

Chapter 11: THE REGULATOR - Contents

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11.1. Approach to regulation

The Companies (Audit, Investigations and Community Enterprise) Act 2004 ('the Act') established the Regulator as an independent statutory office-holder appointed by the Secretary of State. The Regulator's appointment was subject to an open public recruitment process monitored by the Office of the Commissioner for Public Appointments. The Regulator's powers and duties are set out in the Act and Regulations (see section 27 and schedule 3 of the Act).

The Act requires the Regulator to discharge her functions in accordance with good regulatory practice.

She must, in particular, have regard to:

- ❖ The likely impact of her actions on those affected.
- ❖ The results of consultation with stakeholders.
- ❖ The efficient and economic use of her resources.

The Government has indicated that it expects the Regulator to be "a light touch regulator" who will encourage the development of the CIC "brand" and provide guidance and assistance on matters relating to CICs.

Much of the Regulator's time is spent considering the registration, or conversion, documents for new CICs referred to the Regulator, by the Registrar, to decide whether the companies concerned are eligible to become CICs. The Regulator's decision will be based on examination of the community interest statement, the registration documents, such as, the application form, memorandum and articles of association and the appropriate resolutions in the case of a conversion. It is for the Regulator to ensure that the purposes of the company and its constitution comply with the Act and Regulations and in particular to decide whether, in her view, it satisfies the community interest test (see Chapters 4, 5 and 6).

The Regulator sees her task as facilitating the formation of CICs; she will not take a bureaucratic approach and will through her office try to resolve any problems informally by e-mail, letter or telephone and is prepared to consider additional material submitted by letter. Provision of material by e-mail or letter cannot, however, be a substitute for the completion of the appropriate forms and documents as only these are placed on the public file. The Regulator and her staff are happy to discuss general questions prior to an application being made but cannot advise on specific points, or prejudge decisions.

A similar approach will be taken to all other matters upon which the Regulator has to decide, such as, approval of a change to the objects of a CIC, or disposal of assets.

As a matter of good administrative practice, and in order to comply with her statutory obligations, the Regulator will consult those who are about to be subject to her decisions before making them, except where it would be inappropriate to do so – for example, in some cases, such as where there is a need to act immediately to safeguard a CIC's assets, consultation might undermine the purpose for which action is to be taken.

In matters that are not specific to particular companies, such as possible changes to the dividend and interest caps, the Regulator will consult stakeholders before taking action.

The light touch approach to regulation does not envisage pro-active supervision of individual CICs by the Regulator.

All CICs are required to file with their accounts an annual CIC report that will be placed on the public register at Companies House and will be copied to the Regulator.

It should not be assumed that the filing of this report will automatically make the Regulator aware of any cause for concern about a CIC and members and other interested parties may also wish to draw any such matters to her attention at any time.

She will consider the CIC report and any complaints and, where necessary, may make further enquiries and take appropriate action. It may, however, often be possible to resolve issues in discussion with the interested parties.

11.2. Advice and guidance

The Act provides that the Regulator may issue guidance and otherwise provide assistance on matters relating to CICs and if necessary can be required to do so by the Secretary of State (see section 27 of the Act).

She is expected to consult stakeholders on her guidance before it is issued. This consultation is undertaken informally and it is not intended that formal consultation documents will be issued. If therefore you have any particular points on the material issued by the Regulator or suggestions for other material that she might usefully issue you should write to the Office of the Regulator.

Guidance material will be made available through this web site generally and these information and guidance notes in particular.

In April 2005 the Regulator's Office issued a short leaflet "Community Interest Companies—The Key Facts" which has been updated and revised.

The Regulator and her team have participated in numerous conferences and seminars on CIC or social enterprise related topics and are willing to consider suggestions to attend other events where they may be able to advance the public knowledge of CICs.

The Regulator and her Office are also available to discuss matters relating to CICs generally with interested individuals or organisations. However, they are not able to give advice about specific CICs or to prejudge decisions about CICs in advance of the submission of formal applications.

Under the Act the Regulator may charge fees for any service provided, other than those provided under a legal obligation or which she considers to be guidance of general interest. It is not her current intention to charge any fees other than those dealt with in Chapter 4.

The provision of guidance material or other advice by the Regulator or her office should not be seen as a substitute for professional advice on specific cases.

11.3 Investigations

The Act (see sections 42 and schedule 7 of the CAICE Act 2004) provides the Regulator with powers of investigation similar to the powers given to the Secretary of State by section 447 of the Companies Act 1985, as amended by the Companies Act 2006, which are used by Companies Investigation Branch (CIB) at the Department for Business, Innovation and Skills (BIS).

The Regulator is also able to appoint auditors (at her expense) to examine and report to her on the accounts of a CIC.

It is expected that these powers will only be used on rare occasions as a step to obtain necessary evidence to enable the Regulator to decide whether she should exercise her enforcement powers (see chapter 11.3.).

These powers enable the Regulator to investigate the affairs of the company in relation to its CIC status; they do not replace the Companies Act 2006 powers. Where the Regulator considers that wider issues are raised she may refer the case to CIB to consider whether they should exercise the section 447 powers, or in cases of major concern appoint Inspectors under section s.432 of the Companies Act 1985.

If you have a complaint about the conduct of a CIC which goes wider than regulation, and involves, for example, circumstances suggesting fraud, misconduct or dishonesty you should consider discussing the complaint with or writing to:

Companies registered in England, Wales or
Scotland
The Inspector of Companies
Companies Investigation Branch
Ground Floor
21 Bloomsbury Street
London
WC1B 3QW
Email: vetting.section@bis.gsi.gov.uk
Telephone: 0207 596 6100
<http://www.insolvency.gov.uk/cib/index.htm>

Companies registered in Northern Ireland
Insolvency Service
Address: Fermanagh House
Ormeau Avenue
Belfast
BT2 6NJ
Telephone: 028 902 51441
Email: insolvency@detini.gov.uk
Web site: www.detini.gov.uk

It would, however, be of assistance if you also copy any written complaint to the Regulator's office. There are arrangements between CIB and the Regulator's Office to avoid unnecessary duplication of investigations.

The investigation provisions are set out in detail in section 42 and Schedule 7 of the Act to which you should refer. The following is a brief summary:

- The Regulator may carry out an investigation personally, appoint a member of her staff to do so or appoint a third party, such as, an accountant or lawyer.

- The investigator may require the company or any other person to produce such documents (in whatever form) or provide such information as they may specify. Failure to comply with a requirement may be treated as contempt of Court and provision of false information is a criminal offence. There are some qualifications to protect liens, and in relation to legal professional privilege and banking confidentiality.
- The documents and information so obtained may be used in evidence in civil proceedings brought by the Regulator (or others) including proceedings against those producing the documents and providing information. They may also be disclosed to prosecuting authorities for consideration of possible criminal offences but there are restrictions on the extent that information may be used in criminal proceedings against the person providing it.

11.4. Enforcement

11.4.1. Basis of enforcement

As explained in Chapter 11.1 the light touch regulatory regime does not envisage a proactive supervision of CICs by the Regulator. She will, however, take account of all information and complaints received in respect of CICs, their activities and management and where necessary seek further information. She will attempt where possible to resolve any problems informally with the CIC concerned but if this is not possible she will resort to the appropriate enforcement action.

The Act provides the Regulator with a wide armoury of enforcement powers outlined below but constrains the use of these powers to the extent necessary to maintain confidence in CICs (see Companies (Audit, Investigations and Community Enterprise) Act 2004 section.41, 45-51.)

The powers will not therefore be used lightly and in general it is expected that the members and directors of a CIC will ensure that it conducts its affairs honestly and in accordance with the law and its own constitution. It is likely that in most cases, any enforcement action will be preceded by a formal investigation of some kind (see Chapter 11.3).

It should be emphasised that the Regulator has no role as a referee to resolve differences between factions within a CIC; this is something they must resolve among themselves (if necessary, by recourse to legal proceedings or other formal means of dispute resolution). The Regulator's main concern is to ensure that the CIC continues to serve the community it was set up to benefit and that it is not operating in breach of the asset lock.

11.4.2. The enforcement powers

11.4.2.1. To bring civil proceedings in the name of a CIC

This enables the Regulator to bring proceedings in the name of the company where its members, or directors, have failed to do so; for example where the company may have a claim for breach of duty against the directors.

11.4.2.2. To Appoint or Remove directors

These powers, which can only be used when the "default condition" has arisen (see below), are intended to ensure that the board of the company has the expertise to remedy the default.

11.4.2.3. To appoint a manager of a CIC

This enables the Regulator to appoint a manager to take control of specified aspects of the company's affairs that are giving cause for concern. This power can only be used where the default condition has arisen (see below).

11.4.2.4. To vest (in trust) the property of a CIC

This power can only be used where the default condition has arisen (see below), and is intended to provide a means of protecting the assets of a CIC if they are seen to be at risk. The Regulator has to appoint one of her staff as Official Property Holder who under the direction of the Regulator will deal with the property on behalf of the company.

11.4.2.5. To order the transfer of shares

This power can only be exercised if it appears that the company is an excluded company and enables the Regulator to re-arrange the control of the company with a view to it ceasing to be an excluded company. There are similar powers to achieve the same end with guarantee companies.

11.4.2.6. To present a petition to the Court for the winding up of a CIC

The Regulator may present a petition to the Court who may wind up the company if it is of the opinion that it is just and equitable to so do. The Regulator would present such a petition if she formed the view that it was in the public interest for the company to be wound up i.e. its activities brought to an end and the assets distributed according to law. [See Chapter 11.3.]

11.4.2.7. To apply to the Court for an order that the dissolution is void

If a company is dissolved or struck off its assets become “bona vacantia” and pass to the Crown or the Duchies of Lancaster or Cornwall. By applying for the striking or dissolution to be declared void the Regulator will be able to safeguard the assets for the benefit of the community.

11.4.2.8. The Default Condition

The default condition arises where:

- (a) There has been misconduct, or mismanagement, in the administration of the company;
- (b) There is a need to protect the company’s property, or to secure the proper application of the property;
- (c) The company is not satisfying the community interest test; or
- (d) If the company has community interest objects, the company is not carrying on any activities in pursuit of those objects.

The above notes give very brief descriptions of complex subjects and for a full understanding you will probably need to seek professional advice.

11.5. Accountability of the Regulator

The independence of the Regulator is fundamental to the system but to ensure transparency she is required to present an annual report on the exercise of her functions to the Secretary of State who will lay the report before Parliament. A copy of the report will be placed on this web site.

The Secretary of State may also direct the Regulator to prepare financial accounts. These will be examined and reported upon by the National Audit Office and included in the report.

The period of the Regulator's report and accounts is the 12 months beginning with the 1 April. The first report therefore covers the period 1 April 2005 to 31 March 2006.

The Regulator must also supply the Secretary of State with such other reports and information relating to the Regulator's exercise of her functions as the Secretary of State may require.

Parliamentary Questions relating to the activities of the Regulator should be addressed to the Secretary of State. The Permanent Secretary of the Department for Business Innovation and Skills (BIS) is the accounting officer for the Regulator's expenditure and income.

The Parliamentary and Health Service Ombudsman can consider and investigate complaints of alleged maladministration about the Regulator and her Office. Such complaints can only be considered if they are submitted to the Ombudsman by the complainant's Member of Parliament.

11.6. Appealing against the Regulator's decisions

11.6.1. Introduction

The legislation relating to community interest companies provides for a process of statutory appeals against certain types of decision, which the Regulator may take. This chapter sets out information about the statutory appeals process. The legislation does not restrict any other legal remedies, which may be available in such circumstances, but these are beyond the scope of this guidance.

This chapter is divided into three parts:

- The appeals framework,
- Which decisions can be appealed, and
- The appeals process.

11.6.2. The appeals framework

11.6.2.1. Introduction to the legislation

The appeals framework is set out in the Act and the Regulations.

Section 28 of the Act provides for the appointment of the Appeal Officer for Community Interest Companies ("the Appeal Officer") and describes the Appeal Officer's jurisdiction. Part 11 of the Regulations sets out the procedural framework for appeals to the Appeal Officer.

The Appeal Officer is a statutory office holder appointed by the Secretary of State for Trade and Industry. The Appeal Officer is independent both from the Government and from the Regulator.

Appeals may be brought on the grounds that in making a decision the Regulator has made a material error of law or fact. Where an appeal is made to the Appeal Officer, the Appeal Officer must dismiss it, allow it, or remit the case to the Regulator for reconsideration in accordance with any rulings of law or findings of fact which the Appeal Officer has made.

11.6.2.2. Which decisions can be appealed?

The Appeal Officer only has jurisdiction in relation to those decisions in respect of which legislation specifically states that there is a right of appeal to the Appeal Officer. The Table below sets out an exhaustive list of the types of decision against which an appeal can currently be made to the Appeal Officer. All the decisions listed below are decisions, which may or must be taken by the Regulator.

Type of decision	Who may appeal?	Source*
Decision that a company is not eligible to be formed as a CIC	Any subscriber to the company's memorandum	Act, s. 36(10)
Decision that a company is not eligible to become a CIC	The company	Act, s. 38A(5)
Order appointing a director of a CIC (but not an order removing a director of a CIC, which is appealable to the High Court / Court of Session)	The company	Act, s. 45(13)
Order appointing a manager in respect of a CIC's property and affairs	The company	Act, s. 47(14)
Various orders relating to property held by, on trust for, or on behalf of a CIC	The company and any person to whom the order is directed	Act, s. 48(12)
Orders restricting the transactions which a CIC can enter into / the nature or amount of payments it can make	The company	Act, s. 48(13)
Order transferring specified shares in a CIC to specified persons	The company and any person from whom shares are transferred	Act, s. 49(5)
Order extinguishing specified members' interests in a CIC or appointing new members in place of such members	The company and any person whose interest is extinguished	Act, s. 49(6)
Decision that a company is not eligible to cease being a CIC (prior to becoming a charity / Scottish charity)	The company	Act, s. 55A(4)
Decision not to approve change to statement of CIC's objects in its articles	The company	Regs, reg 15(8)
Directions relating to distribution of CIC's assets on a solvent winding up	Any member or director of the company	Regs, reg 23 (11)

11.6.2.3. The Appeals Process

The process to be followed in appeals to the Appeal Officer is set out in Part 11 of the Regulations, the contents of which are summarised below. It should be noted that, subject to the Regulations, the Appeal Officer is given fairly wide discretion as to the details of procedure to be followed in each case.

* "Act" refers to the Companies (Audit, Investigations and Community Enterprise) Act 2004; "Regs" refers to the Community Interest Company Regulations 2005.

11.6.2.4. Time limit for beginning the appeal process

Appeals to the Appeal Officer are begun by sending a notice of appeal to the Regulator.

- The notice of appeal must generally be sent so that it is received within two months of the date upon which the appellant was given reasons for the disputed order or decision.
- However, if the appeal relates to a direction on the distribution of residual assets in the winding up of a CIC under regulation 23 of the Regulations, the notice of appeal must be received within three weeks of the date on which notice of the disputed direction was given.

Any appeal, which is not made within the relevant deadline, will be dismissed unless the Appeal Officer is satisfied that there are exceptional circumstances to justify its being made late.

11.6.2.5. Notices of Appeal

The notice of appeal must:

- State the name and address of the appellant;
- State an address for service in Great Britain;
- Specify as precisely as the appellant is able the date, or dates, on which the appellant was given reasons by the Regulator for the disputed order or decision, or include a statement that no such reasons were given;
- Contain a statement of the grounds for the appeal;
- Contain details of the disputed order, decision, or direction;
- Contain a succinct presentation of the arguments supporting each of the grounds of appeal;
- Contain a schedule listing all the documents annexed to the notice of appeal; and
- Be signed and dated by the appellant, or on its behalf by a duly authorised officer, or legal representative.

There is no standard form for appeals.

A copy of the disputed order or decision must be annexed to the notice of appeal, together with a copy of any reasons, which the Regulator has given for the disputed

order or decision. As far as practicable, appellants should also annex to their notice of appeal a copy of every document on which they are relying.

11.6.2.6. Role of the Regulator

The Regulator will send an acknowledgement of the receipt of the notice of appeal to the appellant.

The Regulator must send the notice of appeal, endorsed with the date of receipt, to the Appeal Officer. Where it is an appeal against the Regulator's direction on the distribution of residual assets in the winding up of a CIC, the Regulator must forward with the notice of appeal:

- ❖ A statement of the date upon which notice of the disputed direction, or decision, was given to the community interest company in accordance with regulation 23(8); or
- ❖ A statement that no such notice was given.

The Regulator may make a written response to the notice of appeal. If she does so, the response must be received by the Appeal Officer within two weeks of the date on which the Regulator received the notice of appeal, unless the Appeal Officer allows a longer time.

11.6.2.7. Procedure before the Appeal Officer

The Appeal Officer may allow the appellant or the Regulator further opportunities to make written or oral representations and may specify when and how such representations are to be made.

The Appeal Officer may follow such practice and procedure as she thinks fit, having regard to the just, expeditious and economical conduct of appeals. In determining appeals, the Appeal Officer must have regard to all matters that appear to him to be relevant.

The Appeal Officer may at any stage dismiss appeals, which she considers unfounded, which do not comply with the requirements of the Regulations as regards notices of appeal, or if she considers that the appellant is not entitled to bring the appeal.

Appeals may also be discontinued by being dismissed at the request of the appellant. The Appeal Officer must give reasons for any decision to dismiss an appeal, allow an appeal or remit a case to the Regulator. Such reasons must be given to the appellant and the Regulator, and the Appeal Officer must make such arrangements for their publication, as she considers appropriate.