

Changes to rules made under section 51 of the Legal Services Act 2007

Consultation on changes to the Practising Fee Rules 2009

The consultation period will end at 5pm on Friday 8 April 2016.

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Introduction

1. The Legal Services Board (the **LSB** or the **Board**) is one of the organisations created by the Legal Services Act 2007 (**the Act**) and is responsible for overseeing legal regulators, (referred to as the approved regulators in the Act) in England and Wales. The LSB's mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system. The Act requires the LSB and the approved regulators to act compatibly with the same regulatory objectives – including an objective to promote competition within the provision of legal services – and a requirement to have regard to the better regulation principles.
2. Section 51(5) of the Act states that a practising fee (otherwise known as a practising certificate fee – PCF) is payable under the regulatory arrangements of an approved regulator only if the Board has approved the level of the fee. The Board, under section 51, must also make rules (**the PCF Rules**) specifying the permitted purposes, as an approved regulator may only apply amounts raised by practising fees for one or more of the “permitted purposes”. Section 51(4) of the Act states a number of purposes which must be permitted purposes, such as “the regulation, accreditation, education and training of authorised persons”.
3. Section 51(5) of the Act specifies that the PCF Rules must make provisions including:
 - the form and manner in which applications for approval must be made and the material which must accompany applications
 - a requirement that applicants have consulted such persons as may be prescribed by the rules
 - the procedures and criteria that will be applied by the Board when determining whether to approve the level of a fee.
4. The PCF Rules have now been in place for six years and many matters arising from the LSB's assessment of applications have been the subject of comment in our decision letters. The LSB considered it was time, in the light of five years' experience, to test whether the rules continue to meet the purpose for which they were intended. This consultation and the changes proposed to the PCF Rules are a result of the review.

What is this consultation about?

5. This document consults on amendments the LSB proposes to make to the PCF Rules. It is about whether and how we can clarify those rules, including the criteria which the LSB must apply when assessing PCF applications.
6. This is not a consultation as to what should be treated as a “permitted purpose”. Nor is it about the cost of regulation. The consultation seeks views on proposed changes to Rule 10 of the PCF Rules which sets out the criteria against which the LSB will assess any application for approval of a PCF and Rule 11 which describes the evidence that the LSB will require when considering an application against the criteria.
7. The LSB also publishes non-statutory guidance that supports the PCF rules. We will be reviewing the guidance during the consultation period and any changes will be published at the same time as any new rules. Respondents are invited to comment on any additional guidance that might assist in making PCF applications.
8. You are hereby given notice under section 205(3) of the Act that representations about the proposals in this document must be made to the LSB by no later than **5pm on Friday 8 April 2016**. Further details on how to make representations can be found on page 6.

What changes are being proposed?

Rule 10(a) - Reference to the regulatory objectives

9. When considering a PCF application, the LSB must take into account the criteria for deciding applications that are set out in the rules. While section 51 of the Act provides the basis upon which the LSB may make rules specifying the permitted purposes and requires the Board to approve the level of the fee, there are also wider considerations beyond the requirements of section 51.
10. A PCF approval will be an exercise of the LSB’s functions and in delivering that function and we must act in way that is compatible with the overall regulatory objectives. This was not stated explicitly in the rules issued in 2009 and we have therefore decided to emphasise this obligation, for the avoidance of doubt. The

LSB will continue to have regard to all its statutory obligations in deciding whether to approve a PCF, including having regard to the Better Regulation principles and to best regulatory practice (as is also required of the approved regulators).

The additional criteria is inserted as Rule 10(a) in section D of the proposed rules and a definition of regulatory objectives is added in ‘section A definitions’ at Annex A.

Rule 10(f) - Clarity and transparency about total income and its impact on practising fees

11. An issue that emerged from the LSB review of the PCF Rules was the varying degree of clarity and transparency about the total income of the approved regulators, its allocation to expenses and the impact on the PCF level. An illustration of this was the issue of “derivative income” that is generated from PCF funded activities, which could be undertaken by either the regulatory or representative arms of the approved regulators. As section 51 of the Act is silent on the use of derivative income, approved regulators might seek to use it to fund permitted activities or non-permitted activities (for example commercial activities).
12. We consider it particularly important that the regulated community knows how income and resources will be allocated and whether they are from permitted or non-permitted activities and sources. Consequently we propose to introduce a rule which requires the approved regulator to be clear and transparent about its allocation of financial resources in order to ensure accountability in the public interest.

The additional criteria is inserted as 10(f) in section D of the proposed rules at Annex A.

Question 1: *Do the two proposed additional criteria in Rule 10 adequately explain the matters that the LSB will take into account when considering a PCF application?*

Rules 11(b) and 11(c) – evidence required by the Board

13. While we are generally asked to approve PCFs for a single year, the proposed level may be determined not only by the expected expenditure in that year but by also by forecasts for future years. In order to assist in the processing of the application, where there is a proposed increase in PCFs we are suggesting a change to the evidence that is to be submitted in the application to include future forecasts of budgets and PCF.

The additional criteria is inserted as 11(b) and 11(c) in section D of the proposed rules at Annex A.

Question 2: *Are the LSB's proposed changes to the evidence requirements clear?*

How to respond

14. We would prefer to receive responses electronically (in Microsoft Word or PDF format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Post:

Karen Afriyie
Legal Services Board
One Kemble Street
London WC2B 4AN

Fax number: 020 7271 0051

Email: Consultations@LegalServicesBoard.org.uk

15. The consultation period will end at 5pm on Friday 8 April 2016, about 8 weeks after publication.

16. The LSB is happy to meet respondents to discuss views on the consultation if you would find that helpful. Please send requests to:

Email: Consultations@LegalServicesBoard.org.uk

17. The LSB plans to publish all responses received during the consultation period on its website. While the LSB is happy to discuss varying this general policy in individual cases, there is a strong presumption in favour of transparency. It will therefore note publicly that a submission has been received from an identified body which had withheld its consent for publication in the summary of the consultation.

Complaints

18. Complaints or queries about the LSB's consultation process should be directed to Jenny Hart, Consultation Co-ordinator, at the following address:

Jenny Hart
Legal Services Board
One Kemble Street
London WC2B 4AN

Or by Email: consultations@legalservicesboard.org.uk

Annex A - Proposed changes to the LSB's Practising Fee Rules [amendments in red]

Practising Fee Rules [2016]

Version 2: [Date 2016]

The Legal Services Board has, on [Date 2016], made the following rules under Legal Services Act 2007 (c.29), section 51(3) and (6):

A. DEFINITIONS

1. The words defined in these rules have the following meanings:

Act the Legal Services Act 2007 (c.29)

Applicable persons includes “relevant authorised persons” as defined in Section 51(8) of the Act but extends also to other persons over which the Approved Regulator has regulatory powers

Approved Regulator has the meaning given in Section 20(2) of the Act

Board the Legal Services Board

Consumer Panel the panel of persons established and maintained by the Board in accordance with Section 8 of the Act

legal services means services provided by a person which consist of or include “legal activities” as defined by Section 12(3) and 12(4) of the Act

permitted purposes the purposes which an Approved Regulator may apply amounts raised by practising fees, as set out in Rule 6 of these Rules

person includes a body of persons (corporate or unincorporated)

practising fees has the meaning given by Section 51(1) of the Act

regulatory functions has the meaning given by Section 27(1) of the Act

regulatory objectives has the meaning given by Section 1(1) of the Act

reserved legal services has the meaning given in Section 207(1) of the Act.

B. WHO DO THESE RULES APPLY TO?

2. These Rules are the rules that the Board has made in compliance with 51(3) and 51(6) of the Act relating to the control of practising fees charged by Approved Regulators.
3. Accordingly, these Rules apply to each Approved Regulator that proposes to charge practising fees as part of its regulatory arrangements.
4. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.

C. THE PERMITTED PURPOSES

5. Monies raised through practising fees must not be applied for any purpose other than one or more of the permitted purposes.

6. The permitted purposes are:

- a) the regulation, accreditation, education and training of applicable persons and those either holding themselves out as or wishing to become such persons, including:
 - i. the maintaining and raising of their professional standards; and
 - ii. the giving of practical support, and advice about practice management, in relation to practices carried on by such persons;
- b) the payment of a levy imposed on the Approved Regulator under section 173 of the Act and/or the payment of a financial penalty imposed on the Approved Regulator under section 37 of the Act;
- c) the participation by the Approved Regulator in law reform and the legislative process;
- d) the provision by applicable persons, and those either holding themselves out as or wishing to become such persons, of legal services including reserved legal services, immigration advice or immigration services to the public free of charge;
- e) the promotion of the protection by law of human rights and fundamental freedoms;
- f) the promotion of relations between the Approved Regulator and relevant national or international bodies, governments or the legal professions of other jurisdictions;
- g) increasing public understanding of the citizen's legal rights and duties.

D. THE APPROVAL MECHANISM

7. Where an Approved Regulator proposes to charge practising fees as a part of its regulatory arrangements, the Approved Regulator must apply to the Board for approval of the level of that practising fee.

8. In making an application under Rule 7, an Approved Regulator must comply with the provisions of this Part of these Rules.

9. In respect of each Approved Regulator, the Board will set out from time to time:
 - a) a timetable including key decisions and submission dates that must be observed by the Approved Regulator and the Board respectively;
 - b) the persons that should be consulted by the Approved Regulator before submitting its application;
 - c) the criteria against which the Board will decide on applications put to it; and
 - d) the evidence required by the Board to satisfy it against the agreed criteria.

10. Insofar as the criteria mentioned in Rule 9 (c) are concerned, the Board and Approved Regulator should have regard to factors including the following:
 - a) compatibility with the regulatory objectives
 - b) evidence which demonstrates that reasonable care was taken in settling the application in the context of the budget necessary for the immediate and medium term;
 - c) evidence which demonstrates that the revenue raised through the practising fee charge will be applied solely to purposes which are permitted purposes;
 - d) clarity and transparency over the revenue raised through practising fees to be applied for permitted purposes which are regulatory functions;
 - e) clarity and transparency over the revenue raised through practising fees to be applied for permitted purposes which are not regulatory functions;

- f) clarity and transparency on the allocation of all the Approved Regulator's financial resources, whether or not those resources arise from permitted purposes, and the impact on the proposed practising fee; and
 - g) evidence that persons paying practising fees will have explained to them how revenue raised through the charging of practising fees will be applied as between the Approved Regulator's performance of regulatory functions and any other functions also carried on by the Approved Regulator.
11. Insofar as the evidence mentioned in Rule 9 (d) is concerned, the Board and Approved Regulator should have regard to factors including the following:
- a) a description of how the application was developed and settled, including any consultation carried out, whether or not such consultation was required by the Board;
 - b) where there is a proposed increase in practising fees, the budget should show anticipated income from all sources and its allocation to the permitted purposes for the current application and, where available, the next three years;
 - c) the proposed practising fees for the current application and, where there is a proposed increase in practising fees and where available, the estimates for the next three years;
 - d) an explanation of how the cost to each regulated person is to be broken down as between income to be allocated to the discharge of regulatory functions and income allocated to any other functions;
 - e) an explanation of contingency arrangements where unexpected regulatory needs arises in-year;
 - f) evidence of how the previous year's practising fee income was allocated only to permitted purposes; and
 - g) a regulatory and diversity impact assessment.
12. In considering an application submitted to it under this Part of these Rules, the Board reserves the right to consult any person it considers appropriate. In particular, it reserves the right to consult the Consumer Panel about the impact of the proposed fee on persons providing non-commercial legal services.
13. If the Board approves an application under this Part of these Rules, it must notify the Approved Regulator concerned.

14. If the Board does not approve an application under this Part of these Rules, it must:
- a) notify the Approved Regulator concerned;
 - b) give reasons for its decisions;
 - c) require the Approved Regulator to submit a revised application which addresses the Board's reasons for withholding approval previously; and
 - d) specify the circumstances (if any) in which the Approved Regulator may charge a limited practising fee under its regulatory arrangements as an interim measure pending consideration and approval of its full application.