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Dear Mr Peplow

**Application from the Bar Standards Board for a recommendation for designation as a licensing authority.**

Thank you for sending us the Bar Standards Board's application in seeking the designation of the Bar Council as a licensing authority pursuant to Schedule 10 to the Legal Services Act 2007 (the Act).

The CMA has a statutory duty under the Act to review applications to become a licensing authority and provide the Legal Services Board with such advice as we 'think fit' regarding whether the application should be granted. In providing our advice we have to consider whether any given application, if granted, would (or would be likely to) prevent, restrict or distort competition within the market for reserved legal services to any significant extent.

As with our predecessor body the Office of Fair Trading, the default position of the CMA is that an application to become a licensing authority is unlikely to raise any substantive concerns; this is because it is likely to increase choice for consumers and professionals, unless there is compelling evidence to show a significant detriment to competition. However, where an application to become a licensing authority does include a provision that has the potential to restrict competition, the CMA would expect it to be permissible only when evidently justified by one of the objectives set out in the Act.

In this regard, we note that the BSB's proposed regulatory scheme for authorising alternative business structures (ABSs) includes a number of restrictions, some of which are of a mandatory nature while others are factors to be taken into account in

the extent of the BSB's discretion; the effect of this is to limit the nature of ABSs that are likely to be authorised and regulated by the BSB.

In order to be licensed by the BSB as an ABS, an applicant must meet the BSB's mandatory criteria which stipulate that the prospective ABS must:

- 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 a Head of Finance and Administration (HOFA) to be bound by those arrangements;
- 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;
- confirm they will have in place at all times, a Head of Legal Practice (HOLP), who must also be a manager, and a HOFA;
- confirm that they have appropriate insurance arrangements in place and be able to provide evidence of those insurance arrangements;
- confirm that there will be no direct or indirect holding of client money;
- 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;
- confirm that it will at all times have a practising address in England and Wales;
- confirm that, if an LLP or a company, it is appropriately incorporated;
- 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
- confirm that annual fees will be paid when due.

In addition, based on the BSB's policy statement on entity regulation,<sup>1</sup> the BSB intends to exercise discretion in deciding whether to license a prospective ABS in certain circumstances. This discretion will be exercised in accordance with a set of factors which are informed by the BSB's views on (i) the potential risks associated

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<sup>1</sup> [Entity regulation policy statement](#), BSB, 2014

with entity regulation and (ii) the BSB's overall policy objectives in seeking to regulate ABSs. Therefore, the BSB is likely to consider it appropriate to approve an application for ABS status where:

- All owners are also managers;
- All owners and managers are individuals;
- At least 75% of owners and managers are authorised persons – i.e. a 25% discretionary limit on non-lawyer ownership and management of the ABS;
- Most owners and managers are entitled to exercise rights of audience in the higher courts;
- 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;
- A substantial proportion of employees are going to be authorised individuals and each manager supervises only a small number of employees.

***Scope limited to practices that are solely legal, with a substantial part being advocacy, litigation and expert legal advice.***

We note that the BSB's proposed regulatory scheme will limit the scope of services to be provided by BSB-licensed ABSs. For instance, the BSB's mandatory criteria have the effect that it will only license ABSs that are solely providing legal activities (i.e. legal disciplinary practices) and, in accordance with the factors the BSB takes into account when exercising its discretion, it will only tend to approve applications if a substantial part of the services to be provided by the ABS are those that individual barristers currently provide - i.e. advocacy, litigation and expert legal advice. We understand that this is because the BSB intends its licensing regime to be as consistent with its current regulatory regime for individual barristers and non-ABS entities where high volume, standardised legal transactional services (such as conveyancing) are not undertaken to any great extent.

The overall effect of these restrictions is to establish the BSB as a 'niche' regulator for ABSs whose legal activities are likely to resemble those of individual barristers and non-ABS entities. The BSB has told the CMA that, in terms of increasing choice for both consumers and lawyers, it believes that there is little value in replicating the regulatory regimes of other licensing authorities and that the BSB is offering an additional choice of regulator for both consumers and lawyers (especially for barristers who wish to practice in an ABS while also remaining within the BSB's regulatory regime). The BSB expects that this approach will promote applications not

only from barristers, but also from other authorised persons whose practice is aligned with the niche that the BSB typically regulates and for whom the regulatory regime applied by other licensing authorities may be unnecessarily burdensome or less suited to their intended practice.

It follows, therefore, that, to the extent that barristers are contemplating setting up ABS structures that involve the provision of services that the BSB does not typically intend to license (e.g. handling client money), there are likely to be other licensing authorities more suited to regulating those entities. We also understand from the BSB that a small number of barristers do currently manage ABSs regulated by other licensing authorities.

### ***Discretionary 25% limit on non-lawyer ownership and management***

In relation to the discretionary 25% limit on non-lawyer ownership and management of the ABS and the preference for all the proposed owners also to be managers of that entity, we understand that the purpose of these restrictions is to ensure that the potential risks posed by non-lawyer external ownership (which, in the view of the BSB, include potential conflicts of interest and threats to the independence of lawyers) are mitigated in the interests of protecting both individual clients and the rule of law. In relation to potential risks posed by external ownership, the BSB believes that such risks might be particularly serious in relation to the kind of ABSs that the BSB intends to regulate; this is because BSB-licensed ABSs will mainly undertake litigation and advocacy work where the commercial concerns of external investors might well be contrary to duties owed to the Court or the client.

### ***Advice***

On a basic level, allowing the BSB to authorise ABSs when it previously could not will create extra choice for both providers and consumers. This will particularly be the case if, as the BSB envisages, the BSB's proposed regulatory scheme increases choice in regulation for entities seeking to become ABSs or if it results in more barristers and practitioners with barrister-like practices offering the potentially innovative structures and services facilitated by being an ABS.

However, in competition terms, it is still important that the relevant provisions of the BSB's regulatory scheme are not so disproportionate in seeking to meet the BSB's other regulatory objectives under the Act (such as supporting the rule of law or protecting consumers) that they *unnecessarily* restrict competition in the relevant markets. Therefore, the LSB must be satisfied that the benefits of the BSB's most restrictive provisions will outweigh any adverse effects to competition that may be caused as a result.

In assessing that balance, we advise the LSB to have regard to the following considerations. The CMA considers that there may be questions as to whether some

of the BSB's intended restrictions are proportionate in nature. In particular, the CMA queries whether the discretionary 25% limit on non-lawyer ownership and management is necessary given that other licensing authorities do not maintain such a restriction for ABS applications (even though they license entities that provide advocacy and litigation services). We recognise, however, the BSB's point that the discretionary 25% limit alongside the discretionary criterion that a substantial part of the services provided will be litigation, advocacy and expert advice services are all part of an overall approach which is designed to foster ABSs that are an alternative form of provision of the kind of services that the BSB typically regulates. We also understand the BSB's desire to regulate a limited type of ABS as this will enable it to keep the costs for regulating the new ABSs down. We further recognise that the restrictions implicit in the factors that the BSB intends to take into account in exercising its discretion, in so far as they allow the BSB to regulate ABSs as they would individual barristers, may encourage applications from barristers and other types of lawyers who are attracted to the BSB's 'niche' form of regulation and that this, in turn, may promote choice and competition for consumers.

The CMA notes that many of the BSB's restrictions are discretionary in nature and thus are flexible and may be subject to incremental change based on practical experience. The BSB has told us that it is committed to exercising its discretion in a fair and consistent manner while basing its evaluation on an applicant's individual risk profile. Furthermore, the BSB does not exclude the possibility of amending its discretionary criteria in the future as it develops its experience of authorising ABSs and has told us that it aims to review the restrictions after two years.

The CMA would invite the LSB to consider periodically the BSB's exercise of discretion to ensure that, in light of practical experience, these criteria could be amended to allow for greater variation in ABS entry that might facilitate competition. The LSB might also consider whether these provisions should be subject to a 'sunset clause' in order to ensure a review of their proportionality at a later date when any evidence to suggest a detrimental effect on competition and choice in the relevant markets may have come to light.

While noting the points made above, overall we advise that the CMA finds no current evidence to suggest that the Bar Council becoming a licensing authority under the Act would (or would be likely to) prevent, restrict or distort competition within the market for reserved legal services to any significant extent.

Yours sincerely



Sharon Horwitz

**Director, Sector Regulation Unit, CMA**