

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

**Application to Become a  
Licensing Authority**

## Contents

Section	Page
1. Executive Summary	4
2. Background	7-11
3. Licensed body framework	12
Appropriate qualification requirements	12-17
Access to justice	18
Regulating conduct	18
Indemnification arrangements	18-19
Compensation arrangements	19
Regulatory conflict	19-20
Complaints handling arrangements	20
Licence applications	21-27
Determining applications for a licence	27-32
Review of licences	33-34
Continuity of licence	34-35
Modifying a licence	35
Management	35
Head of Legal Practice (HoLP)	36-39
Head of Finance and Administration (HoFA)	36-39
Practice Requirements	39
Licensed activities	39
Compliance with regulatory arrangements	40-41
Disqualified employees	41-42
Indemnification and compensation arrangements	42
Accounts	42
Fees	43
Financial penalties	43-44
Disqualifications	44-46
Suspension or revocation of licence/interventions	46-41
Owners	48-49
Appeals	49-50
Reserved and non-reserved legal activities	50-52
Transitional arrangements	52-53
4. Explanatory material	54-58
5. Governance arrangements	59
6. Equalities considerations	60
7. Consultation	61-63
8. Declaration of truth and accuracy	64
<ul style="list-style-type: none"> <li>• Annexes</li> <li>• Strategic plan 2013-2016 (<b>annex A</b>)</li> <li>• Business plan 2015-16 (<b>annex B</b>)</li> </ul>	

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|---|--|
| <ul style="list-style-type: none"><li>• Section 82 Policy Statement (<b>annex C</b>)<ul style="list-style-type: none"><li>- -- Draft outline of consumer guide (<b>annex C1</b>)</li></ul></li><li>• Handbook (<b>annex D1-D6</b>)</li><li>• Regulatory risk framework (<b>annex E</b>)</li><li>• Entity regulation policy statement (<b>annex F</b>)</li><li>• Supervision strategy (<b>annex G</b>)</li><li>• Enforcement strategy (<b>annex H</b>)</li><li>• Compensation arrangements note (<b>annex I</b>)</li><li>• Process map outlining authorisation process (<b>annex J</b>)</li><li>• Authorisation assessment spreadsheet (<b>annex K</b>)</li><li>• Interventions policy (<b>annex L</b>)</li><li>• Supervision department resources (<b>annex M</b>)</li><li>• BSB constitution (<b>annex N</b>)</li><li>• Joint Protocol for ensuring regulatory independence (<b>annex O</b>)</li><li>• Equality impact assessment (<b>annex P</b>)</li></ul> |  |
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## 1. Executive Summary

### Introduction

- 1.1 The Bar Standards Board (BSB) wishes to apply to become a licensing authority for the exercise of reserved legal activities under the Legal Services Act 2007 (the 2007 Act). In particular this application relates to the following reserved legal activities:
- The exercise of a right of audience;
  - The conduct of litigation;
  - Reserved instrument activities;
  - Probate activities;
  - The administration of oaths; and
  - The provision of immigration advice and services, in accordance with the Immigration and Asylum Act 1999.
- 1.2 The application is made with a view to extending the BSB's entity regulation regime, which has already been approved by the Legal Services Board (LSB).
- 1.3 This application is made in accordance with Part 1 of Schedule 10 of the Act which enables the Lord Chancellor, on the recommendation of the LSB, to make orders designating bodies as licensing authorities.

### Structure of the application

- 1.4 This application is intended to provide a comprehensive overview of the BSB's proposed regulatory arrangements for the designation of licensed bodies.
- 1.5 Sections **1 and 2** of this application contain an introduction and background to the BSB, our approach to regulation and how our functions meet the regulatory objectives set out in the 2007 Act and the better regulation principles.
- 1.6 Section **3** sets out our proposed regulations for licensed bodies. We set out in detail how we meet the licensing requirements set out in the 2007 Act, and our authorisation requirements.
- 1.7 Section **4** contains explanatory material relevant to the application. It includes an implementation plan that assesses our capacities and capabilities in order to function as a licensing authority, and also sets out our approach to risk, which is set out in the risk framework.
- 1.8 Section **5** provides details of our governance arrangements and how we intend to discharge the separation of our regulatory and representative functions as stipulated by the 2007 Act.

- 1.9 Section 6 sets out the equality impact of our proposed arrangements. This will be developed more fully in light of how the authorisation process for entities (non-licensed bodies) develops.
- 1.10 Section 7 sets out the details of our public consultations on entity regulation, including for licensed bodies.

### **Scope of regulation**

- 1.11 The BSB envisages regulating a variety of entity structures, including for example, partnerships, limited liability partnerships or companies, all of which would be able to employ other authorised persons and non-lawyers. An ABS in particular must have at least one authorised person as Head of Legal Practice (HOLP) and at least one non-lawyer manager.
- 1.12 A licence from the BSB will normally entitle a BSB licensed body to:
- Exercise a right of audience before every court in relation to all proceedings;
  - To carry on, reserved instrument activities, probate activities and the administration of oaths;
  - To carry out immigration work; and
  - Conduct litigation (if a litigation extension has been granted)
- As long as the authorisation requirements for a licence are met.
- 1.13 The authorisation and qualification requirements are set out in Part 3, section E of the Handbook. In order to practise as a BSB licensed body, the body must be a licensable body as defined by section 72 of the 2007 Act and meet the requirements set out in rule s83 (see paragraph 3.2.2). All of the non-authorised owners must also be approved by the BSB as being able to hold such interest taking into account the relevant suitability criteria.
- 1.14 The BSB proposes to regulate ABSs whose activities are broadly similar to those of barristers and which present similar regulatory risks. As well as reflecting the eligibility requirements of the LSA, the rules limit the kinds of body which are eligible to become an ABS regulated by it. Some of the restrictions will be mandatory; most will be discretionary so as to avoid unnecessary inflexibility.
- 1.15 Applicants will be required to submit application forms to the Authorisation Team who will take a risk based approach to authorisation. The Authorisation Team will develop a risk framework to enable it to classify the information provided by an applicant into one of 3 categories – High, Medium or Low. These categories reflect the approach to the assessment of risk for entity authorisation and also the BSB's risk-based supervisory strategy.
- 1.16 The BSB will not be operating a compensation fund. Most compensation schemes are set up to mitigate potential losses from misuse of client funds. The BSB regime does not allow client money to be held, so the risk of losses to clients is much less. The BSB considered the nature and scale of the remaining risks to clients, and other

ways of managing those risks in reaching its decision not to operate a compensation fund.

- 1.17 The BSB has chosen to adopt a split route for appeals with disciplinary appeals being heard by the High Court and regulatory appeals being heard by the First-Tier Tribunal. First instance decisions for appeals on licensing decisions will be taken by the BSB's Qualifications Committee.
- 1.18 When an applicant is deemed appropriate for regulation, it will become subject to risk-based supervision, the approach for which is informed by the BSB's overall Supervision Strategy. It is envisaged that there will be close collaboration between the Authorisation and Supervision Teams for newly licensed ABSs to leverage the experience and knowledge gained from the supervision of non-ABS entities and chambers.
- 1.19 The BSB will be able to use the experience gained from operating and developing an entity regulation regime to inform the work that will need to be undertaken and completed in order for the BSB to be in a position to authorise and regulate ABSs once designated as a licensing authority.

## **2. Background**

### **Status of application**

- 2.1 The General Council of the Bar (Bar Council) exercises the powers of an Approved Regulator, as defined by section 20 (designated by Part 1 of Schedule 4) of the 2007 Act and whose regulatory arrangements are approved for the purposes of this application. The Bar Council is entitled to make this application under Schedule 10, paragraph 1(3)(a) of the 2007 Act.
- 2.2 As an Approved Regulator the Bar Council delegates its regulatory functions to the Bar Standards Board (through governance arrangements described in section 6 of this application). The Bar Council has approved the BSB's decision to become a licensing authority and the application therefore refers to the BSB throughout as the applicant.
- 2.3 The BSB is entitled to authorise, in accordance with section 12 of the 2007 Act the following reserved legal activities:
- The exercise of a right of audience
  - The conduct of litigation
  - Reserved instrument activities
  - Probate activities
  - The administration of oaths
- 2.4 The BSB is also entitled to authorise the provision of immigration advice and services in its capacity as a Qualified Regulator under Schedule 18 of the 2007 Act.

### **The BSB**

- 2.5 The BSB was established in January 2006 as a result of the Bar Council separating its regulatory and representative functions. As the independent regulatory arm of the Bar Council, the BSB regulates barristers called to the Bar in England and Wales in the public interest. The BSB is responsible for:
- Setting the education and training requirements for becoming a barrister;
  - Setting continuing training requirements to ensure that barristers' skills are maintained throughout their careers;
  - Setting standards of conduct for barristers;
  - Monitoring the service provided by barristers to assure quality;
  - Handling complaints against barristers and taking disciplinary or other action where appropriate.

2.6 The BSB is also required to discharge its regulatory functions, so far as reasonably practicable, in a way which is compatible with the regulatory objectives of the Legal Services Act 2007 (the 2007 Act). The regulatory objectives are:

- i. protecting and promoting the public interest
- ii. supporting the constitutional principle of the rule of law
- iii. improving access to justice
- iv. protecting and promoting the interests of consumers
- v. promoting competition in the provision of legal services
- vi. encouraging an independent, strong, diverse and effective legal profession
- vii. increasing public understanding of the citizen's legal rights and duties, and
- viii. promoting and maintaining adherence to the professional principles.

2.7 The BSB must ensure that its policies and procedures are consistent with these objectives as well as its own strategic goals. A copy of the BSB's strategic plan for 2013-2016 can be found at **annex A** and the business plan for 2015-16 at **annex B**. The aims of the strategic plan are:

1. Implement our specialist regulatory regimes for advocacy services which operate in the public interest and in support of the regulatory objectives of the 2007 Act;
2. Promote greater public and professional understanding of and support for our role and mission;
3. Set and maintain high standards of entry to and practice in a diverse profession;
4. Become more evidence and risk based in all we do, taking into account also the globalised legal services market; and
5. Strive for 'best practice' as an organisation for those whom we serve and those who work for us.

2.8 The BSB has produced a policy statement, which can be found at **annex C** in accordance with section 82 of the 2007 Act. The statement sets out how the BSB will meet the regulatory objectives in discharging its functions as a licensing authority.

2.9 Our regulated community currently consists of:

- Approximately 12,700 self-employed barristers;
- Approximately 2,800 practising employed barristers.

2.10 The BSB also has some limited regulatory responsibility for other barristers who have been called to the Bar but who are not authorised to provide reserved legal activities or to practise as a barrister (unregistered barristers). An unregistered barrister may not normally refer to themselves as a barrister (i.e., 'hold out' as a barrister) when supplying legal services, which is an important safeguard for clients.

2.11 The BSB in its capacity as approved regulator was recently approved by the LSB to authorise entities that do not fall within Part 5 of the Legal Services Act (discussed

further below). Such entities permit ownership and management only by authorised persons (referred to as “non-ABS entities”). At the time of writing, the BSB has issued 17 authorisation decisions to entities, 16 of these are single person entities and the remaining one is a partnership between two barristers. This application seeks to build on those capabilities in order to be designated as a Licensing Authority.

### **The Bar Standards Board’s approach to regulation**

- 2.12 The BSB is committed to establishing a clear and comprehensive set of regulatory arrangements designed to ensure that persons regulated by the BSB (individuals and entities) act with independence, integrity and honesty, and so promote the interests of the public and of consumers, and uphold the rule of law. To this end the BSB introduced a new Handbook in January 2014 which sets out the regulations that apply to all persons regulated by the BSB. By producing one clear document that applies across the board, we hope that we have established a clear and consistent set of standards and ensured that the public, clients and members of the profession are clear about what is expected of persons regulated by the BSB. The Handbook, as proposed to be amended to cover ABSs, can be found at **annex D**<sup>1</sup>. The proposed changes to cover the regulation of ABSs are shown in bold.
- 2.13 The BSB’s proposal to become a licensing authority is part of a wider programme of reform. The first step was the major revision of the Handbook, which applies to all persons regulated by the BSB moving to a more outcome focus, and removing unnecessary restrictions, for example the prohibition on the conduct of litigation, but retaining the rules necessary to maintain appropriate standards<sup>2</sup>. The next step was the introduction of non-ABS entities<sup>3</sup>, which liberalised the business models and structures through which barristers and other lawyers could provide legal services. In parallel with these developments, the BSB has introduced a new supervisory regime and reviewed its enforcement policy. In the current strategic plan the BSB also articulated its intent to adopt a risk based approach to regulation of legal services in order to describe, understand, prioritise and address issues that might warrant attention. This application to become a licensing authority completes this programme of reform to further facilitate innovation in service delivery, which we believe will bring benefits for consumers.

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<sup>1</sup> Further information can be found in the application to the LSB for the approval of the Handbook at the following link:  
[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/bsb\\_new\\_handbook\\_application.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/bsb_new_handbook_application.pdf)

<sup>2</sup> See link at footnote 1 for further information about removal of unnecessary restrictions and relaxations in the new Handbook.

<sup>3</sup> Further information can be found in the application to the LSB for the approval of the BSB’s entity regulation arrangements  
[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2014/20140626\\_1\\_BSB\\_Change\\_Of\\_Regulatory\\_Arrangements\\_Under\\_Schedule\\_4\\_Entity\\_Regulation\\_Application.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2014/20140626_1_BSB_Change_Of_Regulatory_Arrangements_Under_Schedule_4_Entity_Regulation_Application.pdf)

- 2.14 The general approach we have adopted can be characterised as a move towards a higher level, more outcomes-and risk based approach where we have sought to identify core duties and outcomes that apply to BSB regulated persons and provide appropriate, proportionate and targeted sanctions to ensure that our regulations, and hence standards, are maintained. In order to achieve this the BSB has developed a risk framework to manage regulatory risk across the BSB. The framework will allow us to better assess proportionality, consistency and targeting activity only where action is needed. The BSB began taking an expressly risk-based approach to regulation with the introduction of the new Handbook, at which time we implemented a new approach to supervision and enforcement guided by risk. Since then we have launched a further change programme to build on this experience and ensure that a risk-based approach is integrated through all of our regulatory activities. This has informed our approach to non-ABS entity regulation and the evidence that we are gathering through that activity will assist us to update and develop our risk-based approach ahead of becoming a licensing authority. A summary of the BSB's regulatory risk framework and associated activity is attached at **Annex E**.
- 2.15 Our aim is to operate as a specialist entity regulator, providing a regulatory regime suited to the efficient and cost effective regulation of entities whose permitted range of services is broadly the same as those permitted to the self-employed Bar and whose risks and regulatory requirements are similar. Wherever possible therefore we have sought to ensure that the licensing arrangements are consistent with those for BSB regulated individuals. The Handbook therefore sets out the standards and requirements for BSB regulated individuals and BSB regulated entities so that, as far as possible, there is one coherent BSB regulatory regime. The Handbook has now been in force for over a year and experience to date suggests that it is working well.
- 2.16 **Annex C** sets out the policy statement required by section 82 of the LSA showing how our regulatory arrangements for all persons regulated by the BSB (individuals and entities) meet the regulatory objectives and professional principles. Where appropriate, we have identified specific requirements that have been placed on licensed bodies.
- 2.17 We are keen to regulate a range of entities to ensure that the market in legal services is strong and vibrant, with a variety of models, which allow the profession to innovate in terms of the structure used to deliver legal services and how those legal services are provided. We think that this will help to ensure that the legal profession remains vital and dynamic, and is sensitive to the needs of clients. The BSB's proposals are premised on the proposition that there is little advantage in the BSB establishing a regulatory regime which simply replicates that of the SRA or other licensing authorities. The proposed licensing arrangements draw on the BSB's existing entity regulation policy statement, which is attached at **Annex F**. By adopting this approach, the BSB is offering a choice of regulation, which is attractive to certain types of business, and by widening the types of business, increases the public's choice in access to justice. By regulating certain kinds of entities, the BSB has broadened the range of choice available to lawyers who want to work in entities

(allowing barristers to achieve this while remaining with the same regulator).  
Becoming a licensing authority is a logical extension of this and many potential entities want to exploit the greater flexibility that operating as an ABS will provide, bringing in a wider range of investors and professional expertise, further adding to the consumer choice available in the market. This approach should also ensure that there are no potential entities which operate on a specialist basis in the market which cannot find an appropriate regulator.

- 2.18 The BSB considers that the professionalism of the individual is central to the achievement of the regulatory objectives, irrespective of whether the individual is self-employed or employed. Effective systems for running the business are also essential. Our regulatory approach takes an entity based approach where appropriate (in particular when authorising and supervising entities and in an analogous way when supervising barristers' chambers). It seeks to strike the right balance between the individual and the entity which should lead to more effective regulation, which is lighter weight and less costly compared to other regulators and hence is in the consumer interest. The BSB has designed this regime with an analysis of the market and the end user in mind.

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### 3 Licensed body framework

#### 3.1 Introduction

- 3.1.1 The BSB's licensed body framework has been informed with reference to the 2007 Act and the LSB's licensing rules guidance. The framework sets out the parameters by which we will authorise ABSs. These parameters are contained in section E of Part 3 of the Handbook which contains the BSB's authorisation and licensing rules for entities.
- 3.1.2 Regulatory arrangements for the regulation and authorisation of licensed bodies have been devised to provide consistency with the regimes for non-ABS entities and individual barristers where possible. The regime only differs where the risks posed by the regulation of ABSs require different action to be taken, so for example our ABS regime will permit the involvement of non-lawyers in the entity. In deciding whether or not to authorise such entities the BSB would refer to its entity regulation policy statement as well as what is set out in the licensed body framework below.
- 3.1.3 This section summarises how the BSB's proposed licensed body framework meets the requirements of the Act and the LSB's guidance.

#### **Section 83 requirements**

##### 3.2 Appropriate qualification regulations [section 83(5)(a)]

- 3.2.1 The application and authorisation rules set out the general criteria that BSB authorised bodies will need to meet in order to be authorised by the BSB.
- 3.2.2 Mandatory requirements for authorisation are set out in section E of the Handbook at rs83. An applicant must:
- a. have arrangements in place to ensure at all times that any obligations imposed from time to time on the entity and its managers, owners or employees by the BSB's regulatory arrangements (including its rules and disciplinary arrangements) are complied with and provide explicit consent by the entity, its managers and HOFA to be bound by those arrangements;
  - b. have arrangements in place to ensure that at all times any other statutory obligations imposed on the entity or its owners, managers or employees, in relation to the activities it carries on, are complied with;
  - c. confirm they will have in place at all times, a Head of Legal Practice (HOLP), who must also be a manager, and a Head of Finance and Administration (HOFA);

- d. confirm that they have appropriate insurance arrangements in place and be able to provide evidence of those insurance arrangements;
- e. confirm that there will be no direct or indirect holding of client money;
- f. confirm that any individuals appointed as HOLPs, HOFAs, managers and employees have not been disqualified from acting as such by the BSB or any other approved regulator;
- g. confirm that it will at all times have a practising address in England and Wales;
- h. confirm that if an LLP or a company, it is appropriately incorporated;
- i. confirm that at least one manager or employee is an authorised individual in respect of each reserved legal activity that the entity proposes to provide; and
- j. confirm that annual fees will be paid when due.

3.2.3 The requirement that there must be at least one manager or employee who is an authorised individual in respect of each reserved legal activity the entity wishes to provide ensures that the entity is legally able to undertake the activities for which it is authorised. This is a minimum requirement and the BSB would judge on a case by case basis whether each entity had the necessary expertise.

The discretionary criteria to authorise an entity

*Appropriateness of the entity for BSB regulation*

3.2.4 If the mandatory criteria are met, the BSB will then consider whether an entity is an appropriate one for it to regulate, with reference to its entity regulation policy statement. The BSB proposes to regulate ABSs whose activities are broadly similar to those of barristers and which present similar regulatory risks. As well as reflecting the eligibility requirements of the LSA, the rules (via the published entity regulation policy statement (**Annex F**) limit the kinds of body which are eligible to become an ABS regulated by it. Some of the restrictions will be mandatory; most will be discretionary so as to avoid unnecessary inflexibility. The criteria are set out in our entity regulation policy statement.

3.2.5 As already stated, the BSB's intention is to be a niche regulator and only to regulate entities which are relatively low risk and straightforward so that its regulatory regime can be geared only to such entities and kept relatively simple and less costly, knowing that other regulators are willing and able to regulate more complex organisations. The BSB does not intend, for example, to regulate multi-disciplinary practices (MDP) or entities where owners with a material interest are not also managers or businesses which handle client money, as having undertaken an

assessment of our capacities and capabilities we do not believe regulating an entity of this type would be appropriate without significant changes to our regime. Any such changes would incur cost for those whom we regulate and in turn for consumers of their services. We do not believe that the development of the market will benefit from our seeking to duplicate the regimes of other regulators who are already equipped to manage such risks. Nor do we think that real choice for consumers will be promoted by the multiplication of alternative regimes that regulate in the same way and may tend to encourage a convergence in the models by which regulated businesses seek to provide their services.

3.2.6 The BSB will exercise its discretion about the proportion of lawyers and non-lawyers as owners and managers and about the nature of the legal services to be provided, as set out in the policy statement. The policy statement sets out factors that will be taken into account when assessing the risks associated with the entity, and highlights some factors, which, when present, would indicate that an entity would be appropriate for BSB regulation. The following factors would tend to suggest that the entity did not deviate significantly from the BSB's policy objectives:

- a. All owners are also managers. The risks posed by external ownership are significantly different in nature in the context of advocacy and litigation services, where the duty to the Court may run counter to the profit principle and has to be safeguarded against conflicts of interest and threats to independence. ABSs predominantly owned by external owners who are not also managers present regulatory challenges which are different, and which other regulatory regimes are already available to regulate. This restriction will ensure that only those with a personal interest in (and direct accountability for) the management of the ABS have a significant investment in it. This reduces the risk of having external investors who might have a different agenda and might bring pressure on it for commercial reasons to act in ways which failed to protect the interests of the rule of law, of the public or of clients. Our intention is to offer consumers a choice of regulatory regime that does not contain such risks (alternative regulatory arrangements are of course available via other regulators who do permit such ownership structures).
- b. All owners and managers are individuals. It is unlikely that we would approve an entity that has non-natural owners or managers. This is because our aim is to create a relatively simple and low cost regulatory regime. Complex ownership structures create a lack of transparency which add to the difficulty and cost of regulating such entities effectively. However, we could be persuaded to approve such an entity (e.g. where all barristers in an entity have previously incorporated themselves into one person companies) subject to our risk assessment.
- c. At least 75% of owners and managers are authorised persons and hence are individually subject to regulation as such, as well as the entity itself being regulated. This ensures that the entity is well suited to our approach to regulation, which emphasises the primacy of the individual's duty to the Court

when providing advocacy or litigation services and which focuses on the individual responsibility of authorised persons for their work, whether they are within an entity or not. In the case of an entity, our regulatory hold is strongest, and hence our ability to ensure consumer protection and protection of the public interest is strongest, when the owners and managers are for the most part also authorised persons directly responsible for the legal services supplied by the entity and, ultimately, exposed to the loss of their own ability to practice in the event of sufficiently serious breaches. A proportion of non-lawyers as owners and managers will be beneficial in bringing other skills to the entity, and that is fully recognised in this application, but if the entity is predominantly owned and managed by non-authorised persons it is likely to be better suited to other styles of regulatory regime. The discretionary 25% limit on non-lawyer ownership and management should allow ABSs sufficient flexibility to bring in (for example) clerks and practice managers or other managers with business experience, whilst ensuring that management and ownership remains predominantly in the hands of those who are individually subject to regulation as authorised persons. However, the BSB will not apply this percentage rigidly and will exercise a discretion.

- d. Most owners and managers are entitled to exercise rights of audience in the higher courts. This is a mechanism for matching entities to our specialist niche and ensuring that the business is to a significant degree advocacy focused. The expectation of a majority of people with higher court rights, leaves enough flexibility for involving lawyers who are not higher court advocates, for example solicitors whose role would be to provide or supervise litigation services.
- e. A substantial part of the services to be provided are advocacy, litigation and/or expert legal advice and not high volume, standardised legal transactional services. As mentioned already, the aim of the licensing regime is to be as consistent as possible with the regime for self-employed barristers and the BSB's existing expertise, so it follows the scope of services should also be similar. The services the self-employed Bar presently offers include the reserved legal activities of advocacy, litigation, oath taking, probate, reserved instrument activities as well as non-reserved legal services, such as specialist advice, mediation and arbitration. The breadth of this range has not precluded individuals from developing and maintaining specialist expertise in advocacy, as not all barristers choose to offer all of these services. Entities whose services are high volume, standardised transactional services or conveyancing will not fit our proposed specialist niche and nor is the BSB's regulatory regime likely to be suitable for them.
- f. A substantial proportion of employees are going to be authorised individuals and each manager supervises only a small number of employees. As already noted, the BSB's regime will be best suited to entities where the work is predominantly in the hands of the individuals who are themselves subject to regulation as authorised persons and less well suited to pyramidal structures

in which small numbers of authorised persons supervise large numbers of non-lawyers. Again, the BSB is not proposing to take an overly rigid approach to structural requirements and will be exercising a margin of discretion.

3.2.7 The percentages quoted in the policy statement will not operate as rigid limits but rather assist to promote the primary objective of providing specialist regulation for low risk, advocacy focussed entities. The BSB may therefore accept a higher percentage of non-authorised persons or of people without higher rights of audience if it concludes that the risks in the particular proposed structure are acceptable. This discretion will, in particular, allow for more flexibility in the structure of small ABSs. For example it is likely that the BSB will permit some flexibility about ownership of ABSs by spouses/partners, (provided that the spouse/partner is also a manager). The BSB wishes to avoid overly complex ownership structures as these can be insufficiently transparent and result in higher regulatory costs. It will therefore normally expect owners to be natural individuals but again it will have discretion to accept other ownership structures if the risks are acceptable. For example, it would be prepared to consider licensing an applicant whose owners were barristers who were practising as single person barrister only entities.

#### Other qualification requirements

3.2.8 If the entity meets discretionary requirements and the BSB concludes that it is an entity appropriate for it to regulate, it may still refuse the application in certain circumstances. These are set out in rs101. In particular, the application may be refused if the BSB is not satisfied about the suitability of the managers and owners or about the adequacy of the management and control arrangements.

3.2.9 The authorisation and licensing rules require applicants to provide information, documents and references in support of the application as may be required. The BSB will be updating the forms and guidance that it currently uses for non-ABS entities, which will provide further information as to what documents need to accompany the main application form.

3.2.10 All applicants will be required to provide details of owners with a material interest, managers, the HOLP and the HOFA. HOFAs and non-authorised owners and managers will be required to be individually approved. All managers and owners must meet the BSB's suitability criteria before the applicant is authorised (see paragraph 3.3.59 below).

3.2.11 The BSB does not wish to create unnecessary entry barriers for small entities therefore it will be possible for the role of HOLP or HOFA to be undertaken by the same individual. For small entities, for example barristers who have set up with one other lay person (such as their spouse), it would be possible for the barrister themselves to be the HOLP and HOFA or for the spouse to be a HOFA if they passed the suitability test.

3.2.12 In deciding whether to approve an ABS and as part of assessing the risk posed by the entity, in particular assessing the potential impact on the regulatory objectives, the BSB will want to be satisfied that the HOLP/HOFA/ any non-authorised managers that have been recommended fulfil the requirements of the suitability test and are fit and proper to hold those roles. This should provide licensable bodies with the incentive for them to nominate the high quality candidates we would expect to be in place for these roles. The BSB is not proposing to specify requirements for the roles of HOLP and HOFA as the extent of skills and experience needed will vary from one kind of ABS to another, but it will review whether the person proposed appears to be suitable for the particular post. Care will be taken to ensure that any requests to disclose criminal convictions or cautions are done in a way that is compatible with the Rehabilitation of Offenders Act 1974 as amended.

3.2.13 Whilst the BSB will not be interviewing HOLPs/HOFAs as a matter of course, we will reserve the right to interview any proposed candidates where we feel this is necessary and appropriate. HOLPs and HOFAs are discussed in further detail directly below and non-authorised managers and owners are discussed further at paragraphs 3.3.57, 3.3.83 and 3.4.1 – 3.4.6 below.

#### HOLPs

3.2.14 In order to be authorised as a HOLP, individuals must be an authorised person. And, to ensure that they have the necessary seniority and influence, they must also be managers. They must not be disqualified from acting as a HOLP by the BSB or another approved regulator. They must also meet the BSB's suitability criteria (see paragraph 3.3.59 for more information) and be able to demonstrate that they will be able to effectively carry out their duties as imposed by section 91 of the LSA.

#### HOFAs

3.2.15 The requirements for HOFAs are the same except that HOFAs are not required to be authorised individuals or to be managers. The BSB has not imposed any specific financial qualification requirements on HOFAs (for example an accountancy qualification) as BSB regulated ABSs will not be permitted to hold client money, therefore the role of the HOFA will be much more limited and will not be as broad as the role of HOFAs in SRA regulated entities for example. The HOFA will still however, have to undergo the suitability test in order to be considered a fit and proper person to undertake the role. Additionally the HOFA will be required to provide a CV and consideration will be given to any appropriate qualifications and to relevant financial and / or management experience.

#### Regulatory objectives/improving access to justice [section 83(5)(b)]

3.2.16 The LSA states that licensing rules of a licensing authority must contain provision as to how the licensing authority, when considering the regulatory objectives in connection with an application for a licence, should take account of the objective of improving access to justice.

3.2.17 The new regime proposed by the BSB is designed to meet all the regulatory objectives, including access to justice. Applicants will be required to provide a statement on the application form that demonstrates how their proposed business model could improve or impinge upon access to justice. The BSB will take this into account in assessing the application but would not normally expect to reject an application on such grounds unless the proposed entity structure would restrict competition or the normal functioning of the market.

Regulatory arrangements, inc. Conduct, discipline and practice rules [section 83(5)(c)]

3.2.18 ABSs like other entities will be required to comply with the entirety of the Handbook. The BSB has designed the conduct rules, so that wherever possible the rules will be the same as those for self-employed barristers and non-ABS entities. The application section of the Handbook makes it clear that the Handbook applies to entities authorised by the BSB in accordance with Part 3 of the Handbook which includes BSB licensed bodies.

3.2.19 The Supervision and Enforcement strategies (which can be found at **annexes G and H**) show how the monitoring, supervision and disciplinary procedures will be applied to ABSs and other BSB authorised persons in a proportionate and targeted way, with the emphasis, wherever possible, on securing compliance. The Policy Statement at **Annex C** explains how the rules and these policies take account of the regulatory objectives

3.2.20 The BSB considers that risks presented by ABSs are in most respects similar to those presented by other entities and by self-employed barristers working in Chambers. (The discretionary factors, discussed above, for determining suitability of an ABS for licensing by the BSB should ensure this.) It does not therefore regard it as necessary to impose additional requirements on ABSs. The risks relating to non-authorised owners will be mitigated by the requirement that owners with a material interest must also be managers (see above), by the suitability tests and by the statutory power to seek divestiture. The BSB will also have statutory intervention powers in the event of serious problems developing.

3.2.21 The applicant will be required to confirm that it has in place systems and procedures which will enable it to comply with the requirements of the Handbook relating to the administration of BSB authorised bodies (See rules rC91 onwards) and to equality and diversity (See rules rC110 onwards)

Appropriate indemnification arrangements [section 83(5)(d)]

3.2.22 The LSA states that licensing rules of a licensing authority must contain appropriate indemnification arrangements. Consumers using ABSs should at the very least receive the same minimum levels of protection as they would if they were using the services of a non-ABS entity regulated by an approved regulator. One of the mandatory conditions of being authorised as a licensed body is that the applicant has

or will have appropriate insurance arrangements in place in accordance with the general requirement in part 2 of the Handbook on insurance (rc76-78). The BSB will be issuing guidance as to the minimum acceptable levels of insurance and minimum terms following the same principles as those applied to non-ABS entities. ABS applicants will be required to provide evidence that their insurance arrangements meet the minimum requirements.

#### Appropriate compensation arrangements [section 83(5)(e)]

3.2.23 The BSB has considered what would be appropriate compensation arrangements in order to protect clients of ABSs. Most compensation schemes are set up to mitigate potential losses from misuse of client funds. The BSB regime does not allow client money to be held, so the risk of losses to clients is much less. Having reviewed the nature and scale of the remaining risks to clients, and the insurance and other ways of managing those risks, the BSB has concluded that establishing a compensation fund would not be appropriate. A separate note is attached on the BSB's rationale for reaching this decision. The note discusses the nature of the risk we are seeking to cover, the evidence we have as to the scale of any risks and what alternatives exist for addressing those risks. The note also sets out the options the BSB has considered on deciding what appropriate compensation arrangements would look like. The note can be found at **annex I**. Whilst the BSB's view, for reasons dealt with in more detail in that note, is that its arrangements should not presently include a compensation fund, the BSB is nevertheless seeking by way of a section 69 Order a statutory power to establish such a fund in future, if and when evidence suggests that a change of policy in this respect is warranted. In that event, the rule changes necessary to establish a fund would then need to be consulted on and submitted to the LSB for approval.

#### Resolution of regulatory conflict [section 83(5)(f)]

3.2.24 The LSA sets out that licensing rules of a licensing authority must contain the provision required by sections 52 and 54 (resolution of regulatory conflict).

3.2.25 The BSB has drafted the Handbook with a view to avoiding situations in which its rules and those of another Approved Regulator are incompatible. Certain rules, for example, apply only to self-employed barristers or to BSB authorised entities and not to managers and employees of entities regulated by other Approved Regulators. It is not aware of any situations in which a BSB regulated person would not be able to comply both with its rules and those of any entity regulator to which they were subject. However, if such a situation were to arise, the BSB Handbook provides that the regulated person must comply with the requirements of the entity regulator and will not be considered to be in breach of the Handbook if they do so. No problems of incompatibility have emerged during the 12 months since the Handbook came into effect. If problems come to light in future, the BSB will review its rules. As BSB authorised entities will be permitted only to provide legal services, there is little if any likelihood of conflict with the requirements of an external regulator, but this is an issue that will be considered by the BSB if (and before) it decides to authorise any MDPs.

3.2.26 The BSB is a signatory to the Alternative Business Structures Multi-Disciplinary Practices Memorandum of Understanding. The MoU seeks to clarify as far as possible the roles of the regulators and professional bodies in the oversight of Licensed Bodies. The MoU will allow the regulatory community to co-operate through the sharing of information where it is in the public interest to do so. Under this agreement, the various regulators will coordinate resources and activities to avoid duplication of effort and to increase consumer protection.

#### Complaints handling requirements [section 83(5)(g)]

3.2.27 The LSA sets out that licensing rules of a licensing authority must contain the provision required by sections 112 and 145 (requirements in relation to the handling of complaints).

3.2.28 rC99 and following rules in the Handbook set out the complaints rules as they apply to self-employed barristers, chambers and all BSB authorised bodies. The BSB has produced clear rules that will apply consistently across all regimes. The BSB has also produced further guidance on first tier complaints handling. ABSs like other authorised bodies are under an obligation to ensure that clients know that they can make a complaint if they are dissatisfied with the service they receive and know how to do so. They will also need to ensure that complaints are dealt with promptly and the client is kept informed about the process. In addition, the BSB will be producing a guide for consumers. The consumer guide will aim to make clear when complaints should be made to the BSB, and when complaints should be directed elsewhere, such as to the Legal Ombudsman. It will also clearly outline the different remedies available when complaints about barristers are pursued. A draft outline of the consumer guide can be found at **annex C1**.

3.2.29 The rules also provide that clients must be notified in writing at the time of engagement or if not practicable at the next appropriate opportunity of their right to complain, including their right to complain to the Legal Ombudsman. Similarly clients must be informed of the Legal Ombudsman's details, including timeframes at the conclusion of the complaints process. As part of the authorisation process applicants will need to confirm that they have a complaints policy in place and a review of this policy will feed into the overall risk profile of the entity. If the policy were deemed to be high or medium risk, this would be flagged and assessed as part of the supervision process.

3.2.30 CD9, rC64 and rC71 also require all BSB authorised persons to co-operate with their regulators including the Legal Ombudsman.

### **3.3 Schedule 11 requirements**

#### Licence applications [Schedule 11 paragraph 1(1)]

- 3.3.1 The LSA requires that licensing rules make provision about the form and manner in which applications for licences are to be made, and the fee (if any) which is to accompany the application.
- 3.3.2 Part 3 of the Handbook sets out that to apply for authorisation to practise as a BSB authorised body the applicant must complete the form supplied by the BSB and submit it along with other information, documents and references in support of the application to the Authorisation Team as may be required by the BSB. The onus will be on the applicant to ensure they have familiarised themselves with the requirements of the Handbook and have submitted all relevant information about their application to the Authorisation Team. The following paragraphs set out the proposed arrangements but these will continue to be developed and refined in light of experience with authorising non-ABS entities.
- 3.3.3 Applicants will be required to submit one form comprising 6 (TBC) separate but inter-linked Parts, each of which looks for different information about the applicant.
- Part A: Entity and eligibility details including, questions on the mandatory authorisation criteria;
  - Part B: Procedures and policies for governance, risk management and ensuring compliance with regulatory requirements;
  - Part C: Details about the HOLPs and HOFAs including questions to determine suitability for the role(s);
  - Part D: Manager and owner details to determine suitability of non-authorised individuals for the role(s);
  - Part E: Declaration of Truth; Managers and owners
  - Part F: Litigation Extension.

Parts A – E must be completed for all licence applications whilst Part F will only apply if the applicant wishes to apply to conduct litigation.

- 3.3.4 Below is a table of what the BSB will be requiring in each part of the application form and examples of the supporting documents the BSB will expect to see:

PART	INFORMATION REQUIRED	SAMPLE SUPPORTING DOCUMENTATION
<b>Part A [mandatory and discretionary criteria]</b>	<ul style="list-style-type: none"> <li>• Basic information about the applicant, e.g. the type of entity proposed, incorporation and registration information and contact details</li> </ul> <p><u>Mandatory criteria</u></p> <ul style="list-style-type: none"> <li>• Confirmation of practising address in England and Wales</li> </ul>	<ul style="list-style-type: none"> <li>• Evidence of incorporation</li> <li>• Governance structure</li> <li>• Insurance policy</li> </ul>

	<ul style="list-style-type: none"> <li>• Confirmation that HOLP will also be a manager</li> <li>• Declaration that the applicant will not be holding client money</li> <li>• Confirmation that any proposed HOLP/HOFA/manager/employee has not been disqualified from acting and will not be working in the entity unless prior permission of the BSB has been obtained</li> <li>• Confirmation that there is at least one practising barrister who is a manager and owner</li> <li>• Confirmation that the entity will only be providing legal activities</li> <li>• Confirmation that there is at least one manager/employee who is an authorised individual in respect of each reserved legal activity the entity wishes to provide</li> <li>• Confirmation that any owners are also managers</li> <li>• Confirmation that appropriate insurance is in place and meets minimum terms laid down by BSB</li> </ul> <p><u>Discretionary criteria</u>  <u>We will be asking applicants the following questions in relation to the discretionary criteria:</u></p> <ul style="list-style-type: none"> <li>• Does a substantial part of the services to be provided comprise the provision of specialist legal advisory, advocacy and/or litigation services (please provide a breakdown of the services you will be providing and the estimated revenue from each)</li> <li>• Can you confirm that you will not be providing any high-volume, standardised legal transactional services (in particular, direct to lay clients) and/or conveyancing</li> </ul>	
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	<ul style="list-style-type: none"> <li>• Can you confirm that you will not be providing conveyancing services<sup>4</sup></li> <li>• Are all the owners and all of the managers individuals</li> <li>• Are 50% or more of the owners and 50% or more of the managers entitled to exercise rights of audience in the Higher Courts</li> <li>• Are 75% of owners and managers authorised individuals</li> <li>• What proportion of your employees are authorised individuals</li> <li>• What is the ratio of manager to employee supervision?</li> <li>• If the answer to any of these questions is “No”, the applicant will be asked to explain why they are nevertheless suitable for regulation by the BSB</li> </ul>	
<p><b>Part B [Risk profile of firm]</b></p>	<ul style="list-style-type: none"> <li>• An outline of the applicant’s arrangements for ensuring compliance with the BSB’s regulatory arrangements, in particular with the Handbook and delivery of the core duties and outcomes</li> <li>• Statement of how the applicant if licensed would impact on access to justice and make it easier for potential clients to obtain appropriate legal services</li> <li>• Confirmation that the applicant has in place policies and procedures to enable it to comply with the rules on conduct of business and with the equity and diversity requirements</li> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• Business plan with financial projections for minimum 3 years if a start-up)</li> <li>• Accounts if not a start-up</li> <li>• Whilst the BSB will not require specific evidence of the details listed in part B of the form, we will be carrying out spot checks and sampling, so applicants will be expected to produce evidence if requested.</li> <li>• The policies the BSB may request to see are: <ul style="list-style-type: none"> <li>- Complaints policy</li> <li>- Conflicts policy</li> </ul> </li> </ul>

<sup>4</sup> The BSB has defined conveyancing for the purposes of the minimum terms of entity cover. The minimum terms can be found at the following link:

[https://www.barstandardsboard.org.uk/media/1657322/bar\\_standards\\_board\\_-\\_minimum\\_terms\\_of\\_entity\\_cover\\_-\\_spring\\_2015.pdf](https://www.barstandardsboard.org.uk/media/1657322/bar_standards_board_-_minimum_terms_of_entity_cover_-_spring_2015.pdf)

	<ul style="list-style-type: none"> <li>• Details of any disciplinary findings by any regulator against authorised and non-authorised individuals, including details of any on-going investigations</li> <li>• Complaints against authorised individuals which are deemed by LeO to have merit</li> <li>• Details of how the applicant will be receiving instructions i.e. are these likely to come in mainly on a referral basis or direct from the public?</li> <li>• Details of the main risks which might result in the entity failing to act in accordance with its duties to the courts or to provide a good service to clients and an explanation of how this will be managed.</li> <li>• Details of current turnover (if relevant) and/ or expected turnover in the next 2 years</li> <li>• An outline of how the business will be financed</li> <li>• Details of any relevant voluntary accreditation i.e. Bar Business Standard</li> <li>• Details of compliance/risk manager (if any)</li> <li>• Details of access to outside support if necessary (i.e, through circuits, specialist management companies etc)</li> <li>• Statement of systems in place to ensure the effective running of the business (i.e. litigation case management systems, diary system etc)</li> <li>• Statement of policies in place</li> <li>• Details of any separate businesses providing wholly unreserved services</li> <li>• Details of any associations</li> <li>• Intention (or not) to become an Approved Training Organisation</li> </ul>	<ul style="list-style-type: none"> <li>- Confidentiality policy</li> <li>- Pupillage policy</li> <li>- Risk management policy</li> <li>- Equality &amp; diversity policy</li> <li>- Vulnerable clients (where relevant to the types of work proposed to be undertaken)</li> </ul>
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	<ul style="list-style-type: none"> <li>Continuity arrangements (for smaller ABSs)</li> </ul>	
<b>Part C HOLPs &amp; HOFAs</b>	<p><u>HOLPs</u></p> <ul style="list-style-type: none"> <li>Personal details (i.e. name, address, email etc)</li> <li>Name of the HOLP's approved regulator</li> <li>Details of the reserved legal activities the HOLP is authorised to undertake</li> <li>Questions in relation to the fit and proper test</li> <li>Declaration from HOLP confirming they are willing to act in this role and all the information provided in this part is true and accurate</li> <li>Confirmation that the HOLP is not constrained by collective responsibility in relation to reporting to the BSB</li> </ul> <p><u>HOFAs</u></p> <ul style="list-style-type: none"> <li>Personal details (i.e. name, address, email etc)</li> <li>Questions in relation to the fit and proper test</li> <li>Declaration from HOFA confirming they are willing to act in this role and all the information provided in this part is true and accurate</li> </ul>	<ul style="list-style-type: none"> <li>CVs, including complete employment history, details of professional training and qualifications</li> <li>Proposed job description</li> <li>Copy of practising certificate (if relevant)</li> <li>References</li> </ul>
<b>Part D Managers &amp; Owners</b>	<p><u>Managers</u></p> <ul style="list-style-type: none"> <li>Personal details</li> <li>Job title</li> <li>Name of professional body (if relevant)</li> <li>Length of time in practice (authorised persons)</li> <li>Questions in relation to fit and proper test if non-authorised individuals</li> </ul>	<ul style="list-style-type: none"> <li>Practising certificate/other professional documentation if relevant</li> <li>CVs (if requested)</li> <li>CRB checks (if appropriate)</li> </ul>

	<ul style="list-style-type: none"> <li>• Percentage of voting rights</li> <li>• Any other information that could reasonably be expected to have a bearing on the individual being fit and proper to own or manage a licensed body.</li> </ul> <p><u>Owners (including those with less than a material interest)</u></p> <ul style="list-style-type: none"> <li>• Percentage of shareholding/interest in the business and percentage of voting rights (if different) (including holdings of associates as defined in Schedule 13, paragraph 5)</li> <li>• Names of associates as defined in Schedule 13, paragraph 5 and the nature of their relationship with the named person</li> <li>• If not a natural person, description of their legal status and the identity of the ownership of the body</li> <li>• Fit and proper test (if relevant)</li> <li>• Material interest declaration</li> <li>• Any other information that could reasonably be expected to have a bearing on the individual being fit and proper to own or manage a licensed body.</li> </ul>	
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3.3.5 In addition to the application form, the applicant will be expected to submit supporting documentation and references, including details of its business plan, financial management processes including accounts or financial projections, organisational structure and its policies relating to risk management. .

3.3.6 The Authorisation Team will produce detailed technical and question specific guidance to assist with the application process. A dedicated email address and phone line will be put in place to encourage applicants to contact the Authorisation Team for advice and all communications and documentation will emphasise that the Authorisation Team will be on hand to provide support and assistance.

- 3.3.7 On receipt of a completed application, the Authorisation Team will confirm receipt and carry out an initial review to determine into which of 5 (TBC) application fee categories the applicant falls. The decision will be based on a high level assessment of the size and complexity of the proposed structure of the applicant and the consequent regulatory resource required to evaluate the information provided to determine whether to authorise. The stated turnaround time for the fee categorisation will be 14 days, during which time a check will be carried out to determine whether all necessary documents have been submitted. The applicant will be advised of, and permitted to correct, any substantive omissions or errors.
- 3.3.8 When the fee category has been determined, the applicant will be advised. Once payment is received, the Authorisation Team will notify the applicant that assessment has commenced (see below for details). The receipt of the payment triggers the start of the regulatory decision period.
- 3.3.9 On completion of the assessment process, if the Authorisation Team determines that an application meets the BSB's policy objectives and is therefore suitable for regulation, the applicant will be informed in writing of the decision and the relevant authorisation fee will be requested. On receipt of the fee, the BSB will issue a licence to the applicant as soon as possible requiring the applicant to produce evidence of appropriate insurance to the BSB within a specified timeframe. The applicant will be permitted to operate as a BSB regulated ABS once appropriate insurance is in place. The licence itself will state the name of the entity, the reserved activities it has been authorised to carry out and any conditions.
- 3.3.10 Should the BSB decide that the applicant is not suitable for authorisation, the reasons will be outlined in writing to the applicant and they will be advised of the BSB's review procedures (see below).

#### **Licence Determinations [schedule 11 paragraph 2(1)]**

- 3.3.11 All licensing applications will be considered by the existing Authorisation Team in the BSB.
- 3.3.12 As outlined above, when the application fee is received, the formal assessment period will begin. Whilst this period is stated to be 6 months, it is the BSB's aim (as with non-ABS authorisation), that applications will be processed more quickly. The Authorisation Team can issue an extension notice to extend this period although the total decision period cannot exceed 9 months, being the current statutory limit. The time taken to deal with applications will be monitored on a continuous basis and the results will be published.
- 3.3.13 Whilst assessing the application, the BSB Authorisation Team will determine whether there are any matters that require further investigation, or whether any expert outside input is required, whether checks are required with credit or data verification agencies and whether reference is required to other regulating bodies. All costs

incurred for such checks will be charged to the applicant in addition to the application fee.

### 3.3.14 Data verification checks include

	HOLP	HOFA	Non-authorized manager or person with material interest
ID	x	x	x
Standard DBS	x	x	x
Adverse financial CCJs, adverse orders	x	x	x
Licensing authority or AR disqualification	x	x	x
Prof/regulatory body discipline	x	x	x
Criminal convictions	x	x	x
Bankruptcy/IVA	x	x	x
Academic qualifications	x	x	
References	x	x	
FSA sanctions	X	x	x
International financial	x	x	x
Director disqualification	x	x	x

3.3.15 The Authorisation Team will adopt a risk-based approach to determine whether to license an applicant. It will assess the nature of the risks posed by an applicant, taking into account its structure and governance arrangements, the kind of the services it intends to provide, its impact on the wider legal services market and its own risk assessment and mitigation procedures

3.3.16 The Authorisation Team BSB will assess and determine an application in 4 stages. A process map outlining these stages is included at **annex J**. The stages are:

- 1) Determine whether the application satisfies the mandatory requirements set out in Rules s83 and S84 of the BSB Handbook;
- 2) Evaluate whether the applicant is an appropriate entity for the BSB to regulate (rS99);
- 3) Satisfy itself that and that the applicant will meet the requirements of rS101. The BSB must satisfy itself that the management, control and compliance arrangements are appropriate for the proposed nature and type of business.
- 4) Determine that its owners, managers, HOLP and HOFA and non-authorized individuals meet the suitability criteria as set out in rS110.

## Risk Assessment Process

- 3.3.17 On payment of the application fee, the assessment period formally commences. All information received from an applicant will form part of the assessment.
- 3.3.18 The Authorisation Team will develop a risk framework to enable it to classify the information provided by an applicant into one of 3 categories – High, Medium or Low. These categories reflect the approach to the assessment of risk for entity authorisation and also the BSB’s risk-based supervisory strategy.
- 3.3.19 Criteria will be developed for each category of risk for each question to ensure consistency and transparency of evaluation and decision-making. Where the response requires an evaluative judgement of the risk posed, the applicant will have been asked to provide details including (as relevant) dates, circumstances and resolution. A copy of the assessment spreadsheet the Authorisation Team are currently using to assess entity applications can be found at **annex K**. This will be adapted and updated to reflect additional criteria that needs to be assessed as part of ABS applications.
- 3.3.20 The first check is to determine whether the mandatory criteria are satisfied (see below for more details). Where these are met, there will be an evaluation of the discretionary criteria.
- 3.3.21 It is intended that each application will be assessed independently by 2 experienced assessors within the Supervision Department. Each assessor will note any issues, queries or concerns and these will form the basis for an overall review of the application by the assessors and a determination of the preliminary risk profile. Reflecting the process for entity authorisation, it is intended that each applicant will be formally contacted to permit them to provide more information about the identified areas of risk. Any responses will be reviewed by both assessors to determine whether the area has been addressed, what further action is necessary (see Supervision Strategy below) and the final risk profile.
- 3.3.22 Where the assessors are of the opinion that the applicant should be refused, the application will be escalated internally for review by the BSB’s senior management. All information and document used and produced by the Authorisation Team will be made available. The decision made will be advised to the applicant (see below).

### Assessment of Mandatory Criteria

- 3.3.23 As stated above, the first step will be to check whether the applicant entity satisfies meets all the mandatory criteria set out in rules S83 and S84 of the Handbook. The Authorisation Team must refuse an application if the mandatory criteria are not met. However, in limited circumstances, an application can be assessed where criteria remain outstanding but are actively in progress, e.g. where incorporation is

underway. An authorisation decision will not be issued unless all the mandatory criteria are satisfied.

- 3.3.24 If the mandatory criteria are not met, the Authorisation Team will liaise with the applicant to advise them where the deficiencies lie and to afford them the opportunity to amend the application. The applicant would be expected to do so expeditiously should they wish their application to be considered within the same decision period and for the same application fee. All information provided by the applicant at any point will form part of the overall assessment.

#### Evaluation of Discretionary Criteria

- 3.3.25 Where the mandatory criteria are met, the Authorisation Team will consider additional information to determine whether

- An entity is appropriate to regulate; and
- The management, control and compliance structures and processes are sufficiently robust for the entity being proposed; and
- All owners, managers, HOLP, HOFA and non-authorized individuals are suitable to act in their role(s).

- 3.3.26 The Authorisation Team will adopt a flexible approach in its assessment of whether the entity is appropriate for BSB regulation. The rationale for adopting a holistic, rather than a prescriptive approach, is to ensure that, within the overall umbrella of the BSB policy objectives for regulation of ABS, entities which have an acceptable risk profile but do not fully meet the discretionary criteria can be authorised, thus permitting, within measured parameters, the legal services market to innovate and develop.

- 3.3.27 In the exercise of its discretion, the Authorisation Team will consider the nature and type of business that the applicant intends to carry on to ascertain whether it will have robust processes in place for competent and efficient administration. Factors that will be considered include:

- a) the services that the applicant intends to provide and the nature and extent of any non-reserved activities;
- b) the percentage of owners and managers who are authorised individuals
- c) the percentage of owners and managers who have higher rights of audience
- d) the proposed proportion of managers to employees;
- e) the proposed proportion of authorised individuals to non-authorized individuals;
- f) the extent to which its managers have been and / or are going to be actively involved in advocacy and / or litigation services or related advice;
- g) whether any persons with an ownership interest (whether material or not) are not individuals;
- h) whether any managers are not individuals;
- i) whether the applicant is intending to provide high-volume, standardised legal transactional services (in particular, direct to lay clients) and/or conveyancing

and, if so, whether this is likely to constitute a substantial or significant proportion of its practice;

- j) the systems that the applicant will have in place to manage its services and associated risks.

3.3.28 As it is the BSB's stated decision to be a niche regulator of traditional Bar activities, the Authorisation Team will initially focus on two of the discretionary factors. These are

- Whether a substantial part of the services to be provided comprises the provision of specialist legal advisory, advocacy and/or litigation services; and
- Whether the entity intends to provide high-volume, standardised legal transactional services.

3.3.29 The BSB is likely to refuse an application if

- The provision of specialist advocacy and / or litigation services or other expert legal advisory services is not a significant proportion of the proposed practice; and
- A substantial part of the services to be provided are high-volume, standardised legal transactional services (in particular if direct to lay clients) or conveyancing.

In the context of the above discretionary factors, an indication that an applicant should be categorised as "*Red*" and therefore unsuitable for regulation would be where most or all of the work carried out would be transactional, e.g. conveyancing. However, if an application indicated a combination of transactional work and specialist legal advisory, advocacy and / or litigation services, thereby falling into the "*Amber*" category, the other discretionary factors would be considered to determine suitability for authorisation.

3.3.30 The Authorisation Team will only consider the remaining discretionary factors where these discretionary criteria are satisfied.

3.3.31 An applicant may be unsuitable for BSB regulation where fewer than 75% of owners or fewer than 75% of managers are authorised individuals. Although the Authorisation Team will not apply the 25% lay ownership limit as a rigid one, this may suggest that the entity will be better suited to a different regulatory approach (see discussion of discretionary criteria above) and/or that the focus of services provided by the applicant will not be specialist legal advisory, advocacy and/or litigation services and is therefore incompatible with the BSB's decision to be a specialist regulator.

3.3.32 The discretionary criteria listed are not exhaustive of the matters that may be relevant to the appropriateness of the applicant for regulation. Even if the criteria

listed above are present, the Authorisation Team may refuse an applicant if its analysis of the risks posed indicate that it may not be suitable for regulation. In making this decision the Authorisation Team will consider whether the applicant has assessed its own risks and put in place adequate risk management systems and policies. For example, applicants will be required to provide, amongst other documents, their business plan, a three year financial plan and a disaster recovery business continuity plan. There are currently appropriate financial and accounting staff skills within the Supervision team to assess these documents, and to query where there are marked differences in year on year financial projections. Staff will also ensure that information contained in the business plan matches what is contained in the financial projections (for example, the figures for wages of employees should match up to the number of employees described in the business plan). If the BSB has concerns about the internal management and control arrangements, and these concerns remain after the applicant has had an opportunity to address them, then it will have to decide whether to authorise the applicant, perhaps subject to conditions, with a high risk rating and close supervision or whether to refuse to grant authorisation. In taking this decision, the BSB will take account of the adequacy of its own experience and skills effectively to supervise the applicant, having regard to its assessment of the risks posed by the applicant.

#### Suitability of the owners, managers, HOLP, HOFA and non-authorised individuals

- 3.3.33 The overall test is whether the individual is currently suitable for the specific role and whether the BSB and the public can have confidence in that individual in the particular role. Should the Authorisation Team determine that an individual does not meet the relevant suitability criteria, it is likely that the applicant would be asked to nominate a different individual provided satisfactory responses have been given to the rest of the application.

#### Authorisation decision

- 3.3.34 Taking all the factors into account and having made a thorough assessment of the applicant the Authorisation Team will determine one of the following:
1. To grant a licence free of conditions;
  2. To grant a licence which imposes conditions (to mitigate less serious risks);
  3. To refuse an application.
- 3.3.35 Where a licence is subject to conditions or an application is refused the Authorisation Team will inform the applicant in writing of the reasons. All licences will be subject to the condition that the entity, its owners, managers and employees comply with relevant obligations under the Handbook, the LSA and other legislation.
- 3.3.36 When a licence is granted, the details of the ABS will be included on the BSB's online register of BSB authorised entities.

3.3.37 Similar to the procedure for non-ABS entities, where an applicant is deemed appropriate for regulation and a licence is issued, the new entity will come within the scope of the BSB's Supervision Strategy. Further details are given in a later paragraph.

Licence Determination Review [schedule 11 paragraph 3]

3.3.38 Any applicant or licensed body dissatisfied with our determination of their application has the right to a review of the decision. This includes where the applicant/licensed body considers that:

- An application for a licence was wrongly refused;
- A condition on an application or licence was wrongly imposed;
- A term of a licence is wrongly modified;
- The BSB wrongly refused to modify the terms of a licence;
- The BSB has wrongly done any of the foregoing in relation to the litigation extension to a licence;
- The BSB has failed to provide a decision notice;
- The BSB has wrongly concluded that a non-authorized owner, manager or HOLP or HOFA does not meet the relevant suitability criteria to their proposed position within the entity.

3.3.39 The Authorisations Team will contact all applicants refused authorisation to advise them in detail of the decision, their right to appeal the decision, the appropriate appeals route and applicable fee. The applicant/licensed body has 28 days to request a review from the date the decision is first notified to them.

3.3.40 The review will be carried out by the BSB's Qualifications committee, using the procedure already in place for non-ABS entities. The only substantive change to this process is to allow non-authorized individuals to appeal against decisions that they did not meet the suitability criteria for certain roles within the entity.

3.3.41 The Authorisation Team will furnish both the applicant and the Qualifications Team with a copy of all documentation relating to the application, including that submitted by the applicant entity and that produced by the Authorisations team.

3.3.42 Once the Qualifications Committee has reached a decision the applicant will be notified. If the applicant is not satisfied with the decision they will have the option to appeal this further to the First-Tier Tribunal. External appeals are considered in further detail at 3.5.3.

3.3.43 Following authorisation, an overall risk profile for each ABS will be produced, collating all decisions, assessments and conclusions made by the Authorisation Team about the entity. This risk profile and any licence conditions will be made available to the Supervision Team.

3.3.44 Whilst the specific nature of the monitoring and supervisory activities will depend on the risk profile and licence conditions of each particular ABS, each authorised entity will be assigned a supervisory contact. In addition to the formal contact made at annual renewal (see Licence Period/Renewal below), the supervisory contact will contact each entity at least once within the 12 month period. The purpose of this contact will be to confirm ongoing compliance with the mandatory requirements and to clarify whether any material changes have occurred within the ABS in the intervening period or are planned by the ABS. The responses will inform future supervisory actions in the context of the overall Supervision Strategy.

Licence Period/Renewal [schedule 11 paragraphs 4(1) and (2)]

3.3.45 Licences will be issued for an unlimited duration and will remain valid subject to the following conditions:

- Paying the licensing renewal fee;
- Providing the relevant monitoring information;
- Providing any information or fee within the relevant timescales;
- Compliance with any conditions and with obligations under the rules.

3.3.46 The BSB intends that, similarly to non-ABS entities, the annual renewal process will occur on the same day for all entities.

3.3.47 Prior to the renewal process, it is proposed that each entity will be formally contacted by the BSB and asked to confirm that the mandatory criteria required for authorisation as an ABS remain satisfied. They will also be asked whether any material changes have occurred since the original authorisation decision or the previous renewal. The responses will inform future supervisory actions in the context of the overall Supervision Strategy.

3.3.48 If the conditions in 3.3.45 are not met by the designated day, the BSB will take steps to withdraw the licensed body's licence

3.3.49 The BSB will also be able to withdraw a licensed body's licence if the body fails to replace their HOLP/HOFA in accordance with the requirements of the Handbook and must do so if the body obtains a licence from another licensing authority.

Continuity of licences [schedule 11 paragraph 5]

3.3.50 Rule S115.3 in Part 3 provides that if there is a minor change in the membership of a partnership (such that although legally there is a new partnership, in practice the old partnership continues)) the existing licence would continue uninterrupted.

3.3.51 Part 3 Section F of the Handbook also sets out the procedure that would be followed in the event of non-compliance with any of the mandatory conditions of authorisation. The entity would be expected to notify the BSB of any failure to comply within 7 days and at the time of notifying us also submit proposals for rectifying non-compliance with a proposed timeframe. If the BSB considers that the proposals for rectification

are not sufficient the BSB can issue a notice suspending or revoking the licence. Revocation and suspension of licences is considered further below at paragraphs 3.3.109 – 3.3.112.

#### Licence modification [schedule 11 paragraph 6]

3.3.52 A licensed body is entitled at any time to apply for a modification of its licence terms (rs116). If the body wishes to apply for a modification itself it will be expected to complete the appropriate application form and submit this with the relevant fee. The BSB will aim to process these applications within 28 days. In addition the BSB may modify a licence if:

- Such a modification is required in accordance with the provisions of the Handbook;
- In the event of a sanction imposed by a disciplinary tribunal; or
- Where the BSB considers that such a modification is appropriate and in accordance with the regulatory objectives under the LSA or the policy objectives of the BSB.

3.3.53 If the BSB is making the modifications (rather than the applicant having applied for one) the BSB will give the licensed body notice in writing of the proposed modifications to be made to the licence and will provide a reasonable opportunity for the applicant to make representations prior to a final decision on the modification being made. The modification will take effect 28 days from the date the decision is notified to the licensed body unless the body applies for a review within this time. More detail on the review process can be found at paragraph 3.3.38 above.

#### Management [schedule 11 paragraph 9]

3.3.54 Schedule 11 of the LSA provides that a licensed body must have at least one manager who is an authorised person in relation to a licensed activity. As part of our mandatory requirements we require that at least one manager or employee is an authorised individual in respect of each reserved legal activity they wish to provide.

3.3.55 All managers of ABSs will be individually responsible for compliance on the part of the ABS with the key rules applicable to the ABS. Managers will also be responsible for complying with those rules that are applicable to them individually. However, the latter rules vary depending on the manager's specific role and function within the ABS, the extent to which they have supervisory responsibility over employees and their status as a barrister, other authorised person, or a non-lawyer.

3.3.56 rS83.6 requires all applicants to confirm that they will not employ any person who is disqualified by the BSB or another Approved Regulator without the approval of the BSB.

3.3.57 The rules allow non-authorised persons to be managers of ABSs. The reasons for the discretionary provisions relating to the number of such persons compared to the number of authorised persons is discussed at paragraph 3.3.27 onwards above. The BSB's rules already allow individuals authorised by it to work in ABSs of any kind regulated by other Approved Regulators.

### HOLPs and HOFAs [schedule 11 paragraphs 1, 11, 12 & 13]

3.3.58 Schedule 11 of the LSA and the LSB's guidance sets out various requirements in relation to HOLPs and HOFAs and in particular whether the appointed individual is a fit and proper person.

3.3.59 The BSB will require all HOLPs and HOFAs (as well as non-authorized owners and managers) to undergo a suitability test prior to authorisation. The BSB may conclude that a person is not a fit and proper person where any of the criteria listed below apply to that individual (authorized individuals do not need specific approval to be managers or owners, but the entity may be refused authorisation if any of the managers or owners has done any of the things listed in rS110):

- Any conviction other than minor convictions
- Disqualified from being a director
- Removed from the office of charity trustee or trustee for a charity by an order within the terms of section 72(1)(d) of the Charities Act 1993
- Undischarged bankrupt
- Adjudged bankrupt and discharged
- Entered into an individual voluntary arrangement or a partnership voluntary arrangement under the Insolvency Act 1986
- Has previously been a manager of a non-BSB authorised body or a BSB authorised body which has entered into a voluntary arrangement under the Insolvency Act 1986
- Has been a director of a company or a member of an LLP which has been the subject of a winding up order, an administration order or administrative receivership; or has entered into a voluntary arrangement under the Insolvency Act 1986; or has been otherwise wound up or put into administration in circumstances of insolvency
- Lacks capacity (within the meaning of the Mental Capacity Act 2005) and powers under sections 15 to 20 or section 48 of that Act are exercisable in relation to that individual
- Is the subject of outstanding judgments involving the payment of money
- Is currently charged with an indictable offence, or has been convicted of an indictable offence, any dishonesty offence or any offence under the Financial Services and Markets Act 2000, the Immigration and Asylum Act 1999 or the Compensation Act 2006
- Has been disqualified from being appointed to act as a HOLP or a HOFA or from being a manager or employed by a licensed body (as appropriate) by the BSB or another Approved Regulator pursuant to its or their powers under section 99 of the LSA or otherwise as a result of its regulatory arrangements
- Has been the subject of an equivalent circumstance in another jurisdiction to those listed above
- Has significant professional conduct findings against them

- |   |
|---|
| <ul style="list-style-type: none"><li>• Has been involved in other conduct which calls into question his or her honesty, integrity or respect for the law</li></ul> |
|---|

3.3.60 A HOLP must be an authorised person and a manager. In determining the suitability of the proposed HOLP the BSB will conclude that an individual is not a fit and proper person to undertake the role if:

- They are not an authorised person;
- They are disqualified by a Licensing Authority from acting as a HOLP, or any other role, in a licensed body.

3.3.61 The BSB *may* conclude an individual is not a fit and proper person to undertake the role of a HOLP if:

- Any concerns have been identified by the criteria listed in paragraph 3.3.59 above; or
- The BSB considers that the person is not able effectively to carry out the duties imposed on a HOLP by section 91 of the LSA.

3.3.62 The same criteria apply to a non-authorised owner or and manager and to a HOFA, except that they do not need to be an authorised person.

3.3.63 The BSB will exercise its discretion whether to approve the HOLP, HOFA or non-authorised owner or manager if there are any factors identified by the fit and proper test. So for example if the HOFA has been identified as being an undischarged bankrupt, this may have a significant impact on the BSB's decision on whether or not to approve that individual. Bankruptcy might be less relevant to other roles. The test to be applied will be whether the person is suitable now to undertake the relevant role

3.3.64 If the BSB concludes that a person is not fit and proper to be a HOLP, HOFA or non-authorised owner or manager, then that person will have a right to seek a review as discussed above.

3.3.65 A candidate approved as a HOLP/HOFA may subsequently become unsuitable. The HOLP will be under a duty to notify the BSB of any fit and proper issues concerning the HOLP/HOFA or managers. As with the fit and proper test applied at the application stage an identified issue would not automatically result in the withdrawal of our approval but a decision would be based on an assessment of the risk posed by the individual in continuing in their role. The BSB will consider whether the imposition of a condition on the licence would mitigate any risks associated with the person continuing in that role.

3.3.66 If a HOLP/HOFA has been approved but subsequently has been found unsuitable, the BSB may withdraw its approval and require the ABS to appoint a different individual to the role of HOLP/HOFA. Dependant on the circumstance the BSB will

usually engage with the entity and individual on an informal basis to resolve any issues prior to approval being withdrawn. Approval will only be withdrawn immediately if the risk to the public is considered so serious that only immediate withdrawal would mitigate this risk. Should a HOLP/HOFA be determined inappropriate by the BSB, the individual or the ABS has the right to request that this decision be reviewed. They request for review must be made within 28 days of the decision. See paragraph 3.3.38 for more information on reviews.

3.3.67 If the ABS ceases to have a HOLP/HOFA as the BSB has deemed them to be no longer suitable or for other reasons (eg the individuals performing those roles have left the organisation) the ABS must take the following steps immediately and in any event within seven days:

- Notify the BSB of the fact;
- Designate another manager or employee to replace its previous HOLP/HOFA as appropriate;
- Make an application to the BSB for temporary approval of the new HOLP/HOFA as appropriate.

3.3.68 When an application for temporary emergency approval of a HOLP/HOFA has been submitted, the BSB will seek to action this as soon as possible and grant authorisation no later than 7 days after the application was first submitted. For temporary emergency approvals the BSB will check:

- Whether the proposed individual is an authorised individual (in relation to HOLPs);
- Whether the proposed individual is or has previously been disqualified from acting as a HOLP/HOFA by another approved regulator or licensing authority.

3.3.69 It would not be practical at this stage to do more detailed checks on the nominated HOLP/HOFA. However the licensed body will be expected to apply for a new HOLP/HOFA within 3 months of the temporary approval first having been granted.

3.3.70 If the licensed body does not seek authorisation for a new HOLP/HOFA within 3 months the BSB will initially contact the body to inform them the approval of the emergency HOLP/HOFA has expired and they are required to nominate an individual to fill the role within a week. If the licensed body fails to do so this could ultimately lead the BSB to revoking or suspending the licensed body's licence.

3.3.71 The rules require the HOLP to be a manager. This will ensure that he has the necessary authority and is part of the senior management team.

3.3.72 The duties of the HOLP/HOFA are set out in Part 2 of the Handbook. As well as the more general duties placed on the licensed body and BSB regulated individuals, HOLPs must:

- a. Take all reasonable steps to ensure compliance with the terms of the licence;

- b. Take all reasonable steps to ensure that the licensed body and its employees, and managers comply with the duties imposed by section 176 of the LSA 2007;
- c. Take all reasonable steps to ensure that non-authorized individuals subject to the duty imposed by section 90 of the LSA 2007 comply with that duty; and
- d. Keep a record of all incidents of non-compliance with the Core Duties and the Conduct Rules of which they become aware and report such incidents to the Bar Standards Board as soon as reasonably practicable (where such failures are material in nature) or otherwise on request by the Bar Standards Board or during the next monitoring visit or review undertaken by the Bar Standards Board.

3.3.73 The HOFA is under a duty to ensure that the licensed body complies with client money requirements set out in the Handbook.

3.3.74 The BSB considered whether HOLPs should be under a duty to report all incidents of non-compliance to the BSB, including minor breaches. The role of the HOLP in securing compliance with the rules would be made much more difficult if all breaches, however small, had to be reported to the regulator. That would risk creating a culture of covering up minor problems rather than discussing them with the HOLP and sorting out arrangements to achieve compliance in future. This would be contrary to the regulatory objectives. This approach is consistent with the requirement on individual barristers and other entities to report serious misconduct to the regulator. The BSB does however expect ABSs to comply with the statutory requirement set down in the LSA 2007 and record all incidents of non-compliance. The BSB reserves the right to request such records during monitoring visits or when carrying out spot checks.

3.3.75 Applicants will be expected to set out the role and responsibilities of the HOLP and HOFA in their application and to demonstrate in their application (for example through the governance structure) that HOLPs/HOFAs have the necessary independence when reporting on matters to the BSB.

**Practising Address [schedule 11 paragraph 15 (1)]**

3.3.76 In accordance with schedule 11 of the LSA the Handbook requires as a mandatory requirement that licensed bodies will have at all times a practising address in England and Wales (rs83.7).

**Licensed Activities [schedule 11 paragraph 16]**

3.3.77 The scope of practice rules in Part III of the Handbook make it clear that reserved legal activities may only be carried out by those who are so entitled under the LSA 2007 and that both the entity and the individual must be appropriately authorised. The rules also state that an individual must not permit any third party who is not authorised or licensed to provide reserved legal activities on their behalf.

3.3.78 The licensed body's licence will specify the reserved legal activities which the body is authorised by the BSB to provide.

**Compliance with regulatory arrangements [schedule 11 paragraph 17(1)]**

3.3.79 Applicants will be expected to provide details of their governance and management arrangements which should assist the BSB in determining how the body once licensed would intend to comply with the BSB's regulatory arrangements.

3.3.80 As well as the HOLP having a specific duty to ensure that all managers and employees comply with the s176 duties set out by the LSA 2007 and that non-authorised individuals comply with the s90 duties, applicants will be required to confirm that they have processes and procedures in place to enable them to comply with Core Duty 10 and the Conduct Rules relating to the conduct of their business. Those requirements include ensuring that employees are competent and carry out their duties correctly, having appropriate risk management procedures, and having arrangements to manage conflicts of interest and ensure client confidentiality. This will form part of the assessment of risk during the authorisation process. As part of the application process, applicant entities will be asked how they will identify and manage potential conflicts of interest and protect client confidentiality, for example in circumstances where they share premises.

3.3.81 If the BSB assesses an entity as high risk they will be subject to an initial monitoring visit and they would also be subject to closer and more intensive supervision than low risk scorers. For entities that score a low risk rating the BSB will carry out sample spot checks to satisfy itself about the evidence for the statements made by applicants and will be looking at the relevant systems and procedures.

3.3.82 If monitoring visits or other information suggest that there are compliance problems, these will be taken up with the entity with the aim of agreeing action to rectify the problems. If there is a serious failure to comply with the Handbook or informal steps do not secure compliance, disciplinary action will be taken against the ABS and/or the managers responsible for the failure. If an individual is responsible for such a serious breach that it calls in question his suitability to work for an authorised person, disqualification proceedings can be brought against the individual. A disqualification order will make it professional misconduct for any BSB-regulated person to employ the disqualified person without prior BSB approval.

3.3.83 Specifically the BSB has the following expectations of those working within an ABS:

*Barrister employees*

Employees of an ABS who are barristers will be subject to the rules and disciplinary procedures applicable to them as individual barristers, and will also share the responsibility for ensuring that the ABS complies with its obligations, dependant on their role in the organisation.

*All managers*

All managers of a BSB authorised ABS will have a duty to ensure that the ABS complies with the rules that apply to the entity, as well as a personal responsibility to comply with the rules specifically applicable to them. They also have a specific duty to ensure they do not do anything to cause (or substantially contribute to) the BSB authorised body or any BSB authorised individual within it to breach their duties under the Handbook.

*Other authorised managers and employees*

The LSA 2007 provides that all authorised persons participating in an entity are subject to the rules laid down by the regulator of that entity. Employees who are individually authorised by other regulators, such as solicitors, will therefore be subject to the BSB's rules as the regulator of the entity in respect of their conduct as a manager or employee, as well as being subject to the rules of their approved regulator as individuals.

*Non-authorised persons*

Section 90 of the LSA 2007 puts a duty on all non-authorised persons who are employees or managers of an ABS not to cause the ABS or authorised persons within it to breach their duties. The Handbook also places general obligations on authorised persons, managers and the entity to ensure that non-authorised and authorised employees have the necessary skills and experience to do their jobs properly.

**Disqualification [schedule 11 paragraphs 18(1) & (2)]**

3.3.84 Paragraph 18 of schedule 11 sets out that licensing rules must include a requirement that a licensed body may not employ a person who under Part 3 of Schedule 11 is disqualified from being an employee of a licensed body. Rule rS83 requires BSB authorised bodies to ensure that they do not employ disqualified persons except with the approval of the BSB. Section E in Part III of the Handbook

requires applicants to confirm that no individual has been or will be appointed to act as a HOLP, HOFA, manager or employee of an ABS who is disqualified from acting as such by the BSB or any other approved regulator pursuant to section 99 of the LSA 2007. As this is a mandatory requirement for authorisation any applicant who has a member of staff who has been disqualified from being an employee of a licensed body and where the BSB's permission for appointing them has not been obtained the entity would not be able to proceed with the application process.

- 3.3.85 If a licensed body once licensed employs a person who is disqualified without BSB approval this would constitute a breach of their licence and appropriate action would be taken. A consistent approach will also be taken for other entities the BSB will regulate.
- 3.3.86 Should the BSB disqualify a licensed body employee (or any other employee), the BSB will inform the LSB and the other Licensing Authorities and Approved regulators of the disqualification. Disqualifications are discussed further at paragraph 3.3.100 – 3.3.108.

Indemnification and compensation arrangements [schedule 11 paragraph 19(1)]

- 3.3.87 See paragraphs 3.2.22 and 3.2.23 above.

Accounts [schedule 11 paragraph 20(1)]

- 3.3.88 The BSB wishes to ensure that the regulatory framework allows barristers and BSB regulated entities sufficient scope to provide services that are competitive with those legal services offered by other providers, this is particularly important in relation to entities' ability to offer litigation services. It is in the interests of consumers and the public more widely to ensure that BSB regulated entities and barristers working within those entities who are authorised to conduct litigation can provide competitive services. This includes ensuring that the method of payment for litigation is acceptable to clients.
- 3.3.89 Other Approved Regulators permit the persons they authorise to hold client money. This facilitates payments but introduces risks that the money will be dishonestly used or handled incompetently with resultant risks to clients. To mitigate these risks, the regulator has to implement and enforce detailed handling rules, and operate a proactive monitoring system. Self-employed barristers have never been allowed to hold client money and this has permitted the BSB to adopt a less interventionist approach. Similarly the BSB will not be permitting entities to hold client money and hence there is no need for client money account rules. Instead the BSB permits self-employed barristers and BSB regulated entities to use third part payment services that are appropriately regulated by the FCA and comply with guidance at gC103 and following. We believe that this provides the optimum level of consumer protection, whilst avoiding additional (and possibly duplicatory) structures within the BSB's regulatory arrangements.

### **Fees [schedule 11 paragraph 21(1) & (2)]**

- 3.3.90 The BSB proposes that, similarly to its non-ABS regime, entities will pay a one off fee to have their applications assessed and a one off fee for authorisation. A renewal fee will be payable annually. The application and authorisation fees will be based on the size of the entity applying for authorisation to reflect the regulatory resource required to assess the applications.
- 3.3.91 Fees for parts of the application process that are not of general application should be borne by those making the application on a cost recovery basis. For example the BSB will reserve the right to charge amounts in addition to the standard fee for complex applications, for data verification and if external advice on an application is required. The intention is that fees for the initial authorisation process will be fully borne by entities and will not be recovered from the rest of the regulated community.
- 3.3.92 The BSB intends that the renewal fee structure will be based on the risk profile of the entity at the time of renewal taking into account the actual and anticipated resource required to supervise that entity. The Supervision Department's experience with non-ABS entities and the data gathered will enable it to relate different kinds of risk to the ongoing costs of regulation of ABS.
- 3.3.93 It is also proposed to charge fees for applications to the BSB such as approvals for new managers or the appointment of HOLP or HOFA. These fees will be set a level to cover the costs of dealing with the applications. We may also charge for additional monitoring visits if these are necessary.
- 3.3.94 The BSB will provide further information on fees following the assessment of the initial operation of BSB entity based regulation and the appropriateness of the fee structure in place for that regime. In addition, further take up research will be undertaken in order to establish interest from potential ABS in regulation by the BSB.

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### **Financial penalties [schedule 11 paragraph 22]**

- 3.3.95 The LSA 2007 sets out that licensing rules must make provision as to:
- The acts and omissions in respect of which the Licensing Authority may impose a penalty under section 95;
  - The criteria and procedure to be applied by the Licensing Authority in determining whether to impose a penalty under that section, and the amount of any penalty.
- 3.3.96 Following a disciplinary finding, one sentencing option available will be to impose a fine against the entity and/or individual within the entity. Pursuant to s95(1) of the LSA 2007 a licensing authority may, in accordance with its licensing rules, impose on

a licensed body (or a manager or employee of a licensed body) a penalty of such amount as it considers appropriate. Subsections (2) and (3) of section 95 confirm that the fine must not exceed the maximum prescribed by the LSB.

3.3.97 The prescribed maxima set by the LSB are £250,000,000 with respect to the licensed body and £50,000,000 for a manager or employee within a licensed body and these are the fines the BSB has adopted in relation to ABSs.

3.3.98 In deciding the appropriate level of fine to be imposed, the BSB and Disciplinary Tribunal will take into account all relevant circumstances, including that any financial penalty should:

- a. Be proportionate to:
  - i. The misconduct;
  - ii. The harm done;
  - iii. The means of the person directed to pay
- b. Be of an amount that:
  - i. Is likely to deter repetition of misconduct;
- c. Take into account:
  - i. The intent, recklessness or neglect that led to the misconduct;
  - ii. Any mitigating or aggravating circumstances;
  - iii. Any indicative guidance published by the BSB from time to time<sup>5</sup>.

#### *Administrative sanctions*

3.3.99 The BSB will apply administrative sanctions to minor breaches of the Handbook where appropriate. Administrative sanctions will be imposed by the Professional Conduct Committee (or senior staff in line with delegated authority) applying the balance of probabilities in assessing whether there has been a breach. The maximum level of fine that may be imposed is £1,500 for entities and £1,000 for individuals. Alleged breaches of the Handbook will only be elevated to the more serious professional misconduct if one or more of the relevant criteria have been satisfied. The BSB has agreed, as part of the approval process for the first wave of entity regulation, to review the levels and effectiveness of fines for both ABS and non-ABS entities.

#### Disqualifications under section 99

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<sup>5</sup> The BSB has published indicative guidance on sanctions for individual barristers and will be extending that guidance to cover entities

3.3.100 Paragraph 23 of Schedule 11 of the LSA 2007 states that licensing rules must make provision as to the criteria and procedure to be applied by the Licensing Authority in determining whether a person should be disqualified under section 99.

3.3.101 By virtue of the LSA 2007 the BSB has a statutory power to disqualify a person from being a manager or employee of an ABS or acting as a HOLP or HOFA in an ABS if they breach the duties that the LSA 2007 places on them or cause or contribute to breaches of the body's licence and the BSB is satisfied that it is undesirable for the person to be a manager, employee, HOLP or HOFA, as the case may be. Non-authorised employees are discussed in greater detail at paragraph 3.2.6 . above.

3.3.102 Information leading to a decision to disqualify will come from a variety of sources. Because all authorised persons and HOLPs are under an obligation to report serious misconduct, one important source of information will be self-reporting by the ABS. Any information which discloses serious misconduct on behalf of a manager or an employee will be investigated by the Professional Conduct Department (PCD) and referred to the BSB's Professional Conduct Committee (PCC) in the ordinary way. In appropriate cases the PCC will then refer matters to a Disciplinary Tribunal for disposal.

3.3.103 Where referral involves a non-authorised employee, the Disciplinary Tribunal will not be asked to consider a charge that alleges a specific breach of the Handbook, Rather the BSB will make an application for disqualification on the basis that the employee has:

- a. breached their duty to do nothing which causes or substantially contributes to a breach of the Handbook by an authorised person or which causes an authorised person to breach a condition attached to their authorisation or licence; and
- b. it is undesirable for the employee to be employed by or manage a BSB authorised person or entity.

3.3.104 Disqualification will also be available in respect of barristers and non-BSB authorised individuals and non-authorised managers in an ABS who are brought before a Disciplinary tribunal on a charge of professional misconduct. In their case the criteria for applying disqualification will be:

- a. that they have breached the duties imposed on them by s90 and/or s176 LSA 2007, as the case may be, or if they are a HOLP or HOFA the specific duties imposed by sections 91 and 92; and
- b. it is undesirable for them to perform any such role in respect of a BSB authorised body.

3.3.105 For BSB authorised individuals in an ABS, suspension or disbarment would also be relevant. So for example, disqualification will, where this is appropriate, be used to

prevent them from acting as a manager or employee of an entity, in addition to suspending or disbarring them.

3.3.106 The person sought to be disqualified will have an opportunity to put their case, to be represented and to call evidence at an oral hearing. In determining whether the criterion of a breach of a relevant duty is established, the Disciplinary Tribunal will apply the criminal standard of proof (as it is required to do for all disciplinary matters referred to it)<sup>6</sup>. If a breach is found proved to that standard, the Disciplinary Tribunal must then go on to consider whether it is undesirable for that person to be allowed to act in any of the relevant capacities in the future. This is a matter for discretion, to be exercised in the public interest. In reaching a decision the following factors (which are not exhaustive) may be taken into account:

- a. The nature and extent of the breach and whether it caused significant harm or loss;
- b. If the breach was deliberate, calculated, repetitive or prolonged;
- c. If the breach negatively affected any of the regulatory objectives;
- d. Whether the breach has jeopardised the public confidence in the profession;
- e. Any remorse or any remedial steps taken by the individual.

3.3.107 If the Disciplinary Tribunal reaches a decision to disqualify, it will publish the findings and place the individual on a published list of those subject to suspension or disqualification orders or conditions on their authorisation to practice, The BSB will provide details of the disqualification to the LSB and other approved regulators.

3.3.108 If dissatisfied with the decision of the Disciplinary Tribunal, an appeal may be lodged with the High Court. Unless the Disciplinary Tribunal rules otherwise, the decision to disqualify will take immediate effect and the individual will remain disqualified pending appeal. Further information on appeals can be found at paragraph 3.5.1.

#### Suspension or revocation of licence/intervention

3.3.109 The BSB may revoke a licence in the following circumstances:

- In the event of a sanction imposed by a disciplinary tribunal; or
- If the ABS changes its structure/provision arrangements so it no longer complies with the mandatory or discretionary criteria for authorisation; or
- Revocation otherwise appears appropriate taking into account the regulatory objectives of the BSB.

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<sup>6</sup> The BSB's position is that it should not consider a move to the civil standard of proof independent of the Solicitors Disciplinary Tribunal (SDT) also considering such a move. The BSB will monitor the position with regard to the standard of proof applied by the SDT, specifically in relation to any prospective cases on the point that might be taken through the courts over the next year or so. The BSB will also formally review the position again as part of its Business Plan for 2016/17.

3.3.110 The BSB may suspend a licence to give it an opportunity to carry out any investigations into whether or not the licence should be revoked taking the above factors into account.

3.3.111 Before revoking or suspending a licence (because mandatory or discretionary criteria are no longer met, or because revocation appears otherwise appropriate,) the BSB will give the licensed body notice in writing of the suspension or revocation, and it will take effect from the date upon which the BSB delivers the notice to the licensed body unless a later date is specified within the notice. In instances other than when a Disciplinary Tribunal has issued a ruling, the entity will have the opportunity to respond to the notice and enter into discussions with the BSB to determine whether the problems can be rectified before the licence is suspended or revoked. If the BSB does decide to suspend or revoke the licence the entity is entitled to seek a review of that decision. Further information on the reviews process can be found at paragraph 3.3.38 above.

3.3.112 If charges of breach of the rules are proved against an ABS, the Disciplinary Tribunal will have the power to suspend or revoke a licence (or to impose a lesser penalty). The PCC will consider the sentence which is likely to be imposed if a finding is made. If the PCC considers that the likely sentence would be one of suspension for more than 12 months or revocation of an entity's licence then the matter will be referred to a five person Disciplinary Tribunal. Otherwise the matter will go to a three person Tribunal. The interim suspension rules will also apply to ABSs

#### *Interventions*

3.3.113 The grounds for intervention under the LSA 2007 include:

- Failure to comply with one or more terms of the licence;
- The appointment of a receiver or another defined insolvency event;
- Suspected dishonesty by a manager or employee;
- Undue delay in dealing with a matter;
- It is necessary to exercise the power to protect the interests of clients.

3.3.114 A policy paper on interventions can be found at **annex L**. The paper discusses how an intervention arises, the process for deciding to intervene, what happens once an intervention decision has been taken and a summary of the capacities and capabilities required in the organisation in order to operationalise this. Broadly the BSB's approach to interventions would be:

- a. The primary aim of the intervention power for the BSB is to take control of documents, mail and other forms of communication as client funds will not be an issue for BSB regulated entities;
- b. The BSB would seek to recover its own costs from the monies held by the entity and vested in the BSB upon intervention; and

- c. The BSB would not normally expect to use the provisions relating to the vesting of monies in order to take control of those monies to which others are beneficially entitled. However, in the event that there were such monies (for example in relation to client monies that were wrongly held in breach of the Handbook) then the BSB would, as far as practicable, seek to establish those entitlements and distribute the statutory trust accordingly. In such circumstance which should arise rarely, if ever, the BSB would appoint an agent to undertake that work.

### **3.4 Schedule 13 requirements**

#### Owners

- 3.4.1 Schedule 13 is concerned with the suitability of owners, in circumstances where an ABS may in principle (under section 72 LSA) be a body which has non-authorised persons either as managers, or as owners, or in both of those capacities.
- 3.4.2 The BSB has described above the fact that the discretionary factors to be applied in determining the suitability of an ABS for BSB regulation will include consideration of the proportion of non-authorised owners and the proportion of owners who are managers. Those are discretionary factors concerned with the BSB's policy objective of operating as a specialist entity regulator, providing a regulatory regime suited to the efficient and cost effective regulation of entities whose permitted range of services is broadly the same as those permitted to the self-employed Bar and whose risks and regulatory requirements are similar so that it can keep its regulatory arrangements simple and costs down, and minimise the risk of regulatory failure.
- 3.4.3 The effect of that policy is that, in the case of an ABS regulated by the BSB, those non-authorised persons involved as owners of BSB licensed bodies will also be managers and will be subject to approval as such. Therefore, it is highly improbable that an individual could be considered suitable to be a manager and yet unsuitable to be an owner of a restricted interest (having regard to the criteria that apply to approval of a restricted interest, in schedule 13, paragraph 6).
- 3.4.4 That said, where a non-authorised manager's holding constitutes a restricted interest for the purpose of schedule 13, it will be subject to approval in accordance with the terms of that schedule. The same will be true in the event that the BSB exercises its discretion to approve, exceptionally, an external owner who is a non-authorised person but is proposed to hold a material interest. In view of the fact that in the BSB's licensing regime the norm will be that non-authorised owners are also managers, the BSB does not propose to exercise the option under Schedule 13 paragraph 2(2) to specify a separate percentage for a controlled interest. Therefore, the approval process under Schedule 13 will apply where a non-authorised person has a material interest, as defined, in Schedule 13 paragraph 3.

3.4.5 Part D of the application form addresses ownership. We will require the entity in its application to disclose all persons to us with any ownership interest in the entity. Non-authorised individuals who are owners with a material interest must meet the following criteria (as specified in Schedule 13, paragraph 6) in order to be approved as owners:

- The non-authorised individual's holding does not compromise the regulatory objectives; and
- The non-authorised individual's holding of that interest does not compromise compliance with the duties imposed by section 176 of the LSA by the licensed body or any authorised individuals that are to be employees or managers of that licensed body;
- The non-authorised individual is otherwise a fit and proper person to hold that interest taking into account:
  - a. That person's probity and financial position;
  - b. Whether the person is disqualified pursuant to section 100(1) of LSA or included in the list maintained by the LSB pursuant to paragraph 51 of Schedule 13 of the LSA and;
  - c. That person's associates ( as defined in Schedule 13); and
  - d. The suitability criteria (the same suitability criteria as applied to employees and managers, HOLPs or HOFAs as set out in rs110).

3.4.6 In deciding whether to authorise the individual as an owner the BSB will take all of the above factors into account and seek additional information, or require information to be verified where there are significant concerns about an individual's interest in the entity.

### **3.5 Other provisions as set out in the LSB's guidance to licensing authorities**

#### **Appeals**

3.5.1 The BSB has outlined in the Handbook the appeals process for regulatory determinations made by the BSB as a Licensing Authority (or as an Approved Regulator). Applicants/the licensed body will be able in the first instance to ask the BSB's Qualification Committee to review a decision in relation to regulatory matters (so for example reviews of licensing decisions). Reviews of decisions and which decisions are subject to review by the Qualifications Committee are discussed at paragraph 3.3.38 above.

3.5.2 If the applicant/licensed body remains dissatisfied following the review by the Qualifications Committee there will be a further right of appeal to the General Regulatory Chamber of the First-Tier Tribunal (FTT), again for regulatory appeals.

- 3.5.3 The appeal route for disciplinary matters in relation to licensed bodies and other entities more generally will follow the same route as disciplinary appeals for individual barristers, going to the High Court.
- 3.5.4 A defendant must provide written notice of their intention to appeal within 21 days from the date of the relevant decision. With the permission of the PCC, the BSB may appeal where a Disciplinary Tribunal has dismissed a charge or it considers that a sentence is inappropriate.
- 3.5.5 The BSB has chosen to adopt a split route for appeals with disciplinary appeals being heard by the High Court and regulatory appeals being heard by the FTT for a number of reasons set out below:
- The proposal to hear disciplinary appeals before the High Court closely replicates the appeal arrangements of the SRA, where appeals from SDT hearings are heard by the High Court. The BSB will be regulating entities composed of barristers and solicitors, and may be taking disciplinary action at both an individual and entity level. In some instances, both the BSB and the SRA may need to take disciplinary action in relation to the same or similar events. It is therefore desirable that the two processes should be broadly consistent.
  - The profession and their clients could not reasonably be expected to understand or accept the alternative, whereby appeals from a disciplinary decision went to the High Court where they concerned a solicitor or barrister in an SRA regulated entity (as is the case under the SRA's current arrangements) but went to the FTT if they concerned a solicitor or barrister in a BSB regulated entity.
  - As well as hearing substantive disciplinary cases brought before it, the SDT has an independent jurisdiction to act as the final appellate body in respect of ABS licensing decisions taken by the SRA. The BSB has assumed that it would be necessary to develop a separate appeal route via the FTT for such decisions, which is why the BSB has proposed to have all disciplinary appeals from the Bar Tribunals and Adjudication Service (BTAS) heard by the High Court and final appeals from BSB regulatory decisions heard by the FTT. That should provide a clear and workable divide.

### **Reserved and non-reserved legal activities**

- 3.5.6 The BSB's policy is that the scope of services that a BSB regulated entity can offer should be the same as the scope of service that the self-employed Bar can offer, albeit some may not choose to offer all types of service that we authorise. The scope of our regulation will also be the same (i.e. we will regulate an entity's non-reserved legal services to the same extent as we do those provided by the self-employed Bar):

- 3.5.7 The services the self-employed Bar presently offers include the reserved services of advocacy, oath taking, probate, reserved instruments, as well as non-reserved legal services, such as specialist advice, mediation, arbitration. The breadth of this range has not precluded individuals from developing and maintaining specialist expertise in advocacy. Not all barristers choose to offer all of these services
- 3.5.8 The maintenance of an advocacy focus will come, not from a narrow definition of permitted services, but largely from the fact that the other restrictions we have proposed are compatible with that type of business and incompatible with the needs of businesses that lack that focus. This is consistent with our policy objective of a regulatory regime which can regulate advocacy services efficiently and cost-effectively precisely because it does not seek to establish the capacity also to regulate services and types of entities that are far-removed from that specialist focus.
- 3.5.9 The BSB is fully aware that the Bar already provide a range of services that include services falling outside the scope of advocacy, advice and litigation related services. In particular, barristers advise on probate related issues and might sometimes draft papers falling within the definition of the reserved activity of probate and they may also and draft reserved instruments of types unrelated to litigation (for example, deeds transferring property). Typically, however, the Bar provides such services as a specialised consultancy service supplied on a bespoke referral basis to an individual lay client, rather than as a commoditised, bulk service direct to the man in the street or to a bulk purchaser. High volume commoditised transactional services or are, as discussed above in the context of discretionary factors, unlikely to be suitable for BSB regulation. However, it is possible that an entity may seek a licence from the BSB to provide similar types of bespoke advisory and drafting services (which may include work falling within the definitions of probate and reserved instrument activities) equating to the bespoke types of services which, as described above, are already provided by some individuals at the self-employed Bar. To date, the BSB has received at least one entity application which is seeking to offer bespoke drafting and advisory services. It was considered that there was little justification for excluding that entity from regulation by the BSB and so an authorisation decision was issued. . The same would in principle be true of a bespoke advisory and drafting service directed at lay clients, provided that the entity demonstrated its ability to manage the risks associated with providing such services on a direct access basis. For this reason the BSB will use its discretion to permit such specialist activities while excluding from BSB authorisation entities that are unsuitable for its regulatory approach, such as entities carrying out transactional work requiring the holding of client money, or entities operating on a bulk, commoditised basis and requiring a systems-focussed, rather than people-focussed regulatory regime, which the BSB is unsuited to provide.
- 3.5.10 This discretion will be exercised during the authorisation process to determine whether the services the entity wishes to provide are suitable for BSB regulation. The applicant will be expected to provide a statement of the services it wishes to provide in Part A of the application form. This will also inform our risk assessment of the applicant.

### *Associations with others*

- 3.5.11 As part of the application process applicant entities will be required to provide details of all of the ‘associations’ they have, and describe their relationship to them. An ‘association’ is defined in the BSB Handbook as when a BSB authorised person – which includes an entity – shares premises and/or costs and/or uses a common vehicle for obtaining or distributing work (e.g., a procurement company), and does so with any person other than a BSB authorised person (N.B. in order to meet the BSB Handbook definition of an ‘association’, this must be done in a manner which does not require the association to be authorised as an entity in its own right). As part of the application process, applicant entities will also be required to provide details of all material commercial interests they have in organisations to which they plan to refer clients, and in organisations which plan to refer clients to them.
- 3.5.12 At the authorisation stage, the BSB will take a risk-based view of proposed business structures and if necessary, impose licence conditions as appropriate. As a result of information provided in an entity’s application it may, for example, be proportionate to impose conditions as to the non-reserved activities which the entity may or may not carry on.
- 3.5.13 Post-authorisation, entities will have a continuing obligation to notify the BSB of any associations they enter into on more than a one-off basis. They will be able to fulfil this notification requirement by completing and returning a form available on the BSB’s website. In addition, if an entity has a material commercial interest in an organisation to which they plan to refer a client, they must tell the client in writing about their interest in that organisation before they refer the client, and keep a record of their referrals to the organisation for review by the BSB on request. If an entity has a material commercial interest in an organisation which is proposing to refer a matter to them, they must follow the same procedure. They must also make a clear agreement with the organisation, or issue a public statement, about how relevant issues such as conflicts of interest will be dealt with.
- 3.5.14 Proactive supervision will help to ensure that post-authorisation, entities comply both with any licence conditions which have been imposed, and the BSB Handbook rules on entering into associations with others. In addition to requesting a record of referrals to and from organisations in which entities have material commercial interests, the BSB will also be able to require entities to provide copies of any protocols they may have in order to ensure compliance with the ‘associations with others’ rules more generally.

### **Transitional arrangements**

- 3.5.15 Should the BSB become a licensing authority, it is expected that it will receive applications from non-ABS entities that wish to become ABS entities. Each application will be assessed on an individual basis. However, it is intended that the

Authorisations Team will engage with the non-ABS entities to determine the nature of the intended change to the structure and / or business model and, where appropriate, ensure that the transition is as streamlined and efficient as possible.

3.5.16 For example, it is expected that a number of non-ABS single barrister entities will apply to share ownership with a spouse or partner. In such circumstances, it is proposed that the Authorisations Team will:

- Review how the entity has been operating since authorisation, including the financial viability;
- Determine that the new owner satisfies the suitability criteria laid out in the Handbook;
- Confirm that the entity continues to meet the mandatory criteria and discretionary criteria; and
- Confirm that there have been no, or will be no, material changes to the business model.

## 4 Explanatory material

### 4.1 Capacity and capabilities required

4.1.1 The Authorisation Team has acquired skills and experience as a result of entity authorisation and there has been significant cross-skilling of resource within the Supervision Department as a whole. A detailed department structure that contains further information about the capacity and capability of the authorisation and supervision team can be found at **annex M**.

### 4.2 Implementation Plan

4.2.1 A detailed implementation timetable and plan will be drawn up by the BSB during the course of the LSB's consideration of its application. It is expected that these activities will commence at the end April 2015 once the project has been formally established. A more detailed implementation plan will be submitted to the LSB 4-6 weeks after the initial submission of the application.

4.2.2 The BSB will be able to use the experience gained from operating and developing an entity regulation regime to inform the work that will need to be undertaken and completed in order for the BSB to be in a position to authorise and regulate ABSs.

4.2.3 Set out below are the areas that the BSB will need to consider and address during the implementation of an ABS licensing regime. This is an indicative list and will be added to as the BSB develops further its thinking on ABS implementation. Each entry is supported by a brief explanation, high level tasks and an indication of its priority.

- High priority indicates that immediate action is necessary;
- Medium priority suggests that some work has already been undertaken but that it is important that the action is completed prior to approval;
- Low priority suggests that work, whilst necessary, can afford to be delayed until nearer the point of implementation of the ABS regime.

4.2.4 As with entity authorisation, the ABS project plan can be updated to reflect any specific queries or considerations which the LSB may identify. Similarly, during the approval process the BSB will share all project planning and management documents with the LSB.

Workstream	Explanation	High Level Tasks	Priority
Authorisation process	The authorisation process is explained within the application but will be refined over time in the light of lessons learned from the BSB's authorisation of entities	Authorisation process design Authorisations skills audit Authorisation supporting documentation	Medium

	and as we gather further information from the market on types of ABS that will seek BSB authorisation.		
Testing	The authorisation process should be tested before 'live' applications are received	Design and execute pilot Review and update process	Low
Capacity and capability	An assessment of the capacities and capabilities required by the BSB in order to operate effectively an ABS licensing regime	Carry out skills audit Assess capacity and create resource plan	High
Interventions	The infrastructure will need to be in place to effect an intervention.	Draft, consult and agree intervention process	Medium
Training and development	Staff will need to be trained on how to operate the ABS licensing regime	ABS process training	Low
Enforcement	Enforcement arrangements will need to be in place at the point of implementation of the new regime	Enforcement process design Enforcement supporting documentation	Medium/Low
Comms/education	There will need to be extensive communication and briefing/education about the ABS regime and the types of ABS that the BSB will be prepared to licence	Create internal and external communication plans	Medium/Low
IT	IT arrangements will need to be in place at the point of implementation of the regime. The IT	Requirements and system design Development Implementation	Medium/Low

	arrangements are likely to be an extension of those in place for entity regulation	Review and monitoring	
Supervision	Supervision arrangements for ABS will need to be defined and agreed – likely to be similar to the arrangements in place for entities and Chambers but an assessment will need to be made about whether there are unique risks to ABS that will require discrete supervision arrangements/methods	Supervision process design Supervision skills audit Supervision supporting documentation	Medium/Low
Fees	A fee structure for application, authorisation and annual renewal needs to be put in place	Draft, consult and agree on fees	Medium/Low
Equality and diversity	The licensing regime will need to be the subject of equality assessment	Conduct equality analysis Impact review	Medium/Low
Market research	The BSB will need to undertake some market research in order to establish likely interest in becoming a BSB licensed ABS and the type of ABS model that might seek to be licensed		Medium

### **4.3 Risk**

- 4.3.1 The BSB takes a risk based approach to regulation and has developed a regulatory risk framework, which will inform all the work done by the BSB. The framework will continue to evolve as the BSB introduces systems to gather further evidence about the risks in the market.
- 4.3.2 Further information on the BSB's approach to risk based regulation can be found at **annex E**. The paper sets out how the BSB will categorise different regulatory risks in relation to the non-achievement of regulatory objectives. It provides further information about the risk index that is maintained by the BSB as well as ongoing work on the regulatory risk programme.

### **4.4 Supervision**

- 4.4.1 At the time of the introduction of the new Handbook, the BSB adopted a new risk based approach to supervision. The BSB has been targeting its resources at those chambers, individuals, entities and areas of work that require more supervisory attention. Supervision will ensure that operations of entities (and chambers and individuals) run smoothly, resulting in less enforcement action and better protection and promotion of consumers' interests.
- 4.4.2 Consistent with outcomes focussed regulation, the emphasis will be less on supervision of chambers and entities against compliance with a prescriptive set of rules and more on how each chambers or entity is mitigating the risks to the regulatory objectives in the 2007 Act. Below we set out how ABSs will be supervised once they have gone through the authorisation process.
- 4.4.3 When an applicant is deemed appropriate for regulation, it will become subject to risk-based supervision, the approach for which is informed by the BSB's overall Supervision Strategy, which can be found at **annex G**.
- 4.4.4 It is envisaged that there will be close collaboration between the Authorisation and Supervision Teams for newly licensed ABS to leverage the experience and knowledge gained from the supervision of non-ABS entities and chambers. The Supervision scheme has been set up to ensure that evidence is gathered and analysed in a manner that will allow for trends to be identified and risk profiles for individual entities as well as the market to be continually updated. This includes a new IT system that will facilitate effective risk reporting. By the time that ABSs come into being the BSB will have close to two years of experience of operational risk-based supervision to draw upon.
- 4.4.5 For example, in early March 2015 the Supervision Team concluded the Supervision Return process for High Impact chambers. This process was designed to allow for an initial risk assessment of all High Impact chambers, which will then inform further supervision activity (including visits) which will result in more evidence being gathered

to better understand risks. A comprehensive report on this process will be published in the second quarter of 2015 and will inform subsequent targeting of supervision resources and activity.

- 4.4.6 An example of how the approach to supervision has been based on evidence and learning from experience can be found in the approach taken to implementing supervision visits. Following 13 pilot visits the Supervision team analysed the results and published a report<sup>7</sup> which explained how the visits had progressed, the key risks emerging and what changes had been made to the approach to visits as a result of the exercise. The risk areas that generated the most actions through this process were risk management, complaints, Equality and Diversity and viability and these areas were all covered in some detail in the Supervision return process. This culture of constantly analysing and adapting is a central tenet of the BSB's approach to supervision.

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<sup>7</sup> The report can be found at [https://www.barstandardsboard.org.uk/media/1620906/report\\_on\\_pilot\\_supervision\\_visits\\_-\\_sept\\_2014\\_-\\_final.pdf](https://www.barstandardsboard.org.uk/media/1620906/report_on_pilot_supervision_visits_-_sept_2014_-_final.pdf)

## 5 Governance arrangements

### **5.1. Separation of regulatory and representative functions**

- 5.1.1 The BSB is the regulatory arm of the Bar Council, which is the Approved Regulator according to the 2007 Act. The BSB's governance structures are underpinned by its constitution and standing orders.
- 5.1.2 The Bar Council has put arrangements in place which observe and respect the principles of regulatory independence (as defined in rule 1 of the LSB's internal governance rules). Accordingly the Bar Council established the BSB as the regulatory arm and made a constitution for the BSB, which is attached at **annex N**.
- 5.1.3 In addition to this the BSB and Bar Council have also jointly agreed a protocol for ensuring regulatory independence, following undertakings being made to the LSB. The protocol is attached at **annex O**. The principles of the protocol are as follows:
- The Bar Council should not ordinarily be involved in the discharge of regulatory actions or obligations;
  - The Bar Council is entitled to make representations to the BSB;
  - In exceptional circumstances the BSB is entitled to seek expert advice from the Bar Council;
  - In such cases the decision to seek Bar Council advice should take into account the risk of undue influence and there should be an assessment as to whether the BSB should develop in-house expertise or use other sources in future;
  - Such Bar Council involvement should only proceed with the express approval of the BSB, under clear terms of reference and governance that are approved by the BSB;
  - The BSB should lead all such work and arrangements and actions should be recorded and transparent;
  - Individuals providing input to the BSB must do so independently of their responsibilities as staff of the Bar Council.
- 5.1.4 In order to create a reliable and fully auditable record of any interaction between the Bar Council and the BSB which falls (or may fall) under the protocol, a robust administrative system has been put into place to support and evidence compliance with the principles which underpin the protocol.

## **6 Equalities considerations**

- 6.1 An equality analysis is attached at **annex P**. An interim equality analysis was submitted to the LSB along with our rule change application for entity regulation. This impact assessment has now been updated to take account of the BSB's role as a licensing authority and the equality impact of authorising ABSs.

## 7 Consultation

- 7.1 The BSB has conducted a series of consultations on the BSB Handbook (which includes the Code of Conduct) and the entity regulation regime. The consultations can be found with accompanying reports at the links below:

[Review of the Code of Conduct](#) – issued June 2007

[Legal Services Act 2007 - Regulation implications](#) – issued February 2008

[Legal Services Act 2007 -LDPS](#) – issued December 2008

[Review of the Code -conduct rules](#) – issued March 2009

[Regulating Entities \(third LSA 2007 consultation\)](#) – issued September 2010

[Code of Conduct for the Bar](#) – issued January 2011

[BSB Handbook and Entity Regulation](#) – issued March 2012

[Entity Regulation Rule Changes and Insurance](#) – issued July 2014

[Entity Regulation: Entity Authorisation Fees](#) – issued September 2014

- 7.2 In addition to carrying out consultations the BSB has also actively sought views through road show events, surveys and by facilitating user group discussions.

### *Consultation responses*

- 7.3 Generally the consultations have received a positive response. The first of a series of consultations (Legal Services Act – Regulation implications), focussed primarily on whether amendments to the Code of Conduct were necessary in order to implement aspects of the 2007 Act. For example questions were posed as to whether barristers should be permitted to practice in ABSs, LDPs and partnerships as well as questions on whether certain restrictions should be removed. The consultation paper also posed the question of whether the BSB should become a Licensing Authority and also regulate LDPs and/or partnerships.
- 7.4 Following this and other consultations, the BSB has already made substantial changes to the Code to allow barristers to practise in LDPs and ABSs. With regards to whether the BSB should itself become a regulator of entities, responses to this first consultation were an early indication that there was appetite for such a change. In this first consultation an overwhelming majority of respondents considered that the BSB should be the prime regulator of the professional conduct of barristers in ABS firms. A clear majority also considered that the BSB should seek to become a licensed regulator of ABS firms.
- 7.5 The second consultation focused solely on whether barristers should be permitted to practise in LDPs and as mentioned above changes to the Code facilitating this have already been made. There was indication however that practice in barrister only partnerships should be permitted.
- 7.6 The third more significant consultation which was issued in December 2010, highlighted strong support for the BSB to begin regulating entities. Approximately 75% of respondents thought it was in the public interest for the BSB to become a

specialist regulator of advocacy focussed entities and the majority were of the view that the BSB should begin to regulate entities.

- 7.7 The more recent consultation which was issued in March 2012. The consultation put forward detailed proposals for the new BSB Handbook and also contained final points of detail on the entity regulation regime. Generally positive feedback was received on the new Handbook and there was continued support for the entity regulation regime.

#### *Survey findings*

- 7.8 In June 2010 the BSB commissioned YouGov to undertake a survey of barristers and clerks to gauge opinion on new business structures and their regulation. The survey included questions on ABSs, LDPs and BoEs, as well as questions as to whether the BSB should regulate entities and relax the rules in relation to litigation and public access. Responses were received from 1,913 barristers and 141 clerks.
- 7.9 The general feedback from the consultations is consistent with results from the survey, in which approximately two thirds of barrister respondents stated that it would be in the public interest for the BSB to be a regulator for new business structures. The survey also found that 40% of respondents were interested in one or more of the proposed new business structures, if they had the ability to conduct litigation, compared to 35% without the ability to conduct litigation.

#### *Road shows*

- 7.10 The BSB has held a number of road show events, with the more recent ones taking place over the consultation period for the final Handbook and entity regulation consultation. The events were organised in conjunction with the circuits and Specialist Bar Associations. There was general interest in joining entities in most of the road shows, with a few individuals keen for the BSB to begin regulating entities more quickly than the current timetable allows. There was also some views expressed that the BSB should go further and license most kinds of ABSs and MDPs
- 7.11 In addition to the road shows the BSB has held a number of ad hoc meetings with various chambers and individual barristers to discuss possible new business structures, and participated in a number of debates where the pros and cons of entity regulation have been presented by the profession.

#### *Consumer input*

- 7.12 The LSB's own consumer panel has responded to the majority of BSB consultations on entity regulation. In addition to this the BSB has specifically included a number of consumer organisations as part of its consultee list. As this has not always elicited responses the BSB has sought to actively engage its own User Group. Consultation on these proposed changes took place some time ago, before the BSB had launched its non-ABS entity regulation regime. Since we originally consulted on these proposals, the BSB has set up a new stakeholder forum, comprised of bodies

representing consumer interests with which we have regular dialogue. This will continue throughout the implementation of our ABS regime as we develop policies and processes to ensure we have a sound understanding of consumer needs and expectations.

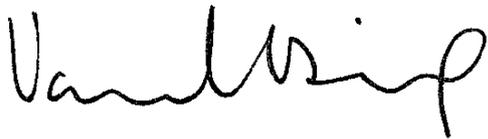
**Statement by our Director General**

*The evidence provided by the Bar Standards Board in this Application is accurate and can be relied upon.*

**Dr Vanessa Davies**

**Director General**

**Signature:**

A handwritten signature in black ink, appearing to read 'Vanessa Davies', written in a cursive style.

**Date: 29<sup>th</sup> April 2015**