

# Compliance and Enforcement – Statement of Policy

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*Consultation paper on compliance and enforcement strategy (including maximum financial penalty), draft statutory instrument and rules*

This consultation will close on **26 October 2009**

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## 1. Executive Summary

- 1.1 The Legal Services Board (the “**LSB**”) is the organisation created by the Legal Services Act 2007 (the “**Act**”) and is responsible for overseeing legal regulators, (referred to as the Approved Regulators<sup>1</sup> in the Act) in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in the public interest; and that the interests of consumers are placed at the heart of the system. The Act gives the LSB and the Approved Regulators the same Regulatory Objectives<sup>2</sup> and a requirement to have regard to the Better Regulation Principles<sup>3</sup>. Compliance by the LSB and the Approved Regulators with the Regulatory Objectives, other requirements in the Act and other statutes will help to ensure that this mandate is achieved.
- 1.2 The Act also gives the LSB certain enforcement powers, and obliges it to make a Statement of Policy about how it will use them<sup>4</sup>. This consultation paper explains the strategy underpinning how the LSB may use its enforcement powers and the approach it is likely to take to using them in practice. The document also sets out draft rules relevant to enforcement as well as an initial impact assessment on how the enforcement powers are likely to affect different groups of people.
- 1.3 One of the powers that the Act gives the LSB is to set the maximum amount of financial penalty that it can impose on an Approved Regulator. This document therefore also consults on the level at which that maximum should be set. There is a separate initial impact assessment on the maximum financial penalty and a draft statutory instrument.
- 1.4 The LSB anticipates that it will acquire its enforcement powers on 1 January 2010. In future we will seek to review our compliance and enforcement strategy in the light of our other developing policies and our experience of applying it. In the meantime, therefore, the strategy and approach set out in this document is our interim position and we seek your views and comments.

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<sup>1</sup> Current Approved Regulators are listed at Part 1 of Schedule 4 of the Act

<sup>2</sup> The Regulatory Objectives are

- (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 such as are provided by authorised persons;
- (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.

<sup>3</sup> The five principles of good regulation are proportionality, accountability, consistency, transparency and targeting as set out in Section 3(3) of the Act

<sup>4</sup> See Section 49 of the Act

- 1.5 The deadline for written responses to this consultation is 5pm on **26 October 2009**. Information about how to make submissions is provided at Section 6 of this paper.

## 2. Statement of Policy – Compliance and Enforcement

### Introduction

- 2.1 The Act obliges<sup>5</sup> the LSB to make a Statement of Policy about the exercise of its enforcement powers of:
- performance targets and monitoring;
  - directions;
  - public censure;
  - financial penalties;
  - intervention directions; and
  - cancellation of designation as an Approved Regulators.
- 2.2 The Act also obliges the LSB to make a Statement of Policy about the cancellation of designation of a body as a Licensing Authority. However, as it is not anticipated that this power will be required until at least early 2011, this area will be consulted upon as part of the LSB's next policy consultation on Alternative Business Structures<sup>6</sup> ("**ABS**") later this year.
- 2.3 This Statement of Policy also includes a discussion about the level at which the LSB proposes to set the maximum financial penalty that it can impose on an Approved Regulator.
- 2.4 In preparing this Statement of Policy the LSB has had regard to the fact that it is an oversight regulator<sup>7</sup>. As an oversight regulator, the focus of our enforcement action will be on Approved Regulators and, in general, enforcing principles rather than specific rules. We consider that this means focussing primarily on the outcomes for consumers and those who are regulated by the Approved Regulator. This Statement of Policy also explains how the LSB will take into account the Better Regulation Principles and how it will have regard

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<sup>5</sup> See Section 49 of the Act

<sup>6</sup> Part 5 of the Act allows for alternative business structures to be established which will enable law firms to explore new ways of organising their businesses to be more cost effective, permit different kinds of lawyers and non-lawyers to work together, and allow for external investment

<sup>7</sup> See Section 49(3) of the Act

to the principle that it should only exercise its enforcement functions if the act or omission of the Approved Regulator is unreasonable<sup>8</sup>.

### **The LSB's Strategic Aims of the Compliance and Enforcement Policy**

- 2.5 The LSB's Business Plan<sup>9</sup> sets out its aim that improved regulatory performance will in turn lead to better access and outcomes so that:
- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases; and
  - cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.
- 2.6 The LSB considers that a credible and effective compliance and enforcement policy (including transparency about all forms of enforcement action, both informal and formal) provides an incentive for those being regulated to comply with their obligations since there are serious reputational as well as financial risks for non-compliance.
- 2.7 Section 3 of this paper set out the approach that the LSB proposes to use to encourage compliance by Approved Regulators. It will seek, when appropriate, to resolve issues on non-compliance informally with the Approved Regulator<sup>10</sup>. This should enable early resolution of a wide range of issues, some of which may be relatively minor. It may also enable resolution of more serious issues, saving resources for both the Approved Regulator and the LSB and producing a satisfactory outcome more quickly for consumers and those that are regulated by the Approved Regulator.
- 2.8 However, the LSB considers that its enforcement powers are important tools in enabling it and the Approved Regulators to comply with the Regulatory Objectives. The specific enforcement tools that the Act gives the LSB will help it to improve the performance of an Approved Regulator if its behaviour is inconsistent with one or more of the Regulatory Objectives and informal resolution has failed or is inappropriate. We will use an appropriate combination of those powers that we consider are most likely to lead to compliance. The Act only permits the most interventionist powers to be used when other measures have failed to produce the desired results.

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<sup>8</sup> See Section 49(4) of the Act

<sup>9</sup> [LSB Business Plan 2009/10 Paragraph 45](#)

<sup>10</sup> See Section 49(4) of the Act

2.9 The outcomes that the LSB seeks in its approach to compliance and enforcement are set out in its Business Plan. It wants the Approved Regulators to be seen as world leaders in the full range of their activities so that consumers will be confident that their advisors are proportionately regulated by bodies which:

- keep constantly modernising and updating registration and education requirements to reflect changing social and consumer needs and promote diversity in, and wider access to, the profession;
- maintain and enhance standards of professional conduct in the light of changing circumstances and best practice elsewhere;
- ensure that robust and independent systems of quality assurance are in place;
- themselves monitor and, where necessary, take appropriate enforcement action to ensure that professional standards are put into action at ground level; and
- are accessible and responsive to concerns put to them.

2.10 Compliance will also help to ensure that those who provide regulated activities (now and in the future) are confident that their regulators are:

- proportionate and consistent in their decision making, monitoring and enforcement activities;
- well-governed and cost-effective; and
- up to date in their professional thinking and management practice.

2.11 The LSB is committed to the Better Regulation Principles. In particular we will ensure that our decisions on compliance and enforcement are transparent, proportionate and consistent. We will target our enforcement on those areas that we judge to pose the greatest risk to achieving the Regulatory Objectives and, therefore, threaten most the achievement of the above outcomes for consumers and those being regulated.

2.12 Our approach to compliance and enforcement will have regard to the Regulators' Compliance Code<sup>11</sup> which aims to embed in regulators a risk-

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<sup>11</sup> <http://www.berr.gov.uk/files/file45019.pdf>

based, proportionate and targeted approach to enforcement. Over the course of 2010-11 we will develop a risk assessment process to enable us to concentrate resources on areas of Approved Regulator activity that need them most. In the meantime, we will assess each issue on a case by case basis using the above strategic framework as a guide. We will review our compliance and enforcement strategy in the light of our other developing policies and our experience of applying it.

**Question 1** - What are your views on the LSB's proposed compliance and enforcement strategy? If you think we should have other or additional aims, please say what you think they should be and explain why you think we should have them.



### 3. The LSB's Approach to Compliance and Enforcement Action

#### Introduction

3.1 This section of the document sets out the LSB's process that it will follow in deciding when to use its enforcement tools and which ones it is appropriate to use. It includes a discussion about the level at which to set the maximum financial penalty that the LSB may impose on an Approved Regulator. The LSB may in future supplement its Statement of Policy with guidance.

#### Background

3.2 The Act provides the LSB with a range of enforcement tools that it can use when it identifies that:

- an act or omission by an Approved Regulator has had or is likely to have an adverse impact on one or more of the Regulatory Objectives;
- when an Approved Regulator has not complied with any requirement under the Act (including a Direction by the LSB);
- when an Approved Regulator has failed to ensure its regulatory functions are not prejudiced by its representative functions; and
- when an Approved Regulator has failed to comply with practising fee rules.

3.3 The LSB is required to have regard to the Better Regulation Principles<sup>12</sup> and, from late 2009, will be bound by the requirements of the Statutory Code of Practice for Regulators which aims to embed the Hampton and Macrory principles into regulation (see Annex 1 for more details). The LSB must make a Statement of Policy on enforcement<sup>13</sup>.

3.4 The Act requires the LSB to "take account of the desirability"<sup>14</sup> of resolving matters informally. It must have regard to the principle that it should only take enforcement action when it considers that the act or omission of the Approved Regulator was unreasonable<sup>15</sup>.

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<sup>12</sup> See Section 3 of the Act

<sup>13</sup> See Section 49 of the Act

<sup>14</sup> See Section 49(4) of the Act

<sup>15</sup> See Section 49(4) of the Act

## Approach

- 3.5 The LSB intends to take into account best regulatory practice as well as the processes set out in the Act. Annex 2 sets out a diagrammatic representation of the process that the Act sets out for each enforcement tool other than the process relating to the cancellation of designation as a Licensing Authority. As mentioned at paragraph 2.2 above, this enforcement tool will be dealt with in one of our consultations on ABS.
- 3.6 For the avoidance of doubt, the LSB does not consider that it is appropriate to introduce an additional formal appeal stage at any point in the enforcement process. The Act sets out when Approved Regulators have a right to make representations, their right in certain circumstances to appeal to the court and the grounds for such an appeal. Introducing further (non-statutory) appeals would introduce delay and cost into the enforcement process. Section 4 of this paper sets out our proposals on oral and written representations. We propose to use these procedures for any oral or written representations that are permitted as part of the enforcement process.

### ***Monitoring and information gathering***

- 3.7 The LSB expects to gather information about Approved Regulator compliance from a number of different sources, including as part of its day to day work. For example:
- admission of non-compliance by act or omission (e.g. by failing to publish adequate data) by the Approved Regulator by proactive notification to the LSB;
  - information from other Approved Regulators or stakeholders;
  - monitoring of Approved Regulators under Section 31 of the Act (performance targets and monitoring);
  - outcomes from the review process that the LSB intends to develop to assess the performance of the Approved Regulators<sup>16</sup>;
  - issues that arise in discussions with Approved Regulators;
  - information from the regulated community or other stakeholders;
  - identification of issues through research and analysis;

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<sup>16</sup> [See the LSB's Business Plan 2009-10 at Section 5D](#)

- concerns raised by the Consumer Panel; and
  - information from regular reviews of Approved Regulators' performance.
- 3.8 The LSB will assess the information available and form a decision about whether it requires more information to enable it to make an initial assessment about whether to proceed with any type of enforcement action (either informal or formal). If it needs more information it may use its formal information gathering powers<sup>17</sup> to obtain it.
- 3.9 Once the LSB considers it has all the information it needs, the LSB will decide whether (and if so what) action is appropriate. In doing so, it will take into account some or all of the following:
- the risk that is posed to one or more of the Regulatory Objectives and Professional Principles<sup>18</sup>, and the impact of that risk;
  - its enforcement strategy;
  - its position as an oversight regulator;
  - best regulatory practice including the requirement that its activities must be proportionate, consistent and targeted only at cases in which action is needed;
  - whether it considers that the Approved Regulator's act or omission has been unreasonable through being for example:
    - a contravention of a requirement in the Act or other statutes (such as competition law) including a failure to act compatibly with the Regulatory Objectives;
    - a failure to take account of the Better Regulation Principles or other best regulatory practice;

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<sup>17</sup> See Section 55 of the Act

<sup>18</sup> Section 1(3) of the Act states that 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;
- (e) that the affairs of the client should be kept confidential.

- an act or omission which has taken place over a long time or which is part of a series of the same or similar actions or which appears to be deliberate or vexatious or which follows a failure to resolve the matter informally in a way that the LSB considers satisfactory;
- the seriousness of the act or omission and the impact (or likely impact) of it on consumers and those being regulated);
- the desired outcome for consumers of taking action and whether that outcome is likely to be significantly beneficial compared to the impact of not taking action;
- the likely impact on those being regulated by the Approved Regulator and the likely impact on the wider provision of legal services;
- whether the resource requirements needed are proportionate to achieving the desired results; and
- any other matters that it appears appropriate to take into account.

**Question 2** - What are your views on the matters that the LSB proposes to take into account in deciding whether (and if so what) action is appropriate? In particular, what are your views on how the LSB should judge whether an Approved Regulator's acts or omissions have been unreasonable?

3.10 If the LSB decides that the matter should be pursued it may:

- seek to resolve the matter informally with the Approved Regulator; or
- pursue one or more of the other enforcement tools.

### **Stage 1 – Consideration of informal resolution**

3.11 The Act requires the LSB to take account of the desirability of resolving matters informally<sup>19</sup>. However informal resolution may not be appropriate in all cases, for example if the impact of the issue is serious and widespread or in other circumstances that the LSB considers are not suitable for informal resolution.

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<sup>19</sup> See Section 49(4) of the Act

3.12 Wherever the LSB becomes aware of an issue with an Approved Regulator then it will normally notify the Approved Regulator promptly of the issue and will expect:

- acknowledgement of the notification within 4 working days and including in the acknowledgement a time line for assessment of the issue within 20 further working days unless explicitly agreed on a case by case basis with the LSB. (The LSB will not normally consider that fitting the timetable of pre-arranged governance meetings within Approved Regulators is a reason for extending the deadline); and
- a resolution of the issue or a detailed proposal for remedying the issue within what the LSB considers to be a reasonable time, to be provided to the LSB within the assessment time line.

3.13 Resolution of the issue can include a full explanation to the LSB's reasonable satisfaction of why the issue as presented shows a misunderstanding of the facts which have been presented to it.

3.14 In line with Freedom of Information legislation and good practice generally on regulatory transparency, the LSB would expect all communications to be public except in the most exceptional circumstances and/or to the limited extent that Data Protection legislation requires otherwise.

**Question 3** - What are your views on the informal resolution process and the timescales set out above? If you have alternative suggestions please say what they are and why you consider they are more appropriate.

**Question 4** - What should the LSB publish about informal resolution of an issue? Will publication help to spread learning in the regulated community or do you consider that it may hamper informal resolution of an issue? Are there alternatives that you consider would be more appropriate? Please explain your answer.

3.15 The LSB does not consider that the Act requires it to seek an informal resolution at each stage of its enforcement process, before it escalates the type of enforcement action. If the first attempt at informal resolution does not achieve an outcome that, in the LSB's judgement, is appropriate, then it is likely that the formal enforcement action will be taken. However, it will always be open to the Approved Regulator to propose a way to settle an issue. Making such a proposal does not fetter the LSB's discretion to continue with enforcement action (such as directions or performance measurement to

ensure continued compliance, or a financial penalty). However the Approved Regulator's actions in proposing to settle the issue are likely to be taken into account by the LSB in deciding whether, and if so what, further action is needed.

## **Stage 2 – Enforcement Action**

3.16 The Act provides the LSB with a variety of enforcement tools:

- performance targets and monitoring;
- directions;
- public censure;
- financial penalties (in some circumstances);
- intervention (only if the above measures cannot adequately address the issue); and
- cancellation of designation as an Approved Regulator and/or Licensing Authority (only if the above measures cannot adequately address the issue).

3.17 This section describes each of the enforcement tools (other than cancellation of designation as a Licensing Authority, which will be dealt with in one of our consultation papers on ABS) in more detail and sets out the circumstances in which the LSB is likely to consider it appropriate to use each of them. However, each case will be considered on its merits and the LSB will decide what type of enforcement action is proportionate and appropriate, in the circumstances.

3.18 In all cases (subject to Data Protection and Freedom of Information requirements), the LSB will publish relevant documentation, including the reasons for its decisions, notices, statements, advice and representations received on its website.

### ***Performance targets and monitoring (Section 31)***

3.19 The Act enables the LSB to set one or more performance targets relating to performance by an Approved Regulator of any of its regulatory functions or to direct an Approved Regulator to set its own performance target. Performance targets can be set if an act or omission (or a series of them) by an Approved Regulator has had or is likely to have an adverse impact on one or more of

the Regulatory Objectives and it is appropriate in all the circumstances. The Act sets out a process that the LSB must follow to impose performance targets, which includes a requirement for a 28 day consultation period on the proposed performance target. An overview of the performance targets and monitoring process is set out in diagrammatic form at Annex 2.

*The LSB's aim in using performance targets and monitoring*

- 3.20 Performance targets are likely to be used when an investigation by the LSB has identified the need for action to improve performance and raise standards or when an Approved Regulator is failing or is at risk of failing in a specific area with a clear impact (or likely impact) on the Regulatory Objectives. This form of enforcement may be combined with or precede other forms of enforcement. For example the greater certainty of delivery given by a direction may be necessary to underpin a target.
- 3.21 The LSB will always consider the facts of the case as to whether it is appropriate to combine this form of enforcement with directions and/or public censure. A combined approach is likely to produce the maximum impact on the Approved Regulator, leading to a much quicker route to compliance and the achievement of the desired outcomes. It would also have a greater general deterrence effect. It would also enable quicker escalation (if appropriate) to more severe forms of enforcement such as a financial penalty.

**Question 5** - What are your views on how performance targets could be used?

***Directions (Section 32)***

- 3.22 Directions can be given if an act or omission (or a series of them) by an Approved Regulator has had or is likely to have an adverse impact on one or more of the Regulatory Objectives, if an Approved Regulator has failed to comply with any statutory requirement or if an Approved Regulator has failed to ensure the statutory requirements for the independence of its regulatory and representative functions.
- 3.23 The Act<sup>20</sup> sets out the process that the LSB must follow in giving directions. This includes giving the Approved Regulator not less than 14 days to make representations, followed by a requirement for the LSB to seek advice from the Lord Chancellor, the Office of Fair Trading (the “OFT”), the Consumer Panel, the Lord Chief Justice and other persons the LSB considers it reasonable to consult. The advice from all these bodies has to be given to the Approved Regulator who must be given not less than 28 days to make

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<sup>20</sup> See Schedule 7 of the Act

representations on them. The LSB can then make a decision whether to proceed with directions. An overview of the directions process is set out in diagrammatic form at Annex 2. Details about the rules that the LSB is required to make in respect of directions are set out in Section 4.

- 3.24 Breach of directions by the Approved Regulator may lead to the imposition of a financial penalty by the LSB.
- 3.25 Failure to follow directions may be enforced by the High Court.

*The LSB's aim in using directions*

- 3.26 Directions are likely to be used when the LSB wants to ensure that specific actions are carried out by an Approved Regulator in order to rectify an act or omission, often within a defined timescale. Directions may be combined with or precede other forms of enforcement. It is possible that directions may be used in lieu of a financial penalty if, in the LSB's judgement and having considered all the circumstances of the particular case, it considers that it is appropriate for the Approved Regulator to be directed to spend money on a particular issue in order to, for example, benefit consumers and/or those being regulated. However, this type of approach may also be considered in conjunction with a financial penalty.

**Question 6** - What are your views on how directions should be used?

**Question 7** - What are your views on using directions to require an Approved Regulator to spend money on a specific issue?

***Censure (Section 35)***

- 3.27 The Act enables the LSB to censure an Approved Regulator if an act or omission (or a series of them) by the Approved Regulator has had or is likely to have an adverse impact on one or more of the Regulatory Objectives and it is appropriate in all the circumstances.
- 3.28 The Act states that the LSB must give the Approved Regulator not less than 28 days to make representations on a draft statement. A further 28 day period must be allowed if the LSB proposes to change the draft statement after considering the Approved Regulator's representations. An overview of the censure process is set out in diagrammatic form at Annex 2. Once the



representation process is complete, the LSB can publish the statement censuring the Approved Regulator.

*The LSB's aim in using censure*

- 3.29 Censure is likely to be used (either on its own or combined with other forms of enforcement) to draw particular attention to the act or omission by the Approved Regulator. The aim of the censure statement is to change the behaviour of the Approved Regulator.
- 3.30 The LSB would always take into account, both in using censure and in its general provision of information about enforcement proceedings, the possible perceptions that consumers and those being regulated would be given, recognising that some forms of publicity may damage confidence in regulation and so lead to less satisfactory outcomes.

**Question 8** - What are your views on how censure should be used?

***Financial penalties (Section 37)***

- 3.31 Financial penalties can be applied if an Approved Regulator has failed to comply with internal governance rules, directions by the LSB or rules controlling practising fees, and the LSB considers that it is appropriate in all the circumstances of the case.
- 3.32 Before imposing a financial penalty, the LSB must give a notice to the Approved Regulator stating that it proposes to impose a penalty and the amount of the penalty. The notice must also specify the failure to which the penalty relates, any other facts that justify the imposition of a penalty and the amount and a period of at least 21 days to make representations. The LSB must consider any representations from the Approved Regulator before it imposes the penalty and gives notice to that effect. An overview of the financial penalties process is set out in diagrammatic form at Annex 2. Details about the draft statutory instrument that the LSB proposed to make in respect of the maximum amount of a financial penalty are set out in Section 4.
- 3.33 Appeals against financial penalties may be made to the High Court on grounds and within the timescale specified in Section 39 of the Act.
- 3.34 Penalties are paid to the Treasury, not to the LSB.

*LSB's aim in using financial penalties*

- 3.35 Financial penalties are likely to be used when, in the LSB's judgement, it is appropriate to impose one to try to change the behaviour of the Approved Regulator by penalising the specific act or omission identified. A further aim is to deter future non-compliance by the Approved Regulator on which the penalty is imposed and on other Approved Regulators.
- 3.36 The LSB believes that it is important that those who pay for the Approved Regulator through their practising fees should be able to influence the Approved Regulator's behaviour, including its approach to compliance. The circumstances in which a penalty can be imposed are serious. It is likely, therefore, that the LSB will consider it reasonable in the circumstances that the members of an Approved Regulator should have to pay (at least in part) for their Approved Regulator's failure to comply. If there is more than one Approved Regulator for a reserved legal activity and the authorised person can therefore switch to another Approved Regulator, this approach may also provide an incentive to Approved Regulators to improve their compliance.

**Question 9** - What do you think the LSB's aims should be in imposing financial penalties?

*Maximum amount of a financial penalty*

- 3.37 The Act gives the LSB the power to set the maximum amount of a financial penalty. The LSB considers that, to act as a credible deterrent, the maximum penalty has to be able to have a significant impact on the Approved Regulator. In other regulatory environments such as utility regulation and competition law, the maximum penalty is often set at 10% of UK turnover. For large corporations, this can be a significant amount of money and large financial penalties have been imposed, in some cases, several million pounds. A high maximum level gives a regulator the flexibility to exercise its discretion and judgement in setting a penalty in a way that enables it to take into account the likely wide variation in the outcomes of investigations that it will encounter.
- 3.38 The concept of "turnover" is not necessarily directly applicable to an Approved Regulator. An equivalent measure might be an Approved Regulator's total income (or equivalent) for the year in which the act or omission took place. If the LSB set the maximum financial penalty at 10% of an Approved Regulator's total annual income, this would result in a maximum level of penalty of around £10m for the Law Society and around £1.5m for the Bar Council. If the maximum penalty were able to be passed through to solicitors

by being added to the practising fee, it would increase by approximately £95 for that particular year.

3.39 However, different Approved Regulators set out their accounts in different ways and the concept of “total income” is likely to be difficult to define in a way that is consistent for all Approved Regulators. That would mean that there would not be an appropriate level of certainty about the maximum penalty to which an Approved Regulator might be exposed. In addition, it is possible that this approach might contravene Section 29 of the Act which prohibits the LSB from exercising any of its functions in relation to any representative function of an Approved Regulator, except in specific circumstances.

3.40 In addition, the total is a relatively low amount when considered against the possible impact on consumers, or those being regulated, of an Approved Regulator’s actions, particularly if it is possible to determine actual financial loss caused. 10% of an Approved Regulator’s total annual income is also a low figure when compared to the value of the contribution to GDP from legal services of around £23.25bn<sup>21</sup>. It may therefore be more appropriate to set the maximum penalty at a much higher level (either as an absolute figure or as a percentage) to reflect the value and importance of the services being regulated.

3.41 The LSB considered whether it might be appropriate to set the maximum penalty at a percentage of the practising fee payable by individuals authorised to carry on reserved legal activities. The LSB views the threat of a large financial penalty as a significant incentive on an Approved Regulator to ensure compliance and if in future an Approved Regulator was funded in a way that did not require a practising fee, that would render the LSB unable to impose a financial penalty. An Approved Regulator that charged a small practising fee might have behaved in a way that the LSB considered warranted a larger penalty than a defined percentage of the practising fee would allow. In addition, using the practising fee to set the maximum level of a financial penalty may not be possible if an Approved Regulator only regulated entities (rather than individuals).

3.42 The LSB therefore proposes setting a maximum penalty of the greatest of:

- an amount equal to £250 per individual that the Approved Regulator regulates;

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<sup>21</sup> Office for National Statistics (ONS), Annual Business Inquiry (ABI), figures for 2006; <http://www.statistics.gov.uk/abi>

- an amount equal to £5,000 per entity that the Approved Regulator regulates; or
- £10 million.

3.43 Currently, this formula could result in a maximum penalty of around £28 million<sup>22</sup> for the Law Society and £10 million<sup>23</sup> for the Bar Council. The LSB considers that this is an appropriate formula by which to calculate a maximum level of a penalty that takes into account the fact that the Approved Regulator may regulate individuals and/or entities in the future. It also enables the LSB to impose a large penalty on an Approved Regulator that does not regulate a large number of individuals or entities, if it considered it appropriate in all the circumstances of the particular case.

3.44 In some cases (for example if the penalty is for an act of omission concerning internal governance rules (Section 30 of the Act)), it may be appropriate for the LSB to specify how much of the penalty should be apportioned to the regulatory and representative arms of the Approved Regulator. It would not be appropriate for a failure to enable a regulatory arm to do its job properly to lead to that regulatory arm being further disadvantaged by a budgetary reduction.

3.45 If the LSB is investigating a number of breaches by an Approved Regulator as separate investigations (for example one investigation into a breach of directions concerning internal governance rules and a separate investigation into a breach of rules controlling practising fees), it may be appropriate for each investigation to impose a separate penalty, in each case of up to the maximum amount.

**Question 10** - What are your views on what the maximum amount of a financial penalty should be?

**Question 11** - Is the formula proposed the right one or is there another more appropriate measure?

**Question 12** - Can you identify any circumstances when the proposed formula may be inappropriate to use?

<sup>22</sup> [The consolidated report and financial statements for The Law Society as at 31 December 2008](#) state (at page 5) that there were 112,246 solicitors holding practising certificates as at March 2009. If you multiply this figure by £250 you reach approximately £28 million.

<sup>23</sup> The number of individuals that the Bar Council currently regulates is approximately 15,000. 15,000 multiplied by £250 equals £3.75 million. This means that the £10 million threshold would apply.

**Question 13** - What are your views on whether the maximum should be linked to the total value of the services being regulated?

**Question 14** - What are your views on the amounts suggested in the formula? What other amounts do you think might be appropriate, bearing in mind the need for a financial penalty to act as a credible deterrent? Please explain your answer.

*Process for setting a penalty*

- 3.46 The LSB will use its reasonable discretion in setting the level of a financial penalty. However, the LSB does not consider that it is appropriate to set out in advance the exact mechanism by which it will decide on the appropriate level of a penalty since this is likely to vary on a case by case basis and a prescriptive approach is unlikely to be able to be applied in all cases.
- 3.47 The LSB will consider whether there are any aggravating factors when it sets the level of the penalty. Aggravating factors it may consider could include (but not be limited to) the seriousness of the failure, the extent to which it was deliberate or reckless<sup>24</sup>, the impact on consumers and whether the actions have resulted in an actual or potential loss to anyone (for example by preventing them from participating in certain types of business opportunities), the duration of the act or omission and whether there was a lack of co-operation by the Approved Regulator with the LSB's investigation.
- 3.48 The LSB will also consider whether any mitigating factors should reduce the level of penalty. These could include (but not be limited to) whether the failure was accidental in nature or the result of a genuine misunderstanding, the presence of good controls or procedures, and the extent of impact on the Regulatory Objectives, the Professional Principles and consumers, co-operation by the Approved Regulator with the investigation, whether directions have been issued that require the Approved Regulator to spend money on a particular issue, and whether there were any genuine proposals by the Approved Regulator to resolve the matter during the course of the investigation.
- 3.49 Finally, the LSB will consider whether, in all the circumstances, the amount of the proposed penalty is reasonable. In doing this, it will take into account the

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<sup>24</sup> See Section 49(5) of the Act

resources of the Approved Regulator. It will also check that it does not exceed the maximum amount.

**Question 15** - What are your views on the process that the LSB proposes to use to arrive at an appropriate amount for a financial penalty?

**Question 16** - What are your views on the examples of the factors that the LSB may take into account when deciding what level of penalty is appropriate? What other factors do you consider that the LSB should take into account? Please explain your answer.

### ***Intervention Directions (Section 41)***

- 3.50 An intervention direction is a direction that an Approved Regulator's regulatory function is to be exercised by the LSB or a body approved by it. An Approved Regulator must comply with such a direction. It can only be used when the LSB is satisfied that the matter being investigated cannot be adequately addressed by performance targets and monitoring, directions, censure and/or financial penalties<sup>25</sup>.
- 3.51 Intervention directions can be given if an act or omission (or a series of them) by an Approved Regulator has had or is likely to have an adverse impact on one or more of the Regulatory Objectives and it is appropriate to give the intervention direction in all the circumstances of the case.
- 3.52 The Act (Section 42 and Schedule 8) sets out the procedure that the LSB must follow. This includes giving a warning notice to the Approved Regulator and considering representations from it, obtaining advice from the Lord Chancellor, OFT, Consumer Panel, Lord Chief Justice and other appropriate consultees.
- 3.53 The Act also makes provision for a judge to issue a warrant for entry and search of an Approved Regulator's premises and seizure of written and electronic records<sup>26</sup>. An overview of the intervention directions process is set out in diagrammatic form at Annex 2. Details about the rules that the LSB is required to make in respect of intervention directions are set out in Section 4.

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<sup>25</sup> See Section 41(3) of the Act

<sup>26</sup> See Section 42(3) of the Act

- 3.54 The High Court may enforce an intervention direction. An intervention direction can be revoked in certain circumstances<sup>27</sup>.  
*The LSB's aim in using intervention directions*
- 3.55 The LSB regards the use of intervention directions (with the related powers to enter premises under warrant and seize documents) as an extreme measure which is most likely to be used in serious circumstances. These circumstances are likely to be where there has been a serious and persistent act or omission by the Approved Regulator that poses a very real threat to one or more of the Regulatory Objectives or if, for whatever reason, the Approved Regulator faces a risk to its organisational viability which puts in jeopardy the continuing effective discharge of its regulatory functions. It is also likely that the act or omission would be having a demonstrable harmful impact on consumers and/or those regulated by the Approved Regulator. It may also be appropriate to use this power if an Approved Regulator became insolvent.
- 3.56 The aim of using intervention directions would be to stop the Approved Regulator from being able to regulate, to obtain any documents that were necessary for the person who would be given the Approved Regulator's former functions to carry them out effectively and to prevent further harm being caused to consumers or those being regulated.

**Question 17** - What are your views on the LSB's aims for using intervention directions? Are there other circumstances when you consider that the exercise of this power might be appropriate?

### ***Cancellation of designation as an Approved Regulator***

- 3.57 There are two circumstances in which an Approved Regulator's designation can be cancelled:
- the first is that an Approved Regulator can ask the LSB to make a recommendation to the Lord Chancellor cancelling its designation. The LSB is consulting on rules (see Section 4) setting out the form and manner in which such an application must be made and the prescribed fee<sup>28</sup>. The LSB does not regard this power as part of its enforcement tools. However, it will try to ensure that appropriate arrangements have been put in place by the Approved Regulator before the LSB makes any recommendation. The Lord Chancellor can decide not to cancel the designation; and

<sup>27</sup> See Schedule 8 Part 2 of the Act

<sup>28</sup> See Section 45(3) of the Act

- the second is in relation to enforcement action. The LSB can make a recommendation to the Lord Chancellor if an act or omission (or a series of them) by an Approved Regulator has had or is likely to have an adverse impact on one or more of the Regulatory Objectives and it is appropriate to give the intervention direction in all the circumstances of the case. The Lord Chancellor may (in accordance with a recommendation by the LSB) cancel an Approved Regulator’s designation in relation to some or all of the reserved activities which it regulates. The Lord Chancellor cannot cancel a designation in the absence of a recommendation from the LSB. However, the Lord Chancellor is not obliged to accept the LSB’s recommendation.

3.58 This power can only be used when the LSB is satisfied that the matter being investigated cannot be adequately addressed by performance targets and monitoring, directions, censure, financial penalties and/or an intervention direction<sup>29</sup>.

3.59 The Act (at Sections 45 to 48 and at Schedule 9) sets out the procedure that the LSB must follow. This includes giving a warning notice to the Approved Regulator and considering representations from it, obtaining advice from the Lord Chancellor, OFT, Consumer Panel, Lord Chief Justice and other appropriate consultees. An overview of the cancellation process is set out in diagrammatic form at Annex 2. Details about the rules that the LSB is required to make in respect of cancelling an Approved Regulators designation are set out in Section 4.

*The LSB’s aim in cancelling the designation of an Approved Regulator*

3.60 As with intervention directions, the LSB regards a decision to recommend cancellation of an Approved Regulator’s designation as extremely serious. It is likely only to be used in exceptional circumstances when, as the Act recognises, all other attempts to resolve an act or omission satisfactorily have failed. In using this power, the LSB’s aim would be to try to ensure as smooth a transition as possible to the new body taking over regulation of the former Approved Regulator’s members. The LSB would also try to ensure appropriate provision of information to the public in order to reassure consumers about those providing legal advice to them.

**Question 18** - What are your views on the LSB’s aims for cancelling the designation of an Approved Regulator? Are there other circumstances when you consider that the exercise of this power might be appropriate?

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<sup>29</sup> See Section 45(6) of the Act



## 4. Enforcement Rules

### Rules

- 4.1. The Act requires the LSB to make specific rules in relation to some of the enforcement procedures that it can invoke under Sections 37 to 45 of the Act. The rules that are required cover the procedures of directions, financial penalties, intervention directions and cancellation of designation. Details of the LSB's proposals in respect of each of these rules are set out below.

#### *Directions Rules*

- 4.2. Section 32 of the Act allows the LSB to impose directions on an Approved Regulator. In determining whether the LSB should impose a direction, the Act provides that the LSB should take account of certain oral and written representations made by the relevant Approved Regulator. In doing this, paragraphs 2(5) and 10(3) of Schedule 7 of the Act explicitly require the LSB to make rules governing the making of such oral and written representations.
- 4.3. A draft of the rules that the LSB proposes to make to govern the making of oral and written representations is set out at Annex 3.

#### *Financial Penalty Rules*

- 4.4. Section 37(4) of the Act states that the LSB must make rules prescribing the maximum amount of a penalty that can be imposed under Section 37.
- 4.5. These rules can only be made with the consent of the Lord Chancellor<sup>30</sup> and must be made by way of a statutory instrument<sup>31</sup>. A draft of the proposed statutory instrument is set out at Annex 4.

**Question 19** - Do you think the draft statutory instrument is appropriate? If not, please say why. If you think that it should be changed, it would be helpful if you could suggest drafting changes and explain the reasons for them.

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<sup>30</sup> See Section 37(5) of the Act

<sup>31</sup> See Section 204(2) of the Act

4.6. Section 38(2) of the Act provides that before imposing a penalty on an Approved Regulator, the LSB must consider any representations that are duly made. Though the Act places the LSB under no obligation to make rules governing the making of these oral and written representations, the LSB proposes using the same rules that it is proposing in respect of oral and written representations relating to directions. As referred to above, a draft of these rules is set out at Annex 3.

### ***Intervention Directions Rules***

4.7. Section 41 of the Act allows the LSB to impose intervention directions on an Approved Regulator. The Act provides that the LSB must make certain rules in relation to the processes it undertakes in deciding whether to make an intervention direction.

4.8. The rules that the LSB is required to make are as follows:

- Section 41(5) of the Act – The LSB must make rules as to the persons it may nominate for the purposes of exercising the regulatory function of an Approved Regulator pursuant to an intervention direction;
- Section 42(10) of the Act – The LSB must make rules as to the persons it may nominate to apply for a warrant to enter and search premises;
- Paragraphs 2(5), 10(5) and 21(5) of Schedule 8 – The LSB must make rules governing the making of oral and written representations; and
- Paragraph 13(2)(a) of Schedule 8 – The LSB must make rules in relation to the form and manner of an application by an Approved Regulator to revoke an intervention direction.

4.9. A draft of the rules that the LSB proposes to make in relation to Sections 41(5) and 42(10) of the Act is set out at Annex 5.

4.10. In relation to the oral and written representation rules required under paragraphs 2(5) and 10(5) of Schedule 8 of the Act, the LSB proposes using the same rules that it is proposing in respect of oral and written representations relating to directions. As referred to above, a draft of these rules is set out at Annex 3.

4.11. A draft of the rules that the LSB proposes to make in relation to applications by an Approved Regulator to revoke an intervention direction is set out at Annex 6. These rules also include the rules that the LSB proposes to make in

relation to the making of oral and written representations under paragraph 21(5) of Schedule 8.

### ***Cancellation of Designation Rules***

- 4.12. Section 45 of the Act provides that the Lord Chancellor may by order cancel a body's designation as an Approved Regulator in accordance with a recommendation by the LSB. The Act provides that the LSB can make such recommendation as part of its enforcement powers (in which case Section 45(5) must be satisfied<sup>32</sup>) or if an Approved Regulator applies to the LSB for its designation to be cancelled. The Act provides that the LSB must make certain rules in relation to the processes it undertakes in deciding whether to make a recommendation to the Lord Chancellor.
- 4.13. The rules that the LSB is required to make are as follows:
- Section 45(3) – The LSB needs to prescribe rules as to the form and manner of an application by an Approved Regulator to cancel a designation. These rules must specify the amount of the “prescribed fee” and must be made with the consent of the Lord Chancellor. Though this is not technically an enforcement tool, the LSB considers it reasonable to propose these rules as part of this consultation paper;
  - Section 48(9) - The LSB must make rules as to the persons it may nominate to apply for a warrant to enter and search premises; and
  - Paragraphs 2(5) and 9(5) of Schedule 9 – The LSB must make rules governing the making of oral and written representations.
- 4.14. A draft of the rules that the LSB proposes to make in relation to Section 45(3) of the Act is set out at Annex 7. In relation to the “prescribed fee”, as mentioned in our consultation paper “Designating new approved regulators and approving rule changes”, we would propose adopting the same methodology as that which is used for calculating the “prescribed fee” for bodies applying to be an Approved Regulator<sup>33</sup>.

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<sup>32</sup> Section 45(5) provides that the LSB may recommend an order cancelling a body's designation as an Approved Regulator if it is satisfied: (a) that an act of omission of an Approved Regulator (or a series of such acts or omissions) has had, or is likely to have, an adverse impact on one or more of the Regulatory Objectives; and (b) that it is appropriate to cancel the body's designation in relation to the activity or activities in question in all the circumstances of the case (including in particular the impact of cancelling the designation on the other Regulatory Objectives).

<sup>33</sup> See paragraph 3.7 of the LSB Consultation Paper “Designating new approved regulators and approving rule changes”

[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/2009/pdf/210709.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/210709.pdf)

- 4.15. A draft of the rules that the LSB proposes to make in relation to Section 48(9) of the Act is set out at Annex 8.
- 4.16. In relation to the oral and written representation rules required under paragraphs 2(5) and 9(5) of Schedule 9 of the Act, the LSB proposes using the same rules that it is proposing in respect of oral and written representations relating to directions. As referred to above, a draft of these rules is set out at Annex 3.

### **Your comments**

- 4.17. Specific questions have been inserted into the draft rules contained in the Annexes. However, you are invited to comment generally on the LSB's approach and on the content of the proposed rules.

## 5. Initial Impact Assessments

- 5.1. This section contains two initial impact assessments. These are based on the Ministry of Justice template for impact assessments. The first is for the overall Statement of Policy on compliance and enforcement. The second is specifically on financial penalties.

### IMPACT ASSESSMENT 1 - Initial impact assessment of enforcement strategy

#### *Introduction*

- 5.2. The LSB is undertaking an initial impact assessment on the requirements imposed by it under the Act to make a Statement of Policy about its enforcement powers. The overall impact will depend on the extent of compliance by those the LSB regulates (the Approved Regulators). We are however keen to listen to other views about the impact of these changes on existing Approved Regulators and potential Approved Regulators. We would therefore welcome the highlighting of additional evidence and analysis regarding these issues to assist us in developing a final impact assessment later this year. A separate initial impact assessment has been published on the LSB's powers to impose financial penalties on Approved Regulators.

#### *What is the problem under consideration? Why is intervention necessary?*

- 5.3. The Act requires the LSB to publish a Statement of Policy about the enforcement powers given to it under Sections 31, 32, 35, 41, 45 and 76 of the Act. In addition, the Act requires the LSB to make rules about the exercise of certain enforcement powers. Making the Statement of Policy and associated rules will enable the LSB to carry out enforcement activities to ensure compliance by the Approved Regulators that it oversees with the Regulatory Objectives in the Act. A separate initial impact assessment has been published for the LSB's powers to impose financial penalties.

#### *What are the policy objectives and the intended effects?*

- 5.4. The policy objectives and intended effects are that improved regulatory performance will in turn lead to better access and outcomes so that:
- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases;

- cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

***What policy options have been considered? Please justify any preferred option***

- 5.5. Do nothing - this is not an option – the LSB must publish this Statement of Policy and make these rules before it acquires its full powers. It is anticipated that this will be on 1 January 2010.
- 5.6. Statement of Policy and rules as drafted for consultation. The Act gives the LSB its enforcement powers. The LSB considers it reasonable to make a Statement of Policy as to how it will use these powers if it has to.

***When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?***

- 5.7. In future we may review our compliance and enforcement strategy in the light of our other developing policies and our experience of applying it. This policy may also be the subject of review as part of the LSB's plans to review the performance of the Approved Regulators. However, this will be subject to further consultation in due course. The LSB intends to publish information about both its informal and formal enforcement action. Over time, this should enable a better assessment of the costs and benefits of the policy.

*Annual costs*

- 5.8. One-off (transition): £ negligible.
- 5.9. Average annual cost (excluding one-off): £ negligible.

*Annual benefits*

- 5.10. One-off: £ negligible.
- 5.11. Average annual benefit: £ negligible.

***What is the geographic coverage of the policy/option?***

- 5.12. England and Wales.

***On what date will the policy be implemented?***

- 5.13. It is anticipated that this will be 1 January 2010 when the LSB takes on its full powers under the Act.

***Which organisation will enforce the policy?***

5.14. The LSB.

***Does enforcement comply with Hampton principles?***

5.15. Yes.

***Will implementation go beyond minimum EU requirements?***

5.16. Yes. EU requirements do not require the regulatory framework set out in the Act.

***What is the value of the proposed offsetting measure per year?***

5.17. Nil.

***What is the value of changes in greenhouse gas emissions?***

5.18. Nil.

***Will the proposal have a significant impact on competition?***

5.19. No.

***Annual cost (£-£) per organisation (excluding on-off)***

5.20. The costs of this policy are not expected to add to the overall cost of compliance by Approved Regulators. If a penalty is imposed this may be passed through to those that the Approved Regulator regulates.

5.21. Micro: n/a                      Small: n/a                      Medium: n/a                      Large: n/a

***Are any of these organisations exempt?***

5.22. n/a.

***Impact on Admin Burdens Baseline (2005 Prices)***

5.23. Increase of £: approximately nil.

5.24. Decrease of £: approximately nil (although potential for small decrease).

5.25. Net Impact £: approximately nil.

## ***Evidence Base***

- 5.26. We have undertaken an initial impact assessment of the policy on financial penalties and the maximum amount of a penalty. We consider that the cost of these changes is significantly below the generally accepted threshold of £5 million costs, below which an impact assessment is not necessary. However, we believe that in setting out how we have considered the various elements of the impact assessment will help us consult on both our proposals and our assessment of their impact.
- 5.27. Note that the LSB is an oversight regulator. Its enforcement policy is directed at the Approved Regulators that it regulates, not on those (such as solicitors or barristers) that they regulate.

### *Competition*

- 5.28. We expect our enforcement strategy and processes to have a positive effect on competition. Compliant Approved Regulators should lead to a regulatory framework which enables providers of legal services to innovate and develop services that better reflect the needs of consumers.

### *Small Firms Impact Test*

- 5.29. The LSB will take a proportionate approach to regulating smaller Approved Regulators to ensure the cost of compliance is not too burdensome.

### *Legal Aid*

- 5.30. The enforcement policy will support and enhance the delivery of the Regulatory Objectives and as such will support the legal aid market through effective competition; better focus on consumers and proportionate regulation.

### *Race/Disability/Gender equalities*

- 5.31. Because the LSB is an oversight regulator there is no direct impact on individuals. However, if the LSB achieves its intended outcomes, there will be a general improvement in the standard of regulation and the approach taken to it which we would expect to have a positive impact generally on the provision of legal services to all consumers, and to provide increased opportunities for all groups of those being regulated.

### *Human Rights*

- 5.32. There are specific requirements on the LSB to make rules concerning oral and written representations that can be made about proposed enforcement action. The LSB must consider the representations made. In addition, in some



instances, the Act provides for an appeal to the High Court against decisions taken by the LSB.

#### *Rural Proofing*

- 5.33. There has been some speculation that liberalisation of the legal services market may lead to High Street practitioners closing. This is of particular concern in rural areas. However, the LSB's enforcement policy is not expected to have a specific impact on rural areas.

#### *Sustainability, carbon emissions, environment and health*

- 5.34. There is no impact expected on sustainability, carbon emissions, environment and health.

### **IMPACT ASSESSMENT 2 - Initial impact assessment of financial penalties**

#### ***Introduction***

- 5.35. The LSB is undertaking an initial impact assessment on the requirements imposed by it under the Act to make a Statement of Policy about its powers to impose financial penalties on Approved Regulators and the requirement to set a maximum financial penalty that it can impose. The overall impact will depend on the extent of compliance by the Approved Regulators. We are however keen to listen to other views about the impact of these changes on existing Approved Regulators and potential Approved Regulators. We would therefore welcome the highlighting of additional evidence and analysis regarding these issues to assist us in developing a final impact assessment later this year.

#### ***What is the problem under consideration? Why is intervention necessary?***

- 5.36. The Act gives the LSB the power to impose financial penalties on Approved Regulators in some circumstances. The Act (Section 49) requires the LSB to publish a Statement of Policy about its enforcement powers. This initial impact assessment concerns the powers under Section 37 of the Act, which sets out the circumstances in which the LSB can impose a financial penalty and requires (Section 37(4) of the Act) the LSB to make rules prescribing the maximum amount of a penalty that can be imposed. It should be read in conjunction with the impact assessment on the LSB's other enforcement powers.

***What are the policy objectives and the intended effects?***

- 5.37. The policy objectives and intended effects are that improved regulatory performance will in turn lead to better access and outcomes so that:
- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases;
  - cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

***What policy options have been considered? Please justify any preferred option***

- 5.38. Do nothing - this is not an option – the LSB must publish this Statement of Policy and make these rules before it acquires its full powers. It is anticipated that this will be on 1 January 2010.
- 5.39. Statement of Policy and rules as drafted for consultation. This proposes setting a maximum penalty of the greatest of:
- an amount equal to £250 per individual that the Approved Regulator regulates;
  - an amount equal to £5,000 per entity that the Approved Regulator regulates; or
  - £10 million.
- 5.40. The LSB considers that this is an appropriate formula by which to calculate a maximum level of a penalty that takes into account the fact that the Approved Regulator may regulate individuals and/or entities in the future. It also enables the LSB to impose a large penalty on an Approved Regulator that does not regulate a large number of individuals or entities, if it considered it appropriate in all the circumstances of the particular case.
- 5.41. The LSB considered whether it might be appropriate to set the maximum penalty at a percentage of the practising fee payable by individuals authorised to carry on reserved legal activities. The LSB views the threat of a large financial penalty as a significant incentive on an Approved Regulator to ensure compliance and if in future an Approved Regulator was funded in a way that did not require a practising fee, that would render the LSB unable to impose a financial penalty. An Approved Regulator that charged a small

practising fee might have behaved in a way that the LSB considered warranted a larger penalty than a defined percentage of the practising fee would allow. In addition, using the practising fee to set the maximum level of a financial penalty may not be possible if an Approved Regulator only regulated entities (rather than individuals).

- 5.42. The LSB also considered whether it whether it was appropriate to set the maximum penalty at a percentage of an Approved Regulator's total income. However, different Approved Regulators set out their accounts in different ways and the concept of "total income" is likely to be difficult to define in a way that is consistent for all Approved Regulators. That would mean that there would not be an appropriate level of certainty about the maximum penalty to which an Approved Regulator might be exposed. In addition, it is possible that this approach might contravene Section 29 of the Act which prohibits the LSB from exercising any of its functions in relation to any representative function of an Approved Regulator, except in specific circumstances.

***When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?***

- 5.43. In future we may review our compliance and enforcement strategy in the light of our other developing policies and our experience of applying it.

*Annual Costs*

- 5.44. One-off (Transition): £ negligible.
- 5.45. Average annual cost (excluding one-off): £ negligible.

*Annual Benefits*

- 5.46. One-off: £ negligible.
- 5.47. Average annual benefit: £ negligible.

***What is the geographic coverage of the policy/option?***

- 5.48. England and Wales.

***On what date will the policy be implemented?***

- 5.49. It is anticipated that this will be on 1 January 2010 when the LSB takes on its full powers under the Act.

***Which organisation will enforce the policy?***

5.50. The LSB.

***Does enforcement comply with Hampton principles?***

5.51. Yes.

***Will implementation go beyond minimum EU requirements?***

5.52. Yes. EU requirements do not require the regulatory framework set out in the Act.

***What is the value of the proposed offsetting measure per year?***

5.53. Nil.

***What is the value of changes in greenhouse gas emissions?***

5.54. Nil.

***Will the proposal have a significant impact on competition?***

5.55. No.

***Annual cost (£-£) per organisation (excluding on-off)***

5.56. The costs of this policy are not expected to add to the overall cost of compliance by Approved Regulators. If a penalty is imposed this may be passed through to those that the Approved Regulator regulates.

5.57. Micro: n/a                      Small: n/a                      Medium: n/a                      Large: n/a

***Are any of these organisations exempt?***

5.58. n/a.

***Impact on Admin Burdens Baseline (2005 Prices)***

5.59. Increase of £: approximately nil.

5.60. Decrease of £: approximately nil (although potential for small decrease).

5.61. Net Impact £: approximately nil.

### ***Evidence Base***

- 5.62. We have undertaken an initial impact assessment of the policy on financial penalties and the maximum amount of a penalty. We consider that the cost of these changes is significantly below the generally accepted threshold of £5 million costs, below which an impact assessment is not necessary. However, we believe that in setting out how we have considered the various elements of the impact assessment will help us consult on both our proposals and our assessment of their impact.
- 5.63. Note that the LSB is an oversight regulator. Its enforcement policy, including its policy on using financial penalties and the maximum amount of any penalty is directed at the Approved Regulators that it regulates, not on those (such as solicitors or barristers) that they regulate.

### ***Competition***

- 5.64. We expect our enforcement strategy and processes to have a positive effect on competition. Compliant Approved Regulators should lead to a regulatory framework which enables providers of legal services to innovate and develop services that better reflect the needs of consumers.

### ***Small Firms Impact Test***

- 5.65. The LSB will take a proportionate approach to regulating smaller Approved Regulators to ensure the cost of compliance is not too burdensome. The LSB will, in any event, take into consideration the impact on the Approved Regulator's resources of any penalty it imposes.

### ***Legal Aid***

- 5.66. The enforcement policy will support and enhance the delivery of the Regulatory Objectives and as such will support the legal aid market through effective competition; better focus on consumers and proportionate regulation.

### ***Race/Disability/Gender equalities***

- 5.67. Because the LSB is an oversight regulator there is no direct impact on individuals. However, if the LSB achieves its intended outcomes, there will be a general improvement in the standard of regulation and the approach taken to it which we would expect to have a positive impact generally on the provision of legal services to all consumers, and to provide increased opportunities for all groups of those being regulated.

### *Human Rights*

- 5.68. There are specific requirements on the LSB to make rules concerning oral and written representations that can be made about proposed enforcement action. The LSB must consider the representations made. Although there is no specific requirement to make rules about oral and written representations about financial penalties, the LSB has decided that the same rules will apply to those as apply to its other enforcement powers. The Act (Section 39(1) and Section 39(2)) provides for an appeal to the High Court against aspects of a decision to impose a financial penalty.

### *Rural Proofing*

- 5.69. The LSB's policy on financial penalties and the maximum amount of any penalty is not expected to have a specific impact on rural areas.

### *Sustainability, carbon emissions, environment and health*

- 5.70. There is no impact expected on sustainability, carbon emissions, environment and health.

**Question 20** - What are your views on each of the initial impact assessments? If you have any evidence to support your view, in particular on the possible costs involved, please provide that information.

## 6. How to Respond

- 6.1. Our consultation period ends at 5pm on **26 October 2009**. In accordance with Section 205(3) of the Act, you are therefore given notice that any representation about the proposals contained in the consultation paper must be received prior to the end of this period.
- 6.2. In framing this consultation paper, we have posed specific questions to help develop our proposed Statement of Policy and rules. These questions can be found in the body of this consultation paper, its Annexes and also as a consolidated list in Annex 9. We would be grateful if you would reply to these questions, as well as commenting more generally on the issues raised where relevant. Where possible please can you link your comments to specific questions or parts of the paper rather than making general statements.
- 6.3. We would prefer to receive responses electronically (in Microsoft Word format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Email: [consultations@legalservicesboard.org.uk](mailto:consultations@legalservicesboard.org.uk)

Post: Mahtab Grant,  
Legal Services Board,  
7th Floor, Victoria House,  
Southampton Row,  
London WC1B 4AD

Fax: 020 7271 0051

- 6.4. We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our decision document.
- 6.5. We are also keen to engage in other ways and we would welcome contact with stakeholders during the consultation period.
- 6.6. If you have any questions about this consultation, please contact the LSB by telephone (020 7271 0050) or by one of the methods described in paragraph 6.3.

## Annex 1 – Macrory and Hampton Principles

### Part A - Macrory Principles

A sanction should:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from a non-compliance;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate;
- aim to deter future non-compliance.

Regulators should:

- publish an enforcement policy;
- measure outcomes not just outputs;
- justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament;
- follow-up enforcement actions where appropriate;
- enforce in a transparent manner;
- be transparent in the way in which they apply and determine administrative penalties;
- avoid perverse incentives that might influence the choice of sanctioning response.



## **Part B – Hampton Principles**

The Statutory Code of Practice for Regulators incorporates the Hampton Principles. It is anticipated that the LSB will subject to this code from late 2009.

The Hampton Principles are:

- regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection;
- regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most;
- regulators should provide authoritative, accessible advice easily and cheaply;
- no inspection should take place without a reason;
- businesses should not have to give unnecessary information, nor give the same piece of information twice;
- the few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions;
- regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.

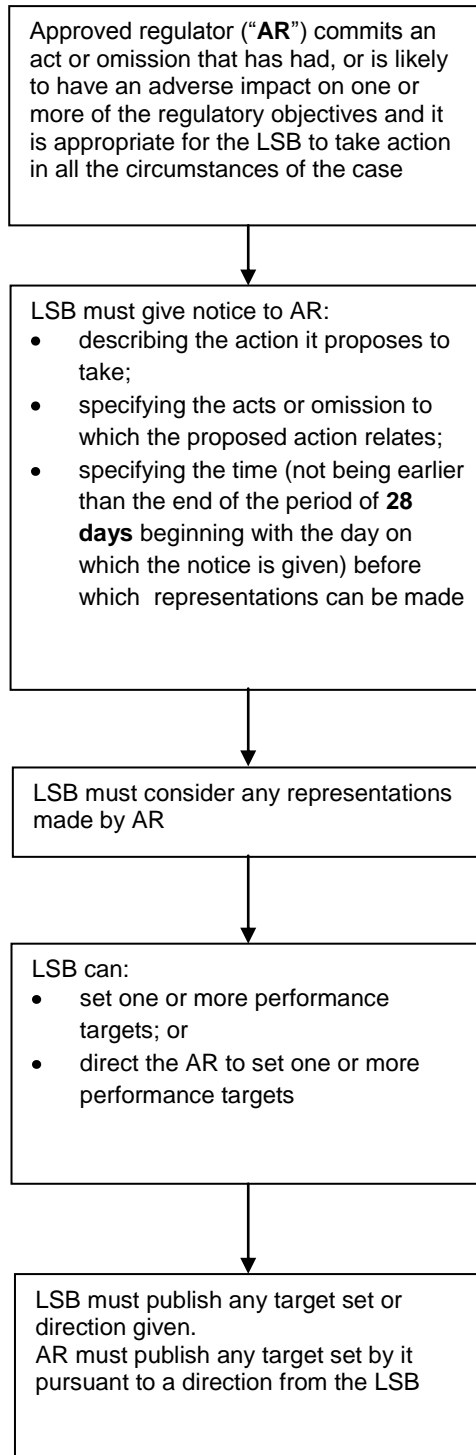
The Statutory Code of Practice for Regulators can be found at:

<http://www.berr.gov.uk/files/file45019.pdf>

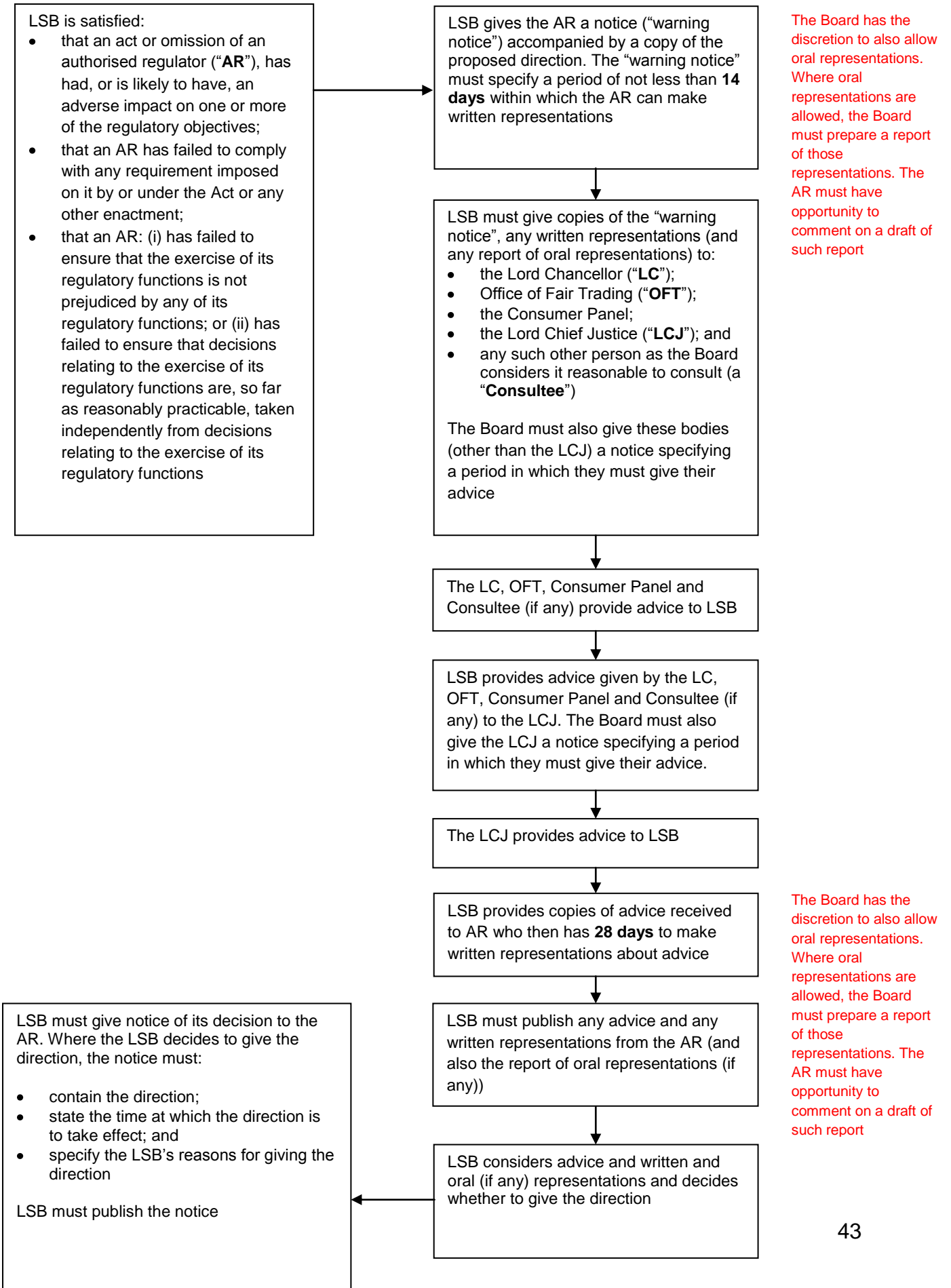
## Annex 2 – Enforcement processes

**Note:** Appeals processes shown are those set out in the Act

### Performance targets and monitoring (Section 31)



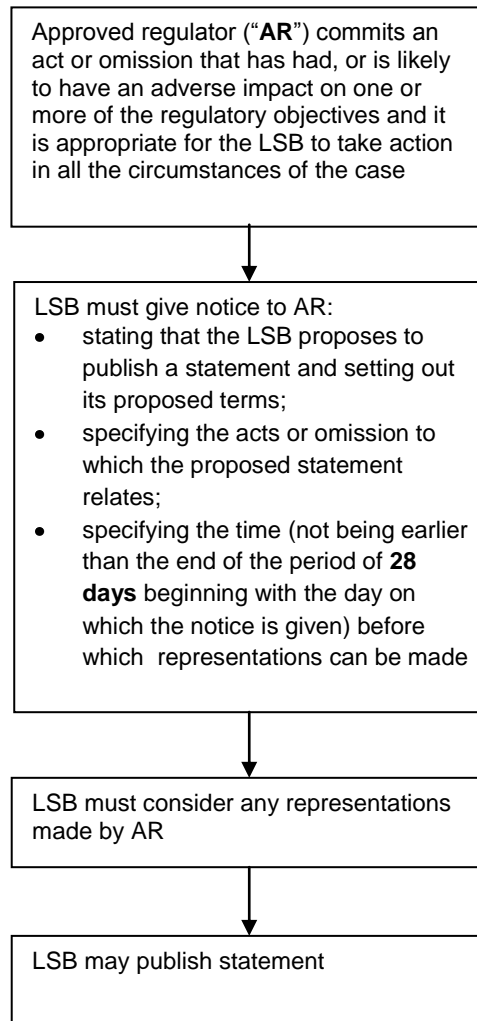
## Directions (Section 32)



The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

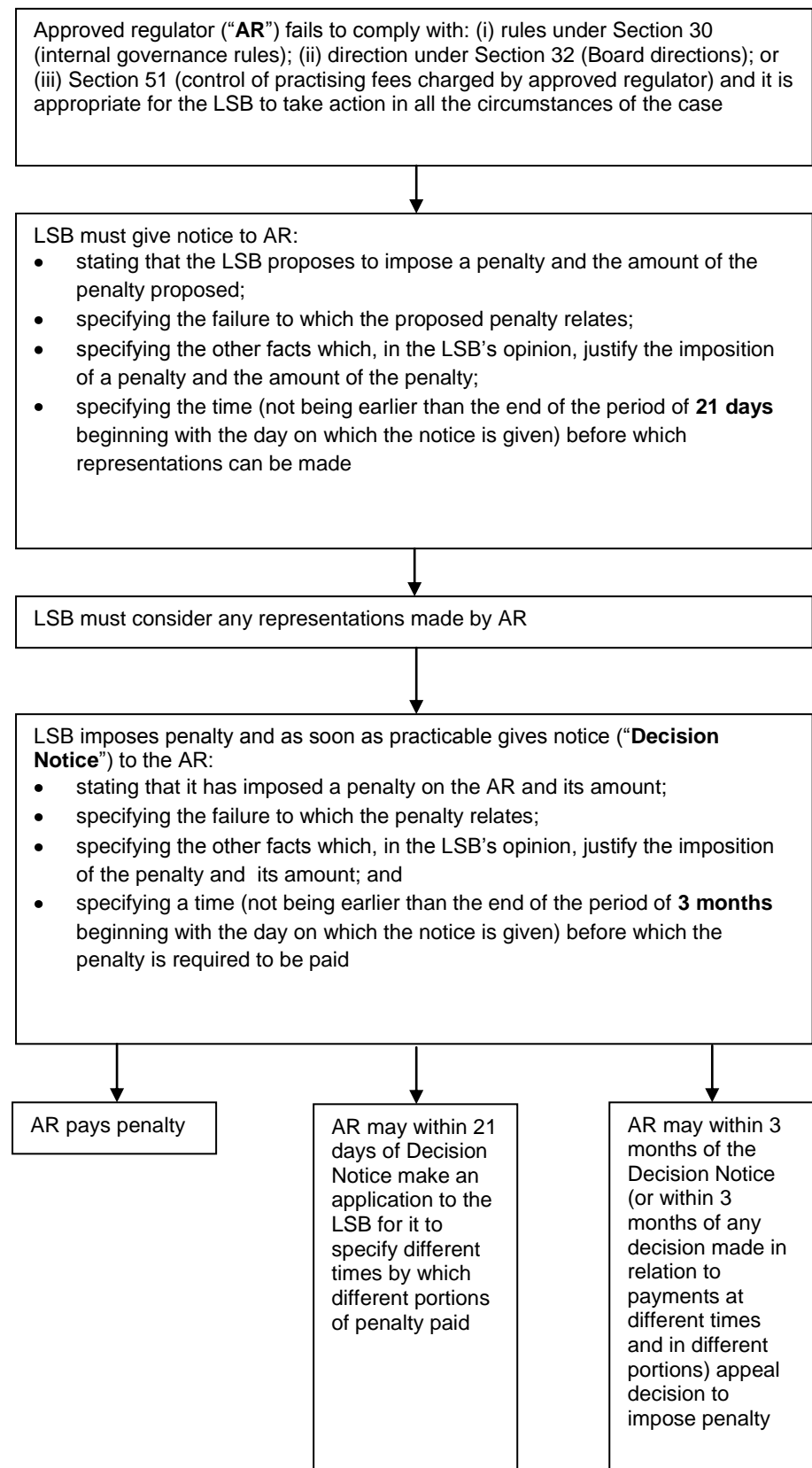
## Public censure (Section 35)



If the Board wishes to vary the proposed statement set out in the notice, it must give notice to the AR:

- setting out the variation and the reason for it;
- specifying the time (not being earlier than the end of the period of **28 days** beginning with the day on which the notice is given) before which representations can be made

## Financial penalties (Section 37)

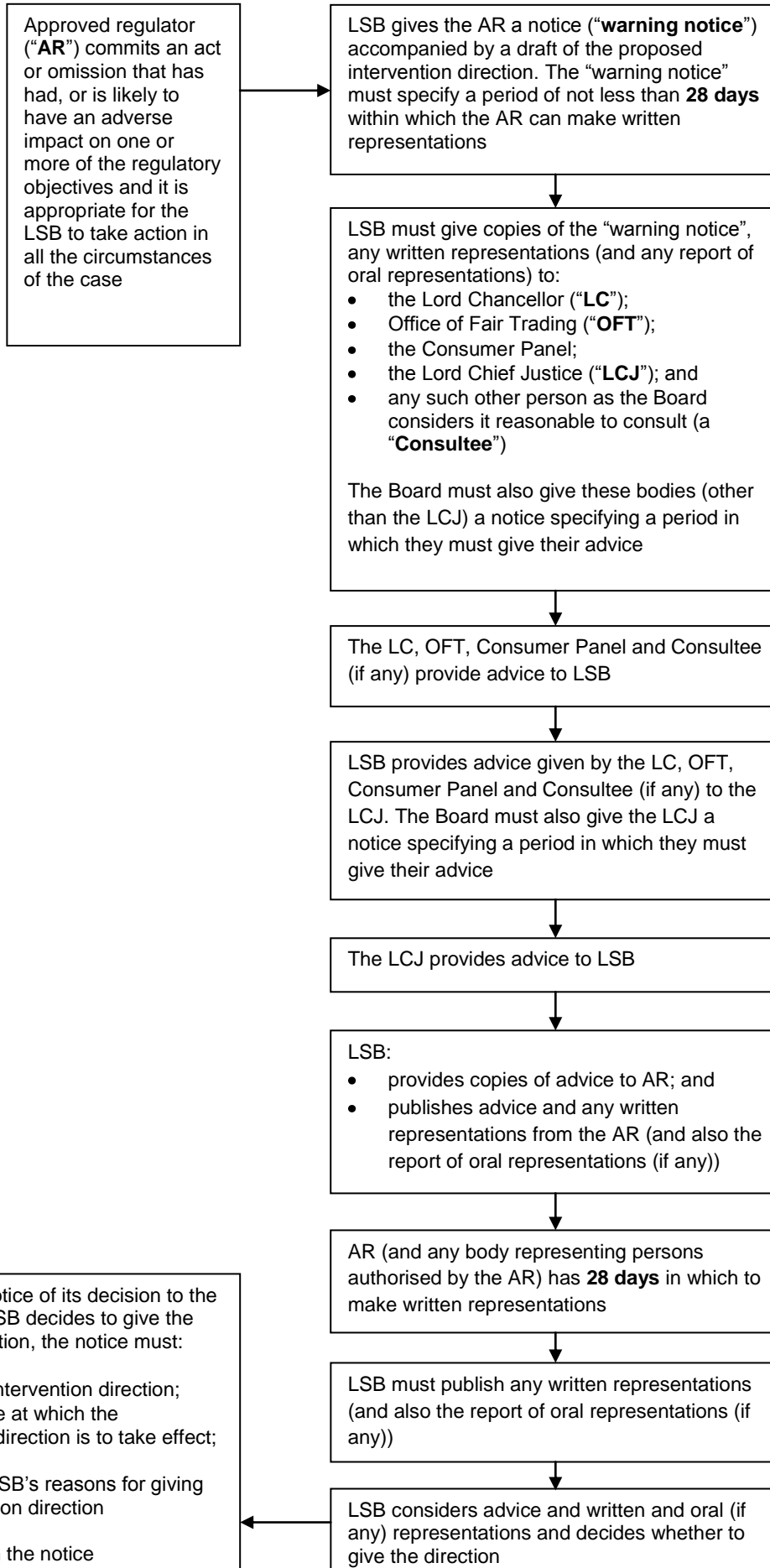


If the Board wishes to vary the amount of the proposed penalty set out in the notice, it must give notice to the AR:

- setting out the variation and the reason for it;
- specifying the time (not being earlier than the end of the period of **21 days** beginning with the day on which the notice is given) before which representations can be made

## Intervention directions (Section 41)

The LSB may only give an intervention direction if it is satisfied that the matter cannot be adequately addressed by exercising the LSB's powers to impose performance targets and monitoring, directions, public censure and financial penalties

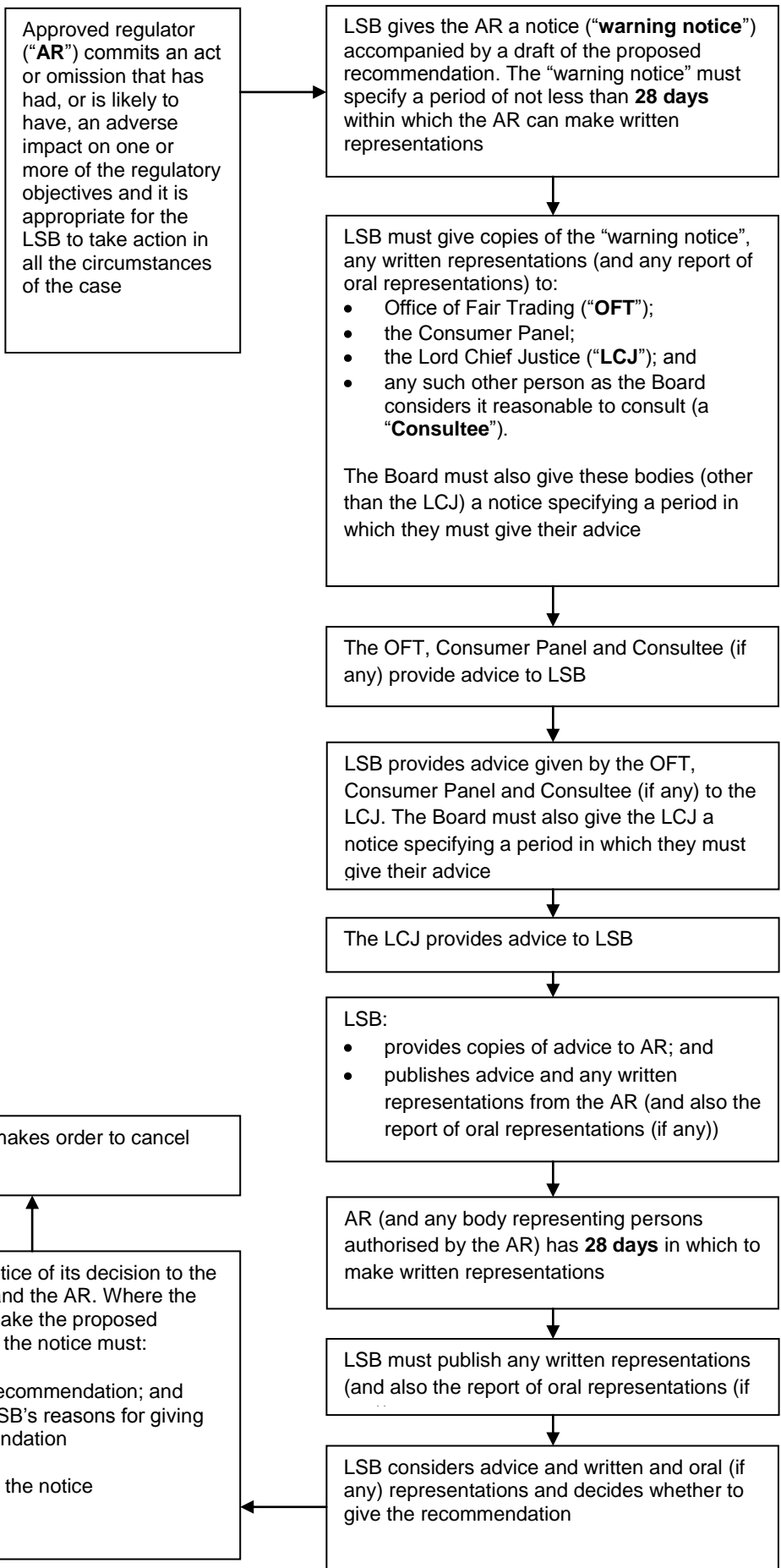


The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The person who made oral representations must have opportunity to comment on a draft of such report

## Cancellation of designation as approved regulator (Section 45)

The LSB may only give a recommendation if it is satisfied that the matter cannot be adequately addressed by exercising the LSB's powers to impose performance targets and monitoring, directions, public censure, financial penalties and intervention directions



The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The person who made oral representations must have opportunity to comment on a draft of such report

## Annex 3 – Enforcement processes: rules on oral and written representations

### A. DEFINITIONS

1. Words defined in these Rules have the following meanings:

<b>Act</b>	the Legal Services Act 2007
<b>Approved Regulator</b>	has the meaning given in Section 20(2) of the Act
<b>Board</b>	the Legal Services Board
<b>Representing Person</b>	an Approved Regulator or any other person who can make representations to the Board in accordance with Section 38(2) and Schedules 7 to 9 of the Act

### B. WHO DO THESE RULES APPLY TO?

2. These Rules are the rules that the Board has made to govern the making of oral and written representations by a Representing Person in accordance with:
  - Section 38(2) of the Act (**Financial Penalties**);
  - paragraphs 2(5) and 10(3) of Schedule 7 of the Act (**Directions**);
  - paragraphs 2(5) and 10(5) of Schedule 8 of the Act (**Intervention Directions**); and
  - paragraphs 2(5) and 9(5) of Schedule 9 of the Act (**Cancellation of Designation as Approved Regulator**).
3. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.
4. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with Section 205 of the Act.



## C. FORM OF REPRESENTATIONS

### ***Written representations***

5. Subject to Rules 6 and 8, all representations made to the Board must be in writing and must be submitted to the Board either by email, post or courier to the relevant address shown below:

- if by email to : [insert email address]
- if by post or courier to:

Address: Legal Services Board  
7<sup>th</sup> Floor Victoria House  
Southampton Row  
London WC1B 4AD

For the attention of: [insert name]

6. Once developed, the Representing Person must, unless otherwise agreed with the Board, submit all written representations to the Board using the online tool at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).
7. All representations must be received by the Board within the relevant period set out in the Act. Representations out of this time will not be considered unless, exceptionally and at the sole discretion of the Board, they appear to raise matters of substance relevant to the process in question which are not already under consideration.

### ***Oral representations***

8. The Board may, at its sole discretion authorise a Representing Person to make oral representations. The Representing Person must bear its own costs in any such representations. On grounds of cost, efficiency, transparency and consistency of treatment between Representing Persons, the Board will not normally accept oral representations unless the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases. If the Board grants such an exception, it will publish its reasons for doing so.
9. Should the Board authorise a Representing Person to make oral representations, the representations will take place at a hearing to be held either by telephone, video conference or in person. The Board will usually give the Representing Person not less than ten business days notice that there will be a hearing. If the hearing is to be held in person, the notice will specify the place and time at which the hearing will be held. If the hearing is to be held by telephone or video conference, the notice will specify the time of the telephone call or video conference and also the arrangements for facilitating the telephone call or video conference.

10. Hearings conducted in person (rather than by telephone or video conference) will normally be held in public. However, the Representing Person may request, with reasons, that aspects of the hearing be held in private. The Board will consider the reasons given and will then publish the reasons for any decision that it reaches. Where the hearing is held in private, the Board may admit such persons as it considers appropriate.
11. The Representing Person must appear at the hearing, either in person, by telephone or by video conference (as the case may be) and may be represented by any persons whom it may appoint for the purpose. The proceeding of the hearing will be recorded on behalf of the Board and will be transcribed onto paper.
12. Where oral representations are made, the Board will prepare a report of those representations which will be based on the transcription of the hearing made in accordance with Rule 11. Before preparing the report, the Board:
  - must give the Representing Person a reasonable opportunity to comment on a draft of the report; and
  - must have regard to any comments duly made by the Representing Person.
13. Subject to complying with the requirements of the Act, the Board reserves the right to extend processes to take account of the need to transcribe and verify oral submissions and to require the Representing Person to pay for the cost of the transcription service.
14. The Board may from time to time adjourn the hearing.

**Question 21** – Do you agree with the approach taken to oral representations?

**Question 22** – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process

#### **D. FURTHER INFORMATION**

15. If you have any questions about the process for making oral or written representations you should contact the Board at:

Address:                      Legal Services Board  
                                     7<sup>th</sup> Floor Victoria House  
                                     Southampton Row  
                                     London WC1B 4AD

Email:                         *[insert details]*

Telephone:                   *[insert details]*

## Annex 4 – Financial penalties: maximum penalty statutory instrument

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### STATUTORY INSTRUMENTS

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2009 No.

## LEGAL SERVICES, ENGLAND AND WALES

### The Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009

*Made* - - - - - \*\*\*

*Laid before Parliament* \*\*\*

*Coming into force* - - - \*\*\*

These Rules are made in exercise of the powers conferred by sections 37(4), 204(3) and (4)(b) of the Legal Services Act 2007<sup>(34)</sup>.

The Legal Services Board has published a draft of the Rules and invited representations about them<sup>(35)</sup>.

The Legal Services Board has had regard to representations duly made to the Board<sup>(36)</sup>.

The Lord Chancellor has consented to the making of the Rules<sup>(37)</sup>.

Accordingly the Legal Services Board makes the following Rules.

#### Citation, commencement and interpretation

1.—(1) These Rules may be cited as the Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009.

(2) These Rules come into force on [date].

(3) In these Rules “the Board” means the Legal Services Board.

#### Maximum penalty

2.—(1) This rule prescribes the maximum penalty which the Board may impose on an approved regulator in exercise of the power conferred by section 37(3) of the Legal Services Act 2007 (financial penalties).

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<sup>(34)</sup> 2007 c.29.

<sup>(35)</sup> See section 205(2) and (3) of the Legal Services Act 2007 (“the 2007 Act”).

<sup>(36)</sup> See section 205(4) of the 2007 Act.

<sup>(37)</sup> See section 37(5) of the 2007 Act.

(2) The maximum amount of a financial penalty which may be imposed on any approved regulator is whichever is the greatest of—

- (a) the amount calculated by multiplying—
  - (i) £250, by
  - (ii) the number of individuals authorised by the approved regulator to carry on one or more reserved legal activities;
- (b) the amount calculated by multiplying—
  - (i) £5,000, by
  - (ii) the number of bodies authorised by the approved regulator to carry on one or more reserved legal activities; or
- (c) £10 million.

### **Duty to provide information required to determine the maximum penalty**

- 1.—(1) For the purpose of enabling the calculations described in rule 2(2) to be carried out—
- (a) each approved regulator must for each year provide the Board with the information required by paragraphs (2) and (3); and
  - (b) the information must be provided no later than 30th April of the year in question.
- (2) The leviable body must provide a statement of the number as at 1st April of that year of—
- (a) all persons authorised by the approved regulator to carry on one or more reserved legal activities; and
  - (b) all bodies authorised by the approved regulator to carry on one or more such activities.
- (3) Any statement provided under paragraph (2) must contain or be accompanied by such information as will enable the Board, or such person as the Board may appoint, to confirm the numbers stated.

### **Determining the maximum penalty in a particular case**

1.—(1) This rule applies to determine which version of the information provided under rule 3 is to be used in a particular case to determine the maximum penalty under rule 2(2) in respect of an approved regulator.

(2) The Board must use the version of the information provided by the approved regulator which relates to 1st April immediately preceding the date of the conduct in respect of which the financial penalty is to be imposed.

(3) Where the application of paragraph (2) requires the use of information which relates to 1st April of two or more years (for example, where the conduct was engaged in over a sustained period)—

- (a) a series of calculations is to be carried out for the purposes of rule 2(2)(a) using the information which relates to each of those years; and
- (b) a series of calculations is to be carried out for the purposes of rule 2(2)(b) using the information which relates to each of those years,

and the highest resulting amount is to be selected from each series and used to make the comparison required by rule 2(2).

*Name*  
Legal Services Board

Date

## **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order specifies the maximum penalty which may be imposed by the Legal Services Board under section 37(3) of the Legal Services Act 2007. That section provides for the imposition of financial penalties on approved regulators for failure to comply with any requirement imposed on them by or under certain specified provisions of that Act (namely, section 30 (internal governance rules), section 32 (Board directions) and section 51 (control of practising fees charged by approved regulators)).

## Annex 5 – Intervention directions: Section 41(5) and 42(10) rules

### A. DEFINITIONS

1. Words defined in these Rules have the following meanings:

<b>Act</b>	the Legal Services Act 2007
<b>Approved Regulator</b>	has the meaning given in Section 20(2) of the Act
<b>Board</b>	the Legal Services Board
<b>Intervention Direction</b>	a direction given by the Board to an Approved Regulator in accordance with Section 41 of the Act

### B. WHO DO THESE RULES APPLY TO?

2. These Rules are the rules that the Board has made in compliance with:

- Section 41(5) of the Act in order to specify the persons that the Board may nominate for the purposes of Section 41(2)(a) of the Act;
- Section 42(10) of the Act in order to specify the persons that the Board may nominate for the purposes of Section 42(3) of the Act.

3. The rules that the Board has made in accordance with paragraphs 2(5) and 10(5) of Schedule 8 of the Act in relation to Intervention Directions and the making of oral and written representations are in the Board's rules on the making of oral and written representations which can be found at (*[insert link to oral and written rules]*).

4. The rules that the Board has made in accordance with paragraph 13(2) of Schedule 8 of the Act in relation to the revocation of an Intervention Direction are in the Board's rules on the revocation of Intervention Directions which can be found at (*[insert link to rules on revocation of Intervention Directions]*).

5. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.

6. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with Section 205 of the Act.

### C. NOMINATIONS FOR THE PURPOSES OF SECTION 41(2)(a)

7. The Board may nominate such person as it considers to be fit and competent to exercise the regulatory function of the Approved Regulator, and this may include another Approved Regulator or other competent person, such as a professional adviser (for example an accountancy firm).

**Question 23** – Do you agree with the Board’s approach for making nominations for the purposes of Section 41(2)(a)?

**Question 24** – If you do not agree with the Board’s approach, what alternative approach would you suggest?

### D. NOMINATIONS FOR THE PURPOSES OF SECTION 42(3)

8. The Board may nominate any person that it considers competent to be able to:
- enter and search the premises of an Approved Regulator;
  - take possession of any written or electronic records found on the premises.
9. In considering whether a person is suitable for nomination under Rule 8, the Board will have regard to the extent to which the person has experience of exercising entry and search functions.

**Question 25** – Do you agree with the Board’s approach for making nominations for the purposes of Section 42(3)?

**Question 26** – If you do not agree with the Board’s approach, what alternative approach would you suggest?

### E. FURTHER INFORMATION

10. If you have any questions about these Rules you should contact the Board at:

Address: Legal Services Board  
7<sup>th</sup> Floor Victoria House  
Southampton Row  
London WC1B 4AD

Email: *[insert details]*

Telephone: *[insert details]*

## Annex 6 – Intervention directions: rules for applications to revoke

### A. DEFINITIONS

1. Words defined in these Rules have the following meanings:

<b>Act</b>	the Legal Services Act 2007
<b>Applicant</b>	an Approved Regulator who submits an Application
<b>Application</b>	an application to revoke an Intervention Direction that is submitted to the Board in accordance with these Rules
<b>Approved Regulator</b>	has the meaning given in Section 20(2) of the Act
<b>Board</b>	the Legal Services Board
<b>Consultees</b>	the Mandatory Consultees and any Optional Consultee
<b>Consumer Panel</b>	the panel of persons established and maintained by the Board in accordance with Section 8 of the Act
<b>Intervention Direction</b>	a direction given by the Board to an Approved Regulator in accordance with Section 41 of the Act
<b>Mandatory Consultees</b>	the Lord Chancellor, the OFT, the Consumer Panel and the Lord Chief Justice
<b>OFT</b>	the Office of Fair Trading
<b>Optional Consultee</b>	any person (other than a Mandatory Consultee) who the Board considers it reasonable to consult regarding an Application
<b>Regulatory Objectives</b>	has the meaning given in Section 1 of the Act
<b>Representative Body</b>	a body that represents persons authorised by the Applicant to carry on activities which are Reserved Legal Activities
<b>Reserved Legal Activity</b>	has the meaning given in Section 12 and Schedule 2 of the Act



## **B. WHO DO THESE RULES APPLY TO?**

2. These are the Rules that apply if an Approved Regulator wishes to apply to the Board, under Part 2 of Schedule 8 of the Act, for the Board to revoke an Intervention Direction given to the Approved Regulator.
3. These Rules set out:
  - the required content of any Application to the Board and some guidance in relation to that content (**see Section C**);
  - the processes and procedures that the Board will undertake in considering the Application (**see Section D**);
  - the manner in which the Applicant and any Representative Body can make representations to the Board about an Application (**see Section E**); and
  - who an Approved Regulator should contact if it has a question in relation to the Application process (see **Section F**).
4. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.
5. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with Section 205 of the Act.

## **C. CONTENTS OF APPLICATION**

6. An Application must include such information as the Applicant believes necessary to satisfy the Board that:
  - all the issues relating to the act or omission which resulted in the imposition of the Intervention Direction have been appropriately dealt with; and
  - it is appropriate for the Board to revoke the Intervention Direction in all the circumstances of the case (including in particular the impact of revoking the Intervention Direction on the Regulatory Objectives).

**Question 27** – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

**Question 28** – If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

## D. PROCESSES AND PROCEDURE

### ***Sending the Application***

7. Subject to Rule 8 below, the Applicant must submit their Application either by email, post or courier to the relevant address shown below:

- If by email to: *[insert email address]*
- If by post or courier to:

Address: Legal Services Board  
7<sup>th</sup> Floor Victoria House  
Southampton Row  
London WC1B 4AD

For the attention of: *[insert name]*

8. Once developed, the Applicant must, unless otherwise agreed with the Board, submit their Application to the Board using the online tool at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).
9. On receipt of the Application, an acknowledgement email will be sent to the Applicant by the Board.
10. The Board will consider the Application and may ask the Applicant for such additional information as the Board may reasonably require.
11. The Board has the discretion to refuse to consider, or to continue its consideration of, an Application if it believes that it has not received all the information it requires.

### ***Obtaining advice***

12. On receipt of an Application, and all further information that the Board may require under Rule 10, the Board will send a copy of the Application (together with any further information received) to the Mandatory Consultees and any Optional Consultee.
13. The Board will specify to the Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee a time period in which each body must provide their advice on the Application to the Board. The Board intends to:
- request that these bodies provide their advice within a time period which is reasonable, published and variable dependent on the volume and complexity of the Application received; and

- request that these bodies agree that if they do not provide their advice within the specified time period, then they will be deemed to have elected not to provide any advice.
14. The Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee will then each consider the Application within the specified time period and will provide their advice to the Board.
  15. The Board will then provide the advice it receives from the Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee to the Lord Chief Justice and will specify to the Lord Chief Justice a time period in which he must provide his advice on the Application to the Board. Again, the time period that the Board will specify will depend on the particular circumstances of the Application.
  16. The Lord Chief Justice will then consider the Application and will provide his advice to the Board.
  17. In providing their advice to the Board, each Consultee may ask the Applicant (or any other person) to provide them with such additional information as they may require.

#### ***Publication of Advice***

18. Once the Board has received the advice of the Lord Chief Justice, it will:
  - provide a copy of all the advice that has been given by the Consultees to the Applicant;
  - publish a copy of all the advice that has been given by the Consultees on its website.

#### ***Representations***

19. The Applicant and any Representative Body has **28 days** beginning on the day on which a copy of the advice referred to in Rule 18 has been published on the Board's website, or such longer period as the Board may specify in a particular case, to make representations to the Board about the advice. Any representations made by the Applicant or any Representative Body must be made in accordance with Section E of these Rules.

#### ***Publication of Representations***

20. As soon as practicable after the end of the period within which representations under Rule 19 may be made, subject to Rule 21, the Board will publish on its website, any written representations duly made by the Applicant or any Representative Body (and any reports of oral representations prepared under Rule 33).
21. Prior to the publication of any written representations (and any report of oral representations prepared under Rules 33) the Board will ensure, so far as practicable,

that such materials exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Board, would or might seriously and prejudicially affect the interests of that individual.

### ***The Board's Decision***

22. After considering the Application (and any additional information received under Rule 10), the advice received from the Consultees and any representations by the Applicant or any Representative Body and any other information that the Board considers relevant to the Application, the Board will decide whether to grant the Application.
23. If the Board decides to grant the Application, it will notify the Applicant and will state the time from which the revocation of the Intervention Direction is to take effect.
24. If the Board decides not to grant the Application, the Board will write to the Applicant with the reasons for its decision.
25. The Board will publish on its website a copy of any decision that it gives to the Applicant.

## **E. FORM OF REPRESENTATIONS**

### ***Written representations***

26. Subject to Rules 27 and 29, all representations made to the Board must be in writing and must be submitted to the Board either by email, post or courier to the to the relevant address set out at Rule 7.
27. Once developed, the Applicant or Representative Body must, unless otherwise agreed with the Board, submit all representations to the Board using the online tool at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk)
28. All representations must be received by the Board within the period set out in Rule 19. Representations out of this time will not be considered unless, exceptionally and at the sole discretion of the Board, they appear to raise matters of substance relevant to the Application which are not already under consideration.

### ***Oral representations***

29. The Board may, at its sole discretion authorise an Applicant or any Representative Body to make oral representations at their own expense. On grounds of cost, efficiency, transparency and consistency of treatment between Applicants and Representative Bodies, the Board will not normally accept oral representations unless the particular circumstances of the Applicant or Representative Body or the complexity of the issues merit an exception to the normal process in individual cases. If the Board grants such an exception, it will publish its reasons for doing so.
30. Should the Board authorise an Applicant or Representative Body to make oral representations, the representations will take place at a hearing to be held either by

telephone, video conference or in person. The Board will usually give the Applicant or Representative Body not less than ten business days notice that there will be a hearing. If the hearing is to be held in person the notice will specify the place and time at which the hearing will be held. If the hearing is to be held by telephone or video conference, the notice will specify the time of the telephone call or video conference and also the arrangements for facilitating the telephone call or video conference.

31. Hearings conducted in person (rather than by telephone or video conference) will normally be held in public. However, the Applicant or Representative Body may request, with reasons, that aspects of the hearing be held in private. The Board will consider the reasons given and will then publish the reasons for any decision that it reaches. Where the hearing is held in private, the Board may admit such persons as it considers appropriate.
32. The Applicant or Representative Body must appear at the hearing, either in person or by telephone (as the case may be), and may be represented by any persons whom they may appoint for the purpose. The proceeding of the hearing will be recorded on behalf of the Board and will be transcribed onto paper.
33. Where oral representations are made, the Board will prepare a report of those representations which will be based on the transcription of the hearing made in accordance with Rule 32. Before preparing the report, the Board:
  - must give the Applicant or Representative Body a reasonable opportunity to comment on a draft of the report; and
  - must have regard to any comments duly made by the Applicant or Representative Body.
34. Subject to the requirements of the Act, the Board reserves the right to extend processes to take account of the need to transcribe and verify oral submissions and to require the Applicant or Representative Body to pay for the cost of the transcription service.
35. The Board may from time to time adjourn the hearing.

**Question 29** – Do you agree with the approach taken to oral representations?

**Question 30** – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process

## F. FURTHER INFORMATION

36. If you have any questions about the Application process or the preparation of an Application, you should contact the Board at:

Address:                    Legal Services Board  
                                  7<sup>th</sup> Floor Victoria House  
                                  Southampton Row  
                                  London WC1B 4AD

Email:                      *[insert details]*

Telephone:                *[insert details]*

## Annex 7 – Cancellation of designation: rules for applications to cancel

### A. DEFINITIONS

1. Words defined in these Rules have the following meanings:

<b>Act</b>	the Legal Services Act 2007
<b>Affected Authorised Person</b>	an Authorised Person who is regulated by the Applicant in relation to a Reserved Legal Activity which is the subject of an Application
<b>Applicant</b>	a body who submits an Application
<b>Application</b>	an application to cancel a body's designation as an Approved Regulator in relation to one or more Reserved Legal Activity that is submitted to the Board in accordance with these Rules
<b>Approved Regulator</b>	has the meaning given in Section 20(2) of the Act
<b>Authorised Person</b>	has the meaning given in Section 18 of the Act
<b>Board</b>	the Legal Services Board
<b>Cancellation Notice</b>	the notice published by the Applicant in accordance with Section E of these Rules
<b>Prescribed Fee</b>	the fee that must accompany an Application as described in Section D of these Rules
<b>Reserved Legal Activity</b>	has the meaning given in Section 12 and Schedule 2 of the Act

### B. WHO DO THESE RULES APPLY TO?

2. These are the Rules that apply if a body wishes to apply to the Board, under Section 45(3) of the Act, for the Board to make a recommendation to the Lord Chancellor that an order be made cancelling a body's designation as an Approved Regulator in relation to one or more Reserved Legal Activity.
3. These Rules set out:
  - the required content of any Application to the Board (**see Section C**);

- the amount of the Prescribed Fee that must accompany any Application (**see Section D**);
  - the Board's requirements in relation to the Applicant's publication of a notice giving details of the Application in accordance with Section 45(3)(c) of the Act (**see Section E**);
  - the processes and procedures that the Board will undertake in considering the Application (**see Section F**); and
  - whom a body should contact if it has a question in relation to the Application process (see **Section G**).
4. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.
  5. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with Section 205 of the Act.

### **C. CONTENTS OF APPLICATION**

6. An Applicant must include the following information in their Application:
  - the name, address, telephone number and email address of the person whom the Board should contact in relation to the Application;
  - details of the Reserved Legal Activity or Activities to which the Application relates;
  - details of why the Applicant is making the Application;
  - details of the Affected Authorised Persons and whether any communication as been had with such persons in relation to the Application;
  - details of what arrangements the Applicant proposes in relation to:
    - the transfer of the regulation of the Affected Authorised Persons to another relevant Approved Regulator and whether that Approved Regulator has consented to such transfer;
    - the transfer of amounts held by the Applicant which represent amounts paid to it by way of practising fees by the Affected Authorised Persons to another relevant Approved Regulator and whether that Approved Regulator has consented to such transfer;



- if the Applicant is planning on winding-up all its activities, details of how it proposes to do so in an orderly manner.

**Question 31** – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

**Question 32** – If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

#### **D. PRESCRIBED FEE**

7. Any Application must be accompanied by the Prescribed Fee of £ *[insert]*. The Prescribed Fee must be paid by electronic funds transfer to the following bank account:

Bank: *[Insert name]*

Sort code: *[Insert]*

Account No: *[Insert]*

Account Name: *[Insert name]*

Reference: *[[Applicant name]/Cancellation Application]*

**Question 33** – What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

#### **E. NOTICE REQUIREMENTS**

8. On submitting an Application to the Board, an Applicant must publish a Cancellation Notice giving the following information:
- the date on which the Application to the Board was made;
  - details of the Reserved Legal Activity or Activities to which the Application relates;
  - details of why the Application is being made;
  - details of the Affected Authorised Persons;
  - details of what arrangements the Applicant proposes in relation to:

- the transfer of the regulation of the Affected Authorised Persons to another relevant Approved Regulator;
- the transfer of amounts held by the Applicant which represent amounts paid to it by way of practising fees by the Affected Authorised Persons to another relevant Approved Regulator.

9. Any Cancellation Notice given in accordance with Rule 8 must be published:

- on the Applicant's website on the same day on which an Application is submitted to the Board;
- in a publication of general circulation amongst Affected Authorised Persons within 5 working days of the Application being submitted to the Board; and
- in any other publication that the Board may specify from time to time within 5 working days of the Application being submitted to the Board.

## F. PROCESSES AND PROCEDURE

### *Sending the Application*

10. Subject to Rule 11 below, the Applicant must submit their Application (and, proof of transmission of the Prescribed Fee) either by email, post or courier to the relevant address shown below:

- If by email to: *[insert email address]*
- If by post or courier to:

Address: Legal Services Board  
7<sup>th</sup> Floor Victoria House  
Southampton Row  
London WC1B 4AD

For the attention of: *[insert name]*

11. Once developed, the Applicant must, unless otherwise agreed with the Board, submit their Application (and, proof of transmission of the Prescribed Fee) to the Board using the online tool at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).

12. On receipt of the Application and the Prescribed Fee, an acknowledgement email will be sent to the Applicant by the Board.

13. The Board will consider the Application and may ask the Applicant for such additional information as the Board may reasonably require.

### ***The Board's Decision***

14. After considering the Application (and any additional information received under Rule 13) and after satisfying itself that the requirements of Section F have been complied with, the Board will recommend to the Lord Chancellor that an order be made to cancel the Applicant's designation as an Approved Regulator in relation to the one or more Reserved Legal Activities set out in the Application.

### **G. FURTHER INFORMATION**

15. If you have any questions about the Application process or the preparation of an Application, you should contact the Board at:

Address:                      Legal Services Board  
                                    7<sup>th</sup> Floor Victoria House  
                                    Southampton Row  
                                    London WC1B 4AD

Email:                        *[insert details]*

Telephone:                 *[insert details]*

## Annex 8 – Cancellation of designation: Section 48(9) rules

### A. DEFINITIONS

1. Words defined in these Rules have the following meanings:

**Act** the Legal Services Act 2007

**Board** the Legal Services Board

### B. WHO DO THESE RULES APPLY TO?

2. These Rules are the rules that the Board has made in compliance with Section 48(9) of the Act in order to specify the persons that the Board may nominate for the purposes of Section 48(3) of the Act.
3. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.
4. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with Section 205 of the Act.

### C. NOMINATIONS FOR THE PURPOSES OF SECTION 48(3)

5. The Board may nominate any person that it considers competent to be able to:
  - enter and search the premises of an Approved Regulator; and
  - take possession of any written or electronic records found on premises.
6. In considering whether a person is suitable for nomination under Rule 5, the Board will have regard to the extent to which the person has experience of exercising entry and search functions.

**Question 34** – Do you agree with the Board’s approach for making nominations for the purposes of Section 48(3)?

**Question 35** – If you do not agree with the Board’s approach, what alternative approach would you suggest?

#### **D. FURTHER INFORMATION**

7. If you have any questions about these Rules you should contact the Board at:

Address:                    Legal Services Board  
                                  7<sup>th</sup> Floor Victoria House  
                                  Southampton Row  
                                  London WC1B 4AD

Email:                      *[insert details]*

Telephone:                *[insert details]*

## **Annex 9 – List of questions**

### **Section 2**

**Question 1** - What are your views on the LSB's proposed compliance and enforcement strategy? If you think we should have other or additional aims, please say what you think they should be and explain why you think we should have them.

### **Section 3**

**Question 2** - What are your views on the matters that the LSB proposes to take into account in deciding whether (and if so what) action is appropriate? In particular, what are your views on how the LSB should judge whether an Approved Regulator's acts or omissions have been unreasonable?

**Question 3** - What are your views on the informal resolution process and the timescales set out above? If you have alternative suggestions please say what they are and why you consider they are more appropriate.

**Question 4** - What should the LSB publish about informal resolution of an issue? Will publication help to spread learning in the regulated community or do you consider that it may hamper informal resolution of an issue? Are there alternatives that you consider would be more appropriate? Please explain your answer.

**Question 5** - What are your views on how performance targets could be used?

**Question 6** - What are your views on how directions should be used?

**Question 7** - What are your views on using directions to require an Approved Regulator to spend money on a specific issue?

**Question 8** - What are your views on how censure should be used?

**Question 9** - What do you think the LSB's aims should be in imposing financial penalties?

**Question 10** - What are your views on what the maximum amount of a financial penalty should be?

**Question 11** - Is the formula proposed the right one or is there another more appropriate measure?

**Question 12** - Can you identify any circumstances when the proposed formula may be inappropriate to use?

**Question 13** - What are your views on whether the maximum should be linked to the total value of the services being regulated?

**Question 14** - What are your views on the amounts suggested in the formula? What other amounts do you think might be appropriate, bearing in mind the need for a financial penalty to act as a credible deterrent? Please explain your answer.

**Question 15** - What are your views on the process that the LSB proposes to use to arrive at an appropriate amount for a financial penalty?

**Question 16** - What are your views on the examples of the factors that the LSB may take into account when deciding what level of penalty is appropriate? What other factors do you consider that the LSB should take into account? Please explain your answer.

**Question 17** - What are your views on the LSB's aims for using intervention directions? Are there other circumstances when you consider that the exercise of this power might be appropriate?

**Question 18** - What are your views on the LSB's aims for cancelling the designation of an Approved Regulator? Are there other circumstances when you consider that the exercise of this power might be appropriate?

#### **Section 4**

**Question 19** - Do you think the draft statutory instrument is appropriate? If not, please say why. If you think that it should be changed, it would be helpful if you could suggest drafting changes and explain the reasons for them.

#### **Section 5**

**Question 20** - What are your views on each of the initial impact assessments? If you have any evidence to support your view, in particular on the possible costs involved, please provide that information.

#### **Annex 3**

**Question 21** – Do you agree with the approach taken to oral representations?

**Question 22** – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

## ***Annex 5***

**Question 23** – Do you agree with the Board’s approach for making nominations for the purposes of Section 41(2)(a)?

**Question 24** – If you do not agree with the Board’s approach, what alternative approach would you suggest?

**Question 25** – Do you agree with the Board’s approach for making nominations for the purposes of Section 42(3)?

**Question 26** – If you do not agree with the Board’s approach, what alternative approach would you suggest?

## ***Annex 6***

**Question 27** – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

**Question 28** – If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

**Question 29** – Do you agree with the approach taken to oral representations?

**Question 30** – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

## ***Annex 7***

**Question 31** – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

**Question 32** – If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

**Question 33** – What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

## ***Annex 8***

**Question 34** – Do you agree with the Board’s approach for making nominations for the purposes of Section 48(3)?

**Question 35** – If you do not agree with the Board’s approach, what alternative approach would you suggest?