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2 December 2016

Dear Paul

Application to the Legal Services Board for an alteration to regulatory arrangements
Rules 18 & 19 Notaries Practice Rules 2014
Rules 3 & 8 Notaries (Qualification) Rules 2013

On behalf of the Master of the Faculties I am making the above application under Part 3 of Schedule 4 of the Legal Services Act 2007 ('LSA 2007') and the rules made by the Legal Services Board under that part.

A copy of the proposed amended Rules is annexed. Copies of the rules which the amendments replace are available to view on our website at:

<http://www.facultyoffice.org.uk/wp-content/uploads/2014/09/Notaries-Practice-Rules-2014.pdf>

and: <http://www.facultyoffice.org.uk/wp-content/uploads/2014/01/Notaries-Qualification-Rules-2013.pdf> Copies can be provided if required.

The Notaries Practice Rules 2014 have changes to rules 18 (adding Rule 18.4) and Rule 19 is completely altered. A further change to rule 21 may be presented early in 2017 so I am currently presenting the rules as amendments to the 2014 version rather than re-casting them as the Notaries Practice Rules 2017 at this stage.

I would not anticipate making any further alterations to the Notaries (Qualification) Rules 2013 in the short term (other than those which are the subject of this application) and these are, therefore, presented as the Notaries (Qualification) Rules 2017

Reason for the proposed alteration in regulatory arrangements

The proposed amendments to the **Notaries Practice Rules 2014** ("NPR2014") make two changes:

1. To add to rule 18 by the addition of rule 18.4 which provides for a notary who practises within a limited company or a limited liability partnership to be able to share his professional fees, or collect them through, that company or partnership provided that the equity of that company or partnership is wholly owned by the notary or notaries who are the directors or partners of the company or partnership.

This change is to reflect the fact that a small, but increasing, number of notaries are now practising as, or within, limited companies or LLPs either on their own account or with other notaries in order, *inter alia*, to take advantage of the more favourable tax rates applicable to corporate bodies. The existing rule 18 effectively prohibited the 'sharing' of fees by the notary acting in person with his or her 'corporate' identity thus technically negating the potential tax benefits. The change, then, removes a barrier to innovation.

2. The second change is to re-cast rule 19 to make it much less restrictive. It was also the case that the existing rule 19.2 (which related to the use of internet domain names) was proving difficult to effectively enforce and seen by notaries admitted after the effective date of 1st December 2009 as being unduly restrictive and anti-competitive.

The replacement rule 19 is far less restrictive and is part of the Master's drive to remove unnecessary regulatory burdens on the profession. The new rule simply requires a notary to notify me of the name under which they practise from time to time and to ensure that it does not mislead the consumer. It removes, entirely, the restriction on the use of domain names subject to it not being misleading.

The proposed new **Notaries (Qualification) Rules 2017** ("NQR2017") make two main changes to the existing rules (with some further consequential amendments):

1. To add to Rule 3.3 a new category of persons who, being appropriately qualified, may apply for admission as a Notary – that of Chartered Legal Executive. This alteration reflects the fact that Chartered Legal Executives, through the work of their regulator, have a much enhanced status across a broad range of approved legal activities under the LSA2007 in addition to other legal practice areas and the ability to practise on their own account and through CILEX Regulation approved and regulated entities. The proposed change will therefore open up another route into the Notarial profession which is part of the Master's drive to open up the diversity of our profession to those who have not entered the law by one of the more 'traditional' routes.
2. The second change is in relation to applicants for admission as notaries in England & Wales from people who are either qualified and practising as notaries in other jurisdictions or who have qualified to practise but have not yet been admitted in that

jurisdiction. The existing rules 8 and 9 made separate provision for notaries from within the EEA and for those from the other legal jurisdictions within the UK (ie Scotland and Northern Ireland). The proposed change has partly been brought about by changes to EU Directive 2005/36/EC (relating to mutual recognition of professional qualifications) made pursuant to Directive 2013/55/EC which removes notaries "appointed by official act of government" from the ambit of the Directive. The effect of that change was to make the Directive only directly applicable as between Eire and the UK for practical purposes and would have left us with no effective mechanism for admitting notaries from other jurisdictions other than requiring them to re-qualify through our Notarial Practice Course which does not appear to us to be either appropriate or proportionate.

The new Rule 8 (which replaces the existing rules 8 and 9) makes provision for the Qualifications Board to take into account an applicant's existing notarial qualifications and, where applicable, practise when assessing their suitability for admission to practise in England & Wales. Rule 8.3.2 mirrors the provisions of the Directive which means that we would not be in breach of the Directive when considering an application from an Eire qualified notary to whom it still applies; equally it allows us to continue to apply provisions similar to the Directive to all other applicants from both inside and outside the EEA (as well as those in the other UK jurisdictions. The removal of reference to the Directive is also intended to 'Brexit'-proof the rule. This again is intended to help broaden the accessibility and diversity of the profession.

Compliance with the regulatory objectives

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

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

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

- (a) protecting and promoting the public interest

The addition of Rule 18.4 to the NPR2014 is likely to have a neutral effect on this objective. The amended Rule 19 will not provide any enhanced protection or promotion of the public interest than exists under the existing rule. However, the removal of unnecessary restrictions on the name of a notary's practice and the removal of restrictions on the use of domain names will free notaries to promote their practices as they wish provided that the public are not misled. The latter point will, of course, provide public protection.

Similarly, the new NQR2017 do not go any further in protecting and promoting the public interest than those which they are replacing but neither do they diminish the protection and they will, therefore, have a neutral effect.

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

It is not anticipated that any of the rule changes will have any specific positive or negative effect on the constitutional principle of the rule of law.

(c) improving access to justice

The changes to the NPR2014 will have a neutral effect on public access to notaries.

It is hoped that opening up of the potential admission as notaries to appropriately qualified Chartered Legal Executives, as envisaged by the new NPR2017, may encourage additional applicants which will assist in increasing the numbers of authorised practitioners in England & Wales and thereby increase public access to a notary, or a wider choice of notary, in their area. Similarly, the opening up of the profession from notaries qualified in other jurisdictions outside of the EEA (subject to meeting our qualification criteria) may have a positive effect of increasing the number of notaries authorised to practise in England & Wales.

(d) protecting and promoting the interests of consumers

As indicated under (a) above, the amended NPR2014 will neither enhance nor diminish the protections afforded to the public, or consumers.

The new NQR2017 could encourage new applicants for admission as notaries which might result in a small enhancement in the interests of consumers as outlined under (c) above.

(e) promoting competition in the provision of services

By removing the restriction in the amended NPR2014 on the use of domain names (which was introduced by the Notaries Practice Rules 2009 and retained when the rules were amended in

2014), the criticism levelled by some notaries either admitted after 1 December 2009 or who started to use domain names to promote their business after that date, that the rule was anti-competitive will have been answered. To that extent the change might arguably assist in promoting competition.

Similarly, the potential for increasing the numbers of qualified notaries authorised to practise in England & Wales which is at the heart of the changes in the NQR2017 may promote competition in the provision of services in the longer term.

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

The proposed changes in the NPR2014 are intended to encourage an independent, strong, diverse and effective notarial profession by permitting new models of business practice to flourish whilst maintaining the independence of the notary which is essential to the recognition of notarial acts in other jurisdictions.

The new NQR2017 are similarly intended to encourage a strong, diverse and effective profession by opening up the possibility of admission to appropriately qualified applicants from a wider pool of talent both from home and abroad. The opportunity for Chartered Legal Executives, particularly, to apply for admission as a notary is aimed particularly at encouraging diversity within the profession due in large part to the much wider demographic from which Chartered Legal Executives have historically been drawn than other branches of the legal profession as a result of the more flexible routes to qualification.

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

The proposed new rules are unlikely to affect public understanding of citizens' legal rights.

(h) promoting and maintaining adherence to the professional principles

The 'professional principles' are:

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

All the provisions governing the conduct of a notary are underpinned by the general duty to promote and maintain those professional principles which are contained in rules made by the Master of the Faculties, in the general law, and which are common to best notarial practice internationally. Both the amended NPR2014 and the new NQR2017 will have a neutral effect on this objective.

Compliance of the Regulations with the Better Regulation Principles

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

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

The approved regulator must have regard to:

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

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

The amendment to Rule 19 of the NPR2014, particularly, is intended to remove what we now regard as a disproportionately restrictive provision of the old rules.

We believe that the other proposed amendments are transparent, accountable, proportionate, consistent and targeted.

The new rules are presented after consultation with the two representative membership societies (The Notaries Society and The Society of Scrivener Notaries) who all provided feedback and suggested only very minor amendments many of which have been incorporated into the rules.

The Society of Scrivener Notaries were not supportive of the proposed amendment of Rule 8 and a copy of their letter is enclosed. The Notaries Society did not express a view. Rule 8 was the subject of detailed discussion at the meeting of the Qualifications Board in September 2016 and the Board (which includes two Scrivener notaries) was supportive of the proposed change.

We do not feel that the absence of reciprocity provisions is reason not to include the rule, notwithstanding that the principal reason for its original inclusion was to comply with an EU

Directive which no longer has wide applicability across the EEA. The amended Directive does still apply as between the UK and Eire and its non-applicability to other EEA jurisdictions has not been wholly satisfactorily established. When (or if) Article 50 is triggered by the UK Parliament, there may well still be notaries qualified in other jurisdictions (both within and without the current EEA) who wish to reside and practise in England & Wales and we feel that it is appropriate to have provisions for qualification and admission which are able to take account of pre-existing notarial qualifications.

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

I am not anticipating any significant changes following the making of the amended NPR2014. The amendment to Rule 18.4 is intended to avoid notaries who practice in such structures not being in technical breach of the fee-sharing prohibition and Rule 19 is a relaxation of a previous unintentional unduly restrictive provision which has been routinely (whether intentionally or otherwise) ignored and was very difficult to enforce due, in large part, to such a minor breach being difficult to justify as notarial misconduct.

The changes to the NQR2017 are unlikely to result in a significant increase in the number of admissions from foreign jurisdictions but the picture is unlikely to be entirely clear until the UK's position and relationship with the EU is clearer. It is hoped that the opening up of the possibility of admission to suitably qualified Chartered Legal Executives will result in an increase in the numbers of applicants. The discrete modules offered by CILEX Law School are already a recommended route to current applicants for admission to the Notarial Practice Course who are required to obtain any missing or updated level 6 qualifications required under Rule 7 of the current (and proposed) Qualification Rules.

Impact on other approved regulators

Once the provisions are in force, we would intend to liaise with CILEX and CILEX Regulation with a view to publicising the changes as widely as possible through their networks so that potential applicants are made aware of the change and of the benefits which holding dual qualifications might bring both to their personal practices and to the firms in which they practise.

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

Timetable

The amended rules are intended to be made as soon as approval has been given and then signed by the Master. It is hoped that this will be in time to bring them into force on 1st January 2017.

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

Yours sincerely

A handwritten signature in black ink, reading "H J Dellar". The signature is written in a cursive style with a long horizontal flourish at the end.

H J DELLAR
Joint Registrar