

**RULE CHANGE APPLICATION MADE BY THE PATENT REGULATION BOARD
AND THE TRADE MARK REGULATION BOARD
AS THE INTELLECTUAL PROPERTY REGULATION BOARD
TO THE LEGAL SERVICES BOARD
UNDER SCHEDULE 4, PART 3, PARAGRAPH 20(1)
LEGAL SERVICES ACT 2007**

24 January 2018

**APPLICATION TO AMEND REGULATIONS TO IMPLEMENT POWER TO
SUSPEND INDIVIDUAL REGISTRANTS**

CONTACT DETAILS

Fran Gillon

Chief Executive

The Intellectual Property Regulation Board

Fifth Floor, Outer Temple

222-225 Strand

London

WC2R 1BA

Tel: 020 7632 7176

Email: fran.gillon@ipreg.org.uk

1. Introduction

- 1.1 IPReg has the power to make regulations to suspend a person's registration from the Register. This is provided for in the Copyright, Designs and Patents Act 1988, s275A(2)(e) (pursuant to the Legal Services Act at s 185) and the Trade Marks Act 1994 s83A(2)(e) (pursuant to the Legal Services Act at s184).
- 1.2 Although there are regulations in force providing for the suspension of registered bodies¹, IPReg currently has no power to suspend individual registrants. IPReg does, however, have the power to remove registrants (and entities) from the Register.
- 1.3 IPReg is seeking Legal Services Board ("LSB") approval to amend the Continuing Professional Development Regulations 2013 ("CPD Regulations"), and the Patent Attorney and Trade Mark Attorney Qualification and Registration Regulations 2009 ("Qualification and Registration Regulations") to provide for the power to suspend registered individuals in the following circumstances:
- i. Upon non-payment of Practising Certificate fees;
 - ii. Where the registrant is non-compliant with or fails to provide evidence of compliance with continuing professional development ("CPD") requirements;
 - iii. Where the registrant does not have, or fails to provide evidence of compliant Professional Indemnity Insurance ("PII") arrangements.

¹ IPReg Registered Bodies Regulations 2015, Regulation 10

2. Details of existing arrangements

- 2.1 Section 275A(2)(e) of the Copyright, Designs and Patents Act 1988 (“the CDP Act”) provides that the keeper of the register may make regulations which regulate the keeping of the Patent Attorney register and the registration of persons, including provision to authorise the removal or suspension of a person’s registration. Section 275 of the CDP Act specifies that the register is to be kept by the Chartered Institute of Patent Attorneys.
- 2.2 Similarly, section 83A of the Trade Marks Act 1994 (“the TM Act”) provides that the keeper of the register may make provision to remove or suspend a person’s registration from the Trade Mark Attorney register. Section 83 of the TM Act specifies that the register is to be kept by the Institute of Trade Mark Attorneys (now the Chartered Institute of Trade Mark Attorneys).
- 2.3 The power to revoke or suspend registration of Trade Mark and Patent Attorneys was introduced pursuant to the Legal Services Act (“the Act”) sections 184 and 185 respectively.
- 2.4 IPReg already has the power to suspend registration of a registered body in certain circumstances set out in Regulation 10 of the IPReg Registered Bodies Regulations 2015 (“the Registered Bodies Regulations”). These include where the body fails to:
- 2.4.1 Submit its annual self-assessment;
 - 2.4.2 Pay its annual registration fee;
 - 2.4.3 Submit any additional information or self-assessments as required by IPReg.
- 2.5 However, IPReg does not have a corresponding power to suspend individual registrants who fail to comply with rules and regulations in similar circumstances.
- 2.6 The framework in respect of payment of practising certificate fees and compliance with CPD and PII requirements for individuals is currently set out as follows:

Non-payment of practising certificate fees

- 2.7 Regulation 7.4 of the Qualification and Registration Regulations provides that if a registered individual fails to pay the practising certificate fee as required for renewal of registration within two months of the renewal date (which IPReg has set as the 1st of January in each year), he shall receive notice that unless payment is made within 30 days, his name will be removed from the register.
- 2.8 If the registrant’s name is removed from the register in those circumstances, he shall be restored to the register if he pays the practising certificate fee together with any further late payment fee within six months of the original renewal date.

Non-compliance with CPD requirements

- 2.9 Regulation 6.3 of the Qualification and Registration Regulations and regulation 5.3 of the CPD Regulations, specify that where there has been non-compliance with CPD requirements that have not been exempted by IPReg, the registrant concerned shall be referred to the Joint Disciplinary Panel.

Non-compliance with PII requirements

- 2.10 Rule 17 of the Rules of Conduct for Patent Attorneys, Trade Mark Attorneys and other Regulated Persons (“Code of Conduct”) specifies that each registered person must ensure that their PII is commensurate with the risk arising from their particular practice. The Rule directs that the registered person must take out and maintain a policy with a participating insurer.
- 2.11 Registrants are required by Rule 19 of the Code of Conduct to submit information in a timely manner,

as reasonably required by IPReg. Non-compliance will be dealt with under the Disciplinary Procedure Rules if appropriate.

3. Details of proposed changes

3.1 By this application, IPReg wishes to amend current regulatory arrangements to include a power to suspend registrants who fail to comply with their administrative requirements in respect of renewing their practising certificate, complying with CPD requirements and complying with PII requirements.

3.2 The core elements of the proposed changes will be:

3.2.1 The Registrar of IPReg will have the power to suspend the registration of an individual attorney who:

- i. fails to pay the practising certificate fee within three months of the original renewal date, having received a letter two months after the renewal date warning that suspension will follow in one month if the fee remains unpaid;
- ii. fails to comply with CPD requirements;
- iii. fails to provide evidence of completion of CPD to the satisfaction of the Registrar of IPReg;
- iv. fails to hold the requisite PII as prescribed in the Code of Conduct;
- v. fails to provide evidence of compliant PII to the satisfaction of the Registrar of IPReg.

3.2.2 Where an attorney fails to pay the practising certificate fee within the prescribed time and is suspended from the register, the suspension will be lifted upon payment of the practising certificate fee within three months of the suspension taking effect.

3.2.3 Where a suspended attorney fails to pay the practising certificate fee within three months of the date of suspension, he shall be removed from the register.

3.2.4 Where an attorney fails to comply with CPD or PII requirements and/or fails to provide evidence of compliance, the Registrar may suspend the attorney's registration for up to three months.

3.2.5 Where an attorney is suspended for failure to comply with CPD or PII requirements and/or failure to provide evidence of compliance, suspension will be lifted if, within three months of the date he was suspended, the required CPD is completed, requisite PII is in place and/or the required evidence is received, or if the Registrar grants an exemption under the existing CPD Regulations to waive CPD requirements.

3.2.6 Where the required CPD is not completed, the PII is not obtained or evidence is not supplied within three months of the date of suspension, the attorney will be referred to the Joint Disciplinary Panel for consideration of disciplinary proceedings.

3.2.7 In the event that the attorney is referred to the Joint Disciplinary Panel for consideration of disciplinary proceedings, the attorney's name will remain suspended from the register until the disciplinary proceedings have been concluded.

3.2.8 The effect of suspension is that the registrant is not able to carry out any reserved legal activity during the period of suspension.

4. Rationale for changes

Consistency

4.1.1 IPReg may currently suspend registered bodies in circumstances where there has been non-payment of registration fees or a failure to submit information or self-assessments including evidence of compliant PII. Although the power to suspend individual registrants is provided for in legislation as set out in paragraphs 2.2 and 2.3 above, this is not currently implemented in rules or regulations. There appears to be no sound basis for the distinction and by making this rule change, IPReg's enforcement powers against individual registrants will be brought into alignment with enforcement powers as against registered bodies.

Proportionality

4.1.2 The rule change would also allow IPReg to exercise its enforcement powers more proportionately by allowing a registrant more time to comply with the regulatory requirement to renew registration before the ultimate sanction of removal from the register is taken. As suspension would have the effect of allowing the registrant to remain on the register pending compliance, this would ease the administrative burden on registrants who are removed for non-payment by allowing them to remain registered and not put in the position of going through the process of applying for readmission.

4.1.3 In respect of failure to obtain appropriate PII, failure to complete CPD and/or failure to provide evidence of compliance with those requirements, at present the only option available to IPReg is to refer the attorney to a disciplinary panel for consideration of disciplinary proceedings. The rule change would allow the Registrar the power to suspend the individual registrant pending completion of this process which IPReg considers is more likely to secure compliance with the requirements and reduce the need to bring disciplinary proceedings.

Consumer protection

4.1.4 Once an individual registrant is removed from the register, IPReg loses its regulatory locus and accordingly loses any regulatory jurisdiction over the registered person. This has an impact on consumer protection in two ways.

4.1.5 Firstly, in the event that a complaint in relation to a removed registrant is received, IPReg has no jurisdiction to investigate or take any regulatory action in respect of the registrant to protect the interests of the public.

4.1.6 Secondly, registration with IPReg is one of the terms of a registrant's PII arrangements; if removed from the register, the registrant no longer holds valid PII so a consumer would lose the protection afforded by the insurance arrangements should they seek to make a claim against the registrant.

4.1.7 The ability of IPReg to suspend the registrant from the register for non-payment of practising certificate fees, rather than to remove them would allow a consumer to make a claim against an insured attorney as opposed to an uninsured attorney.

5. Regulatory Objectives

5.1.1 IPReg believes that its proposals comply with, and in many cases, promote, the regulatory objectives set out in the Act.

Protecting and promoting the public interest

5.1.2 The power to suspend an individual registrant from undertaking reserved legal activities whilst still maintaining regulatory locus will have the effect of protecting and promoting consumer interests. The introduction of this regulatory measure to be exercised in the public interest will maintain the public's confidence in IPReg as a robust and proportionate regulator which seeks to support a non-compliant registrant into compliance whilst protecting the public as far as possible, by allowing a registrant to remain registered and thus maintain their

professional indemnity insurance.

- 5.1.3 The enforcement measure will also encourage registrants to comply with their regulatory obligations in a more timely manner, strengthening the regulatory framework within which all registered attorneys must practise.

Supporting the constitutional principle of the rule of law

- 5.1.4 The impact on this objective is broadly neutral, but giving IPReg the power to take swift and proportionate action on a registrant's registration underscores the importance of compliance with regulatory rules which are designed to protect the public.
- 5.1.5 Parity of enforcement measures in respect of both types of registrant, whether an individual or a licensed body, also supports the rule of law by ensuring fairness and equality.

Improving access to justice

- 5.1.6 The impact of suspension of an individual's entry on the register serves to improve a consumer's access to justice by preserving the jurisdiction of the regulator to investigate and / or take regulatory action in the public interest. Justice may be denied to some potential complainants if they refer a complaint to the regulator who has removed a registrant from the register for non-payment of fees, and thus loses regulatory locus over the registrant.
- 5.1.7 Removal from the register means that a registrant's PII, which is engaged on a claims-made basis, will lapse. Any claim made against a registrant would therefore not be backed by appropriate insurance causing potential harm to a consumer who may be denied financial compensation.

Promoting competition in the provision of legal services

- 5.1.8 The impact on this objective is neutral.

Encouraging an independent, strong, diverse and effective legal profession

- 5.1.9 The proposed change will encourage a profession to comply with their regulatory obligations in a timely manner, in terms of undergoing continued professional development and ensuring their insurance arrangements are up to date.
- 5.1.10 Where a registered person does not comply in a timely manner and action is taken to temporarily suspend registration, the regulator can continue to work with the registered person to support them back to compliance, and will not be left in a situation where the only enforcement power available is the time and resource heavy implementation of disciplinary proceedings. This will strengthen the profession, instilling in them a greater appreciation of the role and rule of law and their duties as professional lawyers.

Increase the public's understanding of a citizen's legal rights and duties

- 5.1.11 There is no impact on this objective.

Promoting and maintaining adherence to the professional principles

- 5.1.12 The public expect that those who are part of a regulated community are held to a higher standard of professional conduct than those who are not. This higher standard recognises the unique privilege that comes with professional status and reflects the expectations of the public that those who are regulated by IPReg act with independence and integrity, maintain proper standards of work and will serve the interests of their clients to the exclusion of their own.

5.1.13 Maintaining continuous professional development, maintaining appropriate insurance arrangements and paying the annual practising certificate fee which funds the regulation of the profession, are all fundamental requirements of professional people. By giving the regulator the means to deprive a registrant temporarily of their right to undertake reserved legal activities, whilst protecting the public when they fail to comply with these requirements, serves to emphasise the importance of these fundamental professional principles and will promote and encourage adherence to those principles.

6. Better regulation principles

6.1.1 IPReg considers that this proposal complies with, and in many cases promote, the better regulation principles.

Proportionate

6.1.2 As above, the proposed change would also allow IPReg to exercise its enforcement powers more proportionately by allowing a registrant more time to comply with the regulatory requirement to renew registration before the ultimate sanction of removal from the register is taken. As suspension would have the effect of allowing the registrant to remain on the register pending compliance, this would ease the administrative burden on registrants who are removed for non-payment by allowing them to remain registered and not be put in the position of going through the process of applying for readmission. Being able to avoid this process would also relieve the administrative burden on IPReg who would not need to undertake the decision-making process around readmission.

6.1.3 In respect of failure to obtain appropriate PII, failure to complete CPD and/or failure to provide evidence of compliance with those requirements, the rule change would allow the Registrar the power to suspend the individual registrant pending completion of this process which is more likely to secure compliance with the requirements and reduce the need to bring disciplinary proceedings. At present the only option available to IPReg is to refer the attorney to a disciplinary panel for consideration of disciplinary proceedings which is expensive, time consuming and stressful for the registrant.

Accountable

6.1.4 The proposed suspension framework implements a power already foreseen by governing legislation and would be accountable in that respect.

6.1.5 An affected registrant would have the right to appeal a decision to temporarily suspend them, and so IPReg would be held to account for decisions that are made improperly or unlawfully.

Consistent

6.1.6 As above, the proposal to a large extent remedies an existing inconsistency within the current framework in terms of enforcement powers as against registered firms and registered individuals.

6.1.7 IPReg may currently suspend registered bodies in circumstances where there has been non-payment of registration fees or a failure to submit information or self-assessments including evidence of compliant PII. Although the power to suspend individual registrants is provided for in legislation as set out in paragraphs 2.2 and 2.3 above, this is not currently implemented in rules or regulations. There appears to be no sound basis for the distinction and by making this rule change, IPReg's enforcement powers as against individual registrants and registered bodies will be harmonised.

Targeted

- 6.1.8 The proposed amendments to the Rules have been developed specifically to target issues in the renewal process which have been identified in previous years. It is anticipated that the targeted changes will encourage timely compliance with the renewal process.
- 6.1.9 The proposal is targeted solely to those individual registrants who fall into the categories of non-compliance outlined above. This application does not seek to extend the power to suspend registrants in any other circumstances. Furthermore, the power to suspend would be exercised only where the existing measures in place to secure compliance have not been successful.

Transparent

- 6.1.10 A consultation was launched on 1 December 2017, a copy of which is attached at Annexe A. Copies of the responses to the consultation are provided at Annexe B. The consultation was published on our website and those that responded supported the proposed changes.
- 6.1.11 As part of this year's renewal process we are advising all individual registrants who have not already complied with the renewal process by the required deadline, that we are currently seeking to amend our rules to include the power to suspend for non-compliance.
- 6.1.12 If the rule change was to be approved, we would publish this on our website to ensure that registrants were aware of the consequences of non-compliance.

7. Desired outcome

- 7.1.1 The desired outcome of the proposal is primarily to better protect the public. By retaining non-compliant registrants on the register but preventing them from conducting reserved legal activities during the period of suspension, the public is better protected as, in the case of insured registrants, the registrant remains insured providing better protection for the complainant.
- 7.1.2 Where the registrant is not insured and/or has failed to provide insurance information to IPReg, members of the public are better protected as the registrant would remain suspended until the outcome of any disciplinary proceedings.
- 7.1.3 Furthermore, it is anticipated that the ability to suspend will encourage timely compliance with the renewal process, ensuring that individual registrants pay their practising certificate fee and make their CPD declarations when they are required. This will reduce the administrative burden on IPReg in terms of having to chase registrants to secure compliance.
- 7.1.4 Monitoring of the impact of these proposals will be conducted in our usual way, using previous years' results as a measure of the impact of the proposals. The impact on consumer protection will be closely considered, and we will keep under review the extent to which the suspension period of three months affords the anticipated safeguards.

8. Impact upon other regulators

- 8.1 These proposals have no impact on any other regulator.

9. Implementation timetable and operational readiness

- 9.1 IPReg would like to ensure that the power to suspend registrants in the circumstances outlined above, is in place for this year's renewal process.
- 9.2 The renewal date for registration is 1 January of each year. Under the Qualification and Registration Regulations, IPReg may warn registrants who remain non-compliant with the renewals process after two months, that unless they comply within 30 days, they may be

removed from the register. It is hoped that the rule change will be in place by 28 February 2018 so that 30-day warning letters can be sent to non-compliant registrants by that date. Any registrants who fail to comply following that warning would be suspended on 1 April 2018.

- 9.3 Registrants that had not paid their practising certificate fee, made their annual CPD declaration or provided evidence of compliant PII by the renewal date have been warned that IPReg were consulting on this rule change and seeking to introduce this power.

10. Consultation process

- 10.1 On 1 December 2017, IPReg published a consultation paper on the proposed changes [Annexe A]. The consultation set out the existing regulatory framework and the suggested draft of the new Regulations.
- 10.2 IPReg received a total of four responses to the proposal. The full responses are attached at Annexe B. You will note that the response from Richard Halstead is redacted. This is because Mr Halstead raises issues in relation to his personal circumstances which are unrelated to this consultation process.
- 10.3 Both the Chartered Institute of Trade Mark Attorneys (“CITMA”) and the Chartered Institute of Patent Attorneys (“CIPA”) are supportive of the proposal but query whether the length of the proposed suspension is appropriate. CIPA *“asks IPReg to consider if [three months’ non-compliance followed by three months’ suspension] is stringent enough”* while CITMA asks whether a three-month period *“in all cases is appropriate ... Whilst many cases would reach compliance within the three-month suspension period and therefore the suspension would be withdrawn, it may be more appropriate to have an initial shorter suspension period (of one or two months) which could be extended to three months if required.”*
- 10.4 As to whether the proposed change is stringent enough, both CITMA and CIPA identify that the process would potentially allow for a registrant to be non-compliant for up to six months before being removed from the register. IPReg considers that the three-month period of suspension protects the public by allowing for PII to be maintained during that period. This is a protection which the current framework does not afford.
- 10.5 However, we recognise the concerns about the period of time that an attorney can remain on the register before they can be suspended. We will review this as part of our work on how to improve the effectiveness of the operation and maintenance of the Registers as set out in our [Business Plan](#) for 2018.
- 10.6 IPReg is aware (and CITMA makes this point in its response) that attorney firms have a variety of financial processes and procedures in place to deal with bulk payment of their employee attorney’s practising certificate fees. We will take this into account in our review.
- 10.7 IPReg acknowledges that in some cases it may be disproportionate or unfair to suspend individual attorneys in cases of non-payment of fees or other non-compliance. For this reason, the proposed rule change is drafted to allow the Registrar a discretion to exercise the power of suspension. Where for example, an individual registrant is relying on his or her firm to pay the practising certificate fee any payment is not made, the Registrar may not move to suspend the attorney if in all other respects the attorney is compliant with IPReg’s rules and regulations.
- 10.8 Accordingly, IPReg considers that the proposal strikes a fair and proportionate balance between protecting consumers and allowing attorneys and firms sufficient time to meet their compliance obligations within the parameters of their existing processes.

11. Submission

11.1 The LSB is asked to approve this application.