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The Legal Services Board
One Kemble Street
London
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By email only: Matthew.Daykin@legalservicesboard.org.uk

7 March 2014

Dear Mr Daykin

**Application to the Legal Services Board for an alteration to regulatory arrangements
Notaries Practice Rules 2014**

Notaries (Inspections) Regulations 2014 (under rule 24 of Notaries Practice Rules 2014)

On behalf of the Master of the Faculties I am making the above application under Part 3 of Schedule 4 of the Legal Services Act 2007 ('LSA 2007') and the rules made by the Legal Services Board under that part. A copy of the proposed amended Rules is annexed. Copies of the rules which the new rules replace are available to view on our website at <http://www.facultyoffice.org.uk/wp-content/uploads/2013/12/Notaries-Practice-Rules-2009.pdf>. Copies can be provided if required. A copy of the proposed Regulations to be made under the amended Rules and which will govern the inspection regime are also attached.

Reason for the proposed alteration in regulatory arrangements

I should emphasise that although these rules are presented as new rules for 2014, in practice there are only very few amendments to the substantive rules which were last revised in 2009 and are intended to address four main areas:

1. To extend the Master's power to require an inspection of a notary's records to include the practice and to make it clear that inspections may be carried out as a matter of routine rather than following a complaint or allegation of impropriety. The regulations to be made under rule 24 of the new rules are, I hope, clearly expressed and readily understandable;

2. To introduce a set of general overriding principles with which a notary must comply at all times in exercise of his or her office. These are similar to those adopted by the SRA as part of its introduction of Outcomes Focussed Regulation. The ten principles adopted by the SRA have been reduced to eight for notaries as there were two which were inappropriate to the office and work of a notary. Whilst the principles are a new introduction as a separate rule, they are mirrored by many of the provisions of the existing rules (principally those on obtaining instructions which have now become new rule 7;
3. To incorporate a reference to a Code of Practice to which a notary will owe a duty and that non-compliance with it could be construed as Notarial Misconduct and therefore possibly lead to disciplinary proceedings in appropriate cases. The Code of Practice is at present being drafted by senior members of the profession and will be added during the course of 2014/5; and
4. A statement to the effect that notaries are fully entitled to make public instruments which will be effective in the jurisdiction for which they are destined (Rule 3.2). The reason for including this provision is to assist notaries in dealing with queries as to their status and ability to make such instruments which arise from time to time in certain other (mainly European) jurisdictions. In due course, it would be preferable for a provision of this nature to be included in Primary legislation in order to put the issue beyond question but this is, the profession believes, a helpful first step.

The intention of the first three proposed changes is to provide better protection for the consumer of notarial services by clearly setting out the principles with which a notary is expected to comply when accepting instructions from a new client; by providing enhanced guidance to notaries as to the standards which a consumer should expect in the form of the code of practice; and to seek to encourage compliance by providing a mechanism under which the Master, as regulator, can pro-actively inspect a notary's records and practice to ensure compliance with the regulatory regime in addition to reacting to the relatively few complaints which are received annually.

Compliance with the regulatory objectives

The LSA 2007 requires approved regulators to comply with the following objectives:-

- (a) protecting and promoting the public interest;

- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services;
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

In light of the regulatory objectives I have the following comments:-

(a) protecting and promoting the public interest

The new rules are designed to provide enhanced protection to consumers of notarial services and thereby the public interest by clearly setting out the principles which a notary must follow and the standards which a consumer may expect when instructing a notary. Whilst these principles were, as indicated above, largely mirrored by existing rules (notably what is now rule 7) we believe it is helpful to set them out as a discrete rule as indicated in our Developing Regulatory Standards return.

(b) supporting the constitutional principle of the rule of law

It is not anticipated that the rule changes will have any specific positive or negative effect on the constitutional principle of the rule of law. However, the addition of a specific principle requiring a notary to uphold the rule of law and the proper administration of justice will serve to ensure that this requirement remains at the core of a notary's duty when accepting instructions and acting for a consumer.

(c) improving access to justice

The new rules will have a neutral effect on public access to notaries.

(d) protecting and promoting the interests of consumers

As indicated above, the new rules, particularly the General Principles, are intended to enhance the protection and promotion of the interests of consumers. The addition of rules to make provision for a pro-active regime of inspections of a notary's records and practice will also enable the Master to seek to ensure that a notary is complying with the regulatory regime rather

than reacting to complaints or allegations of non-compliance from consumers. The regulations made under the new rules set out the basis upon which the inspections are to be carried out.

(e) promoting competition in the provision of services

It is expected that the amended rules will have a neutral effect on the competition between legal professionals.

(f) encouraging an independent, strong, diverse and effective legal profession

The proposed rules are intended to encourage an effective notarial profession. It is an essential facet of the Notarial profession that they be independent. The new rules are expected to have a neutral effect on the strength and diversity of the notarial profession.

(g) increasing public understanding of the citizen's legal rights and duties

The proposed new rules are unlikely to affect public understanding of citizens' legal rights. However, we hope that the inclusion of clear principles will enable the public to understand the responsibility of the notary whom they instruct in accepting such instructions.

(h) promoting and maintaining adherence to the professional principles

The 'professional principles' are:

- (a) that authorised persons should act with independence and integrity;
- (b) that authorised persons should maintain proper standards of work;
- (c) that authorised persons should act in the best interests of their clients;
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and
- (e) that the affairs of clients should be kept confidential.

These rules, along with all the provisions governing the conduct of a notary, are underpinned by the general duty to promote and maintain those professional principles which are contained in rules made by the Master of the Faculties, in the general law, and which notaries ought to follow because of their membership of an ancient and distinguished profession. The new rules do, however, set out the specific requirement to adhere to a set of clear professional standards

tailored specifically to the office and work of a notary which incorporate and extend the 'professional principles'.

Compliance of the Regulations with the Better Regulation Principles

Section 28 of the Act imposes a duty on an approved regulator, so far as is reasonably practicable, to act in a way:

- (a) which is compatible with the regulatory objectives; and
- (b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.

The approved regulator must have regard to:

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principle appearing to it to represent the best regulatory practice.

I have explained how the revised rules comply with the regulatory objectives.

The general principles are uncontroversial and, as I have indicated, are in large part a re-writing and consolidation into a single rule of principles which were already incorporated into the existing regulatory regime.

Perhaps the more fundamental change is the inclusion of a rule, and the related regulations, providing for inspections of a notary's records and practice. The existing rules did permit the Master to order an inspection of a notary's records and accounts but these provisions have only been used sparingly and, for the most part, in response to specific concerns, allegations or complaints. This is a matter on which the Faculty Office was, I accept with some justification, criticised in the LSB's response to our Developing Regulatory Standards return and which the Master has undertaken to address. The new rule 24 and the accompanying regulations represent our response to this criticism and provide for a more pro-active regime of inspections and extend the remit beyond purely a notary's records to enable the entirety of his or her practice to be brought within the inspection regime.

The Master received the advice and input of the Advisory Board on the scope and content of the new inspection regime. The Master also indicated his intention to introduce an inspection

regime in his address to the 350 or so members of the profession gathered for the Notaries Society Annual Conference in September 2013 and in a question and answer session which followed and has taken account of some of the feedback given at that event in formulating the regulations.

A draft of the new rules and the related regulations were submitted to the two representative membership societies (The Notaries Society and The Society of Scrivener Notaries) who provided feedback and suggested amendments which were incorporated into the rules and offered for a further period of consultation which has now been completed. The first consultation also included submission to the LSB and I was grateful for the helpful comments.

How will the Faculty Office determine whether the Rules have been successful in meeting their objectives?

I am not anticipating any significant changes following the making of these new rules so far as points 2, 3 and 4 of the reasons for the rules set out above are concerned as the amendments are largely a re-writing and consolidation into a single rule, of provisions which already existed.

As far as the amendments relating to the inspection regime are concerned, there will be an ongoing process of evaluation once the regime has started to assess the effectiveness of the inspections, the form of questionnaire to be used and the experience in practice of those undertaking the inspections on behalf of the Master as well as those notaries whose practices have been inspected. I am hopeful that the inspections will not bring to light serious breaches of the regulatory regime and that the relatively low number of complaints against the profession will be reflected in an equally low occurrence of reports disclosing poor practice amongst those inspected.

I shall also invite the representative societies to provide feedback on how the amended rules are perceived by the profession once they are in place. Additional feedback will be sought through discussions at the Master's Advisory Board and the Notarial Open Forum which takes place annually and at which a wide selection of notaries are invited to meet the Master.

Impact on other approved regulators

As the amended rules will have no adverse effect on other approved regulators and they will not give rise to regulatory conflict.

Timetable

The amended rules are intended to be made as soon as approval has been given and then signed by the Master and will come into force on the first day of the month following.

If you have any questions, please do not hesitate to contact my Clerk, Neil Turpin, in the first instance. I look forward to hearing from you in due course.

Yours sincerely

A handwritten signature in black ink that reads "Howard Della". The signature is written in a cursive style with a large, prominent 'H' and 'D'.

H J DELLAR
Joint Registrar