stability over the interests of shareholders.

Unfortunately a small proportion of our PPD lettings members have misappropriated funds from client account, see enclosure. We have a client money protection (CMP) scheme which protects the public in such circumstances.[2] However as not all UK lettings agents voluntarily join a professional body with a CMP scheme there is significant risk to the public in this area. For this reason we welcome greater focus on financial stability more widely.

Allowing sectoral regulators to disqualify directors in their sector

Whether, in certain circumstances, directors barred or prohibited from senior positions in key sectors should be considered for disqualification from acting as directors of any CA06 company?

We agree with this proposal. In our view sectors which involve holding large amounts of pubic client money are key sectors, e.g. lettings agents.

We would like theft from client account to treated as a serious crime given it has the aggravating factor of breach of trust and can affect access to housing. It should automatically lead to prosecution and disqualification from acting as a director in any sector. We would welcome greater information sharing between SOCA, who receives SARs about such thefts, and the Insolvency Service.

We have examples of our ex members using phoenix companies to avoid their responsibilities, including liabilities on their client account. Again, this should be tackled.

Which sectoral regulators should have the ability to make an application to the Court for a disqualification order, or to accept a disqualification undertaking from a director?

As there isn't a sectoral regulator for lettings agents a suitable legislative vehicle and regulator would have to be found. The OFT is the sectoral regulator for estate agents.

The potential cost and benefits of this proposal.

No response.

Factors to be taken into account in disqualification proceedings

Whether Schedule 1 of the CDDA should be amended to provide that any breach of sectoral regulations is a matter of unfitness that may be taken into account by the court in disqualification proceedings?

We agree, but this development cannot apply to the property sector because of the current defects. The UK does not have a regulatory system for estate agents (sales agents), but has a 'negative

[2] If these creditors receive any reimbursement through the insolvency process, the amount they are reimbursed from our client money protection scheme is adjusted accordingly.

licensing' enforced by the OFT using the powers in the Estate Agents Act 1979 (EAA). We believe that when the OFT closes at the end of this financial year the EAA powers will be transferred to a lead Trading Standards Authority, to be nominated by the Department of Business Innovation & Skills and the National Trading Standards Board. We intend encouraging the new lead Authority to enforce the EAA robustly, and we would like them to consider how to integrate director disqualification.

There is no sectoral regulator for lettings.

Whether Schedule 1 to the CDDA should be amended to provide that 'wider social impact' is a matter of unfitness that may be taken into account by the court in disqualification proceedings?

Yes.

How 'wider social impact' should be defined and whether a materiality test should be applied?

Wider social impact, or put another way public interest, should be a given a wide interpretation. We suggest that this is not defined or limited in legislation, but that the concepts are developed over time in case law.

Whether, where unfitness meriting disqualification has been found against a director of a company that dealt with high volume deposits or otherwise vulnerable creditors, two tariffs of disqualification should be handed down (or agreed by way of undertaking):

- **(i) A tariff with respect to acting in the management of all companies; and**
- **(ii) An increased tariff with respect to acting in the management of any company dealing with high volume deposits or otherwise vulnerable creditors (or a company engaged in a business similar to that in relation to which they had been disqualified)?**

We agree. As outlined above, lettings involves deposits but sales does not. However we see sales and lettings as similar businesses because of the property nexus.

Whether Schedule 1 to the CDDA should be amended to provide that failure to pay particular regard to the protection of deposits, pre-payments or otherwise vulnerable creditors once a company has become insolvent is a matter to be taken into account by the court when deciding whether a director is unfit and should be disqualified (or by the Secretary of State in deciding whether to accept a disqualification undertaking)?

Yes- we agree this is relevant and should be taken into account.

What account the court (and the Secretary of State when deciding whether to take action) should take of the track record of the director (including the number of failures a director has been involved in) when deciding whether or not to disqualify an individual and for how long?

Whether there should be a certain number of failures beyond which the presumption is that a director is unfit and should be disqualified. If so, what should that number be?

Track record must be taken into account. We also tend to agree that only a certain number of failures should be allowed.

Improving financial redress for creditors

How frequently the possibility of bringing wrongful and fraudulent trading claims arise, are pursued and what value the existing civil remedies for wrongful and fraudulent trading provide?

Information about our CMP claims record is enclosed. Of these, two involve creditors being compensated by liquidators.

Whether, if liquidators were able to sell or assign wrongful and fraudulent trading actions, more actions would be taken? If so, how many more?

Overall this as an interesting proposal, but there are the practical questions that would need to be addressed.

Given our CMP scheme, NFOPP Regulation may wish to take a fraudulent or wrongful action claim. For this reason we hope that non creditor third parties are allowed to become claimants, even though the considerations and challenges which apply to liquidators would equally apply to us.

No information is provided about what would happen if more than one party was interested in buying the claim. As indicated below, we feel strongly that prospective defendant should not be able to purchase.

It is also unclear whether whoever becomes the claimant assumes the liquidator's right to claim for a contribution to all of the debts of the company, or just his own debt? If just his own debt, could there be a further sale to the other creditors to the extent of their own debts? Assignment to all creditors as a class won't work unless all of the creditors wish to join in. In relation to this, would whoever becomes the claimant owe duties to the other creditors?

The extent to which creditors would benefit from this proposal?

Creating another option for creditors and affected third parties may of benefit, but see queries above.

What practical difficulties might prevent third parties pursuing claims and how these might be overcome?

See above.

Whether safeguards would need to be introduced to prevent certain parties acquiring such a claim? If so, who should they apply to and what form should they take?

Prospective defendants should not be able to acquire. It would bring the system into disrepute if directors could pay to avoid the risk of being ordered to pay greater compensation, and the inconvenience and reputational damage associated with legal action.

Whether this proposal would improve confidence in the insolvency regime?

Yes, provided prospective defendants are unable to purchase.

The benefits of giving courts the power to make compensatory awards against directors?

It may encourage directors to enter into undertakings if compensatory awards, or larger compensatory awards, are only available to the courts.

The potential costs and drawbacks of this proposal?

No response.

Who should receive any monies recovered by action: should it be creditors generally or left to the court to determine?

There should be a presumption in favour of creditors, although courts should also be given a discretion to deviate from this presumption.

Whether the IS (acting on behalf the Secretary of State) should be able request and agree a compensation award from a director when it accepts an undertaking from the director not to act in the management of a company for a certain number of years?

Yes, but see above concerning the possible benefits if compensation in the context of undertakings is kept lower than the amounts available to courts. This would reflect the cost of court proceedings.

Whether this proposal would improve confidence in the insolvency regime?

Any tools to compensate creditors are bound to improve confidence, as well as having a deterrent effect on directors.

<u>Time limit for disqualification proceedings</u>

Whether the period within which disqualification proceedings under section 6 of the CDDA must be instituted should be extended beyond two years?

No response.

If yes, should that period be five years, some other period, or no limit at all?

No response.

How many directors are likely to be affected?

No response.

<u>Educating directors</u>

Whether, if some form of director education were to be introduced, it would increase trust in the enforcement regime?

Making training compulsory, or linking training with other advantages (such as a reduced disqualification period), inevitably risks perfunctory attendance. The best way to mitigate this risk is through testing, and there is rarely testing without qualification.

What form the training should take and who should provide it?

If available, successful completion of sector specific qualifications should be required. NFOPP Awarding Body provides sector specific qualifications which have an accounts element.

What would be the likely cost of such training?

The costs of the Level 3 Technical Award in Residential Lettings & Property Management may be of interest, especially as this qualification has an accounts element. All candidates must sit four exams at a cost of £50 per exam. Study materials are available for purchase, although they are not compulsory; £130 to members and £220 to non members.

Whether successfully completing any such training should enable a reduced period of disqualification; or should be a pre-condition for any disqualified director wishing to seek leave of the court to run a company whilst disqualified?

Successful completion of sector specific qualifications should be a condition of a disqualified director being a director again. It should not be possible for disqualified directors to seek the leave of the court to run a company whilst disqualified as such mechanisms risk brining the system into disrepute.

Whether there would be value in offering such training to all directors of failed companies-irrespective of whether they were disqualified-having regard to the fact that the director would need to cover the cost?

This would be cost prohibitive.

<u>Extending overseas restrictions</u>

Whether regulations should be made using the powers in Part 40 of the CA06 to prevent persons who are subject to foreign restrictions (which fetter their freedoms to act in connection with the affairs of a company) being able to be directors or act in the management of companies in the UK?

Yes. This opportunity should not be missed.

If yes, should the foreign restrictions be made to apply automatically in the UK, or should they require the Secretary of State to make an application to a court?

Automatic, but directors should be able to appeal to a court or to a tribunal.

If not, should a person subject to foreign restrictions be obliged to notify the Registrar of Companies if they act in the promotion, formation or management of a company in the UK?

This should be an additional requirement, which would act as a safety net for information that does not come to the attention of Companies House through other routes.

Whether the Secretary of State should have the power to bring disqualification proceedings against a person on the sole basis that that person has been convicted of a criminal offence overseas in connection with the management of a company or business overseas?

Yes, provided prospective directors will have an opportunity to argue their case if they feel they have fallen victim to a miscarriage of justice in another country.