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Dear Vanessa,

Regulatory Independence 2011: Final assessment

Many thanks for submitting your final dual self-certification of regulatory independence. I would like to thank the Bar Council and the BSB for their positive and effective approach to this year's exercise. Both organisations have taken on board our concerns, provided prompt responses to our queries and made sensible proposals to achieve compliance with the requirements of the Internal Governance Rules (IGR) and the Act.

Overall conclusion

The Board has concluded that, while your arrangements are not totally compliant with the IGR, given your progress and the commitments made during last year's process and this year's, we are willing to accept your position this year. There are a number of reasons why we are unable to assess you as compliant for this year. These are detailed below.

Part 1: Governance

During the 2010 regulatory independence exercise the Board accepted an action plan which meant that by 1 January 2012 the BSB would have a lay majority. This year, we asked for an update on the progress to achieve a lay majority and whether this deadline is on track. You assured us that this was the case, that the BSB has appointed four new lay members and that they will take up their posts following a comprehensive induction programme. While we are concerned that progress is somewhat slower than envisaged in your letter to me of 7 February, we see no reason why the 1 January 2012 date cannot be met. We therefore look forward to being able to declare this issue resolved during next year's exercise.

In last year's assessment we noted that the requirement that "one (but not both)" of the BSB chair and vice chair must be a practising barrister is not compliant with the requirement that the selection and appointment of a chair must not be restricted by virtue of any legal qualification that person may hold (IGR Part 1 C). You have yet to amend this requirement; in the certificate you anticipate that such an amendment will be completed during October / November 2011. Once these changes are made and the lay majority is achieved we would expect to be able to declare you compliant with the IGR principle on governance.

Part 3: Strategy and resources etc

We were pleased that, following last year's exercise, you have now introduced formal service level agreements for the complete range of services provided by the Bar Council to the BSB. You kindly provided those documents for review. We are content with these agreements. However, ultimately the test of such agreements is how they work in practice and what happens in the event of competing demands for resources. During next year's exercise therefore, we are likely to review how the agreements have been working in practice.

Our review of the newly completed finance manual gave rise to a number of concerns about compliance with part 3 of the IGRs. Our specific concerns were in relation to the provision of access to the financial and other resources reasonably required to meet the strategy adopted by the BSB; effective control of those resources; and the BSB's freedom to govern all internal procedures. We considered that the arrangements for the Finance and Audit Committee gave potential for undue influence to those with representative functions, which could be perceived to, or actually, fetter independence.

We discussed these concerns and you indicated that the arrangements have been under review and are likely to be simplified. No clear proposals on how these arrangements have been produced at present – the Bar Council and BSB will be producing proposals during October / November 2011. Given that proposals are not currently codified we are unable to judge them compliant. You have committed to providing details of the new arrangements as they are finalised and an account of how they are working in practice during next year's regulatory independence exercise. In light of this, we are willing to accept the current non-compliance. However, we regard all options for action as open next year, should there be outstanding issues at that stage.

When codifying these proposals, we advise that you pay careful attention to part 3 (A) and (B) of the IGR schedule and our accompanying guidance. The rules and guidance make it clear that we expect arrangements to involve a high degree of delegation to regulatory bodies in respect of the control of strategy and resourcing. The rule refers to "financial and other resources reasonably required...." For the avoidance of doubt, the policy intent of this drafting was that staff and non-staff costs should be considered and treated in the same manner.

Part 4 Oversight

The IGR rules on accept that the applicable approved regulators (AARs), have an oversight role. We are considering whether to issue further guidance on this point.

However it is clear that such arrangements must be transparent and proportionate and must not impair the independence or effectiveness of the persons performing the regulatory functions. Our current guidance makes it clear that 'proportionate' in this context should be defined with reference to the possible need for AAR intervention to mitigate the risk of formal LSB intervention. Our enforcement strategy makes clear that it is our intention to use our most interventionist powers only when other measures, including informal measures, have failed.

We considered that the original arrangements for the Financial and Audit Committee did not reflect our interpretation of these rules and the accompanying guidance. Your certificate details proposals to move to a more pure 'audit committee' structure; where committees provide assurance that systems and controls are in place that are appropriate, including budget planning and reporting processes.

This is closer to our vision that the AAR's role in oversight is limited to satisfying themselves that the regulator has appropriate procedures in place to ensure that there is good governance, that they are compliant with the law and that they promote the regulatory objectives. The regulator should also have arrangements in place to audit compliance with their procedure and such audits should be provided to the AAR for inspection and comment. We will seek details of the new arrangements and an account of how they are working in practice during next year's regulatory independence exercise; and in light of this we are willing to accept the current non-compliance.

Looking forward

Next year we will continue our risk based approach to assessing and, where necessary, enforcing the delivery of independent regulation; and would expect that, in the third year of assessment, there would not be the need for caveats as to the adequacy of implementation. We will be in touch with the Bar Council and BSB with further details next year.

I have written to Oliver Delany in the same terms and copied to Peter Lodder QC and Baroness Deech. This letter and the final certificate will be published on our website shortly.

If you have any further queries please contact James Meyrick on 020 7271 0083 or james.meyrick@legalservicesboard.org.uk. I also remain available to discuss these matters with you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris', with a large, stylized initial 'C'.

Chris Kenny
Chief Executive

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