

Deregulation Article:

To notify (and when to notify)...

The HCA has today published its Direction and related guidance for non-profit private registered providers (NPRPs) on the requirement to notify the regulator of restructures and constitutional changes.

These publications cover:-

- a. The notifications which, by statute, NPRPs are obliged to make; and
- b. Early notifications of restructures which the HCA expects NPRPs to make.

So what are the key points to note for boards and officers of NPRPs?

Statutory Notifications (the duty)

- The statutory notifications replace the consent regime which is currently in place (and which remains in place until 6th April 2017);
- There is a prescribed form for statutory notifications (which can be downloaded from the HCA's website) which will need to be completed by a duly authorised officer of the NPRP;
- From 6th April, certain corporate restructures will not be capable of being registered by the FCA (or Companies House) unless the statutory notification has been made. Note that the guidance is not clear about what evidence the FCA or Companies House will require in respect of that notification; we think that a certified copy ought to be acceptable, but if important arrangements (like loan agreement consent CPs) hang off the registration, you should plan this carefully;
- The timescales for statutory notifications vary depending upon whether the notification relates to:-
 - A restructure - 10 working days after the

restructure has been approved by the shareholders),

- A company arrangement, reconstruction or dissolution - 1 working day after the arrangement, dissolution etc has been approved or the date of the court order; and
- A change to the constitution (or a change in the name or registered office) – 10 working days after the change has been registered or filed with the FCA / Companies House;

Are you a “New body”?

From the 6th April, the HCA is under a duty to assess the eligibility of a “new body” to be (or remain) a RP. “New body” is the term used in the Act to describe the “body” created when a NPRP is involved in:-

- An amalgamation;
- A transfer of engagements; or
- A conversion from a registered society to a company (and vice versa).

This requirement will apply therefore even where, for example, an existing NPRP is receiving a transfer of engagements. The guidance is clear that if the “new body” does not meet the eligibility criteria it will be subject to mandatory deregistration.

In addition to the assessment of the “new body's” eligibility to be (or remain) a RP, the HCA must also determine the designation of the “new body” – whether as a NPRP or as a for-profit RP on the HCA's register of RPs. The guidance sets out the criteria which it will apply to determine eligibility and designation. Prior clearance may be wise. Note that the HCA is offering to give an informal view.

Early Notifications (in the spirit of co-regulation)

In addition to the statutory notifications, the guidance also sets out the HCA's expectation that it be notified whenever a proposal to effect "any kind of corporate restructure" is "reasonably advanced".

The HCA regards this as including:-

- Transfer of engagements or amalgamation;
- Converting from a company to a registered society and vice versa;
- Establishing a Charitable Incorporated Organisation in which to transfer the current charity activity;
- Merger by way of business transfer;
- To become or convert to a charitable body ;
- To become, or cease to be, a subsidiary;
- Any company arrangement or reconstruction, dissolution; or
- Any other significant business change, including any plans to cease to operate".

The HCA regards "reasonably advanced" as being evidenced by "Heads of Terms or similar hav[ing] been drawn up".

The guidance makes clear that a failure to comply with the obligations (or expectations) to notify outlined above "may" be treated by the HCA as a governance failure.

And so what is the likely practical effect of these changes?

- HCA can no longer veto mergers or constitutional changes – but there has been little to no track record to date of HCA utilising those powers.
- HCA will still influence RPs thinking on proposed restructures through dialogue, the spectre of IDAs and the enforcement of the regulatory framework – for example a failure to identify weaknesses in a business case or merger maybe seen as a governance failure.
- The structuring of mergers involving non asset holding parent entities may need to be carefully considered given the 'new body' provisions; and
- For those planning a restructure in April an early dialogue with the FCA would be well advised given the new notification duty and FCA's inability to register restructures after 6 April in the absence of evidence of the RP's compliance with notification requirement.

For more information on the HCA's Direction and Guidance on restructures, please contact Jonathan Jarvis or Andrew Cowan.



Jonathan Jarvis

Partner

020 7065 1810

jonathan.jarvis@devonshires.co.uk



Andrew Cowan

Partner

020 7880 4350

andrew.cowan@devonshires.co.uk

Devonshires has taken all reasonable precautions to ensure that information contained in this document is materially accurate however this document is not intended to be legally comprehensive and therefore no action should be taken on matters covered in this document without taking full legal advice.