

<b>To:</b>	Legal Services Board	
<b>Date:</b>	22 October 2015	<b>Item:</b> Paper (15) 50

<b>Title:</b>	Review of Practising Fee Rules 2009	
<b>Workstream(s):</b>	Statutory Decisions	
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<b>Status:</b>	Official	

<b>Purpose of paper:</b>
This paper updates the Board on the plan to review the Practising Fee Rules 2009.

<b>Recommendation(s):</b>
The Board is invited to note how the LSB intends to review the Practising Fee Rules 2009 to ascertain what, if any, changes should be made to the rules.

<b>Risks and mitigations</b>	
<b>Financial:</b>	None
<b>Legal:</b>	Risk of legal challenge from the Law Society if it perceives the review as a way of introducing restrictions on use of derivative income. The review will be open minded and not have any preconceived stances on what part of the PCF rules should change. If changes are made, these will be the subject of an open consultation.
<b>Reputational:</b>	Reputational damage to LSB if the rules are unclear. The review will ascertain if greater clarity needs to be provided in the rules.
<b>Resource:</b>	There is a risk that the review and any new rules will not be in place in time for the 2016/17 PCF round because the main resource may be needed for time bound statutory decisions. Resources will be kept under review.

Consultation	Yes	No	Who / why?
<b>Board Members:</b>	√		All Board members informed and views sought at 8 September Board in the Chief Executive's update
<b>Consumer Panel:</b>		√	

<b>Others:</b>	
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<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
N/A	N/A	N/A

## LEGAL SERVICES BOARD

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### Review of Practising Fee Rules 2009

1. Section 51 of the Legal Services Act 2007 (the Act) specifies that income raised from practising certificate fees (PCF) can only be applied to permitted purposes. Under the Act the LSB must approve the level of fee before it is payable (section 51(5), and the LSB must also make rules specifying the permitted purposes (section 51(3)).
2. As reported to the Board in the Chief Executive update on 8 September 2015, an issue arose in respect of the Law Society (TLS)/Solicitors Regulation Authority (SRA) PCF application for 2015/16, when in its draft application TLS proposed a different treatment of commercial income from previous years. It had wanted to use income, including that derived from PCF funded permitted purposes (so called "derivative income"), to be allocated to non-permitted activities, and in future years also allocated to non-permitted reserves.
3. By way of background, 'derivative income' can arise as a consequence of activities undertaken by TLS. The mandatory PCF paid by solicitors can be used by TLS to fund the costs of providing accreditation schemes and certain training programmes (i.e. non-regulatory permitted purposes). In addition, TLS can charge solicitors for obtaining accreditation or undertaking training. In the past, such commercial charges paid by solicitors for these items would be used to 'net off' the costs of providing them within the PCF. Under its proposed approach TLS wants to use the monies raised by charging for these activities for other non-permitted activities, which could include paying for TLS overheads or its commercial activities.
4. TLS eventually removed the proposal from the table for the 2015/16 PCF round as it would have not been possible for the LSB to properly consider the implications of the new approach within our usual three week period for making decisions on PCF applications. We gave a commitment to TLS that we would revisit the issue subsequent to making a decision on the 2015/16 application.
5. It is worth highlighting the strength of opinion on this matter to TLS. A key concern for them is that the LSB does not interfere with the running of TLS representative functions. Whilst the LSB acknowledges the general obligation to not exercise its functions in relation to representative activities, the issue is more nuanced. The LSB also has a duty in reference to the regulatory objectives in the Act, including protecting and promoting the interest of consumers, assuming that

the cost of the PCF is ultimately passed on to consumers. And while it is true that under section 29(1) of the Act, nothing (in the Act) authorises the LSB to exercise its functions in relation to any representative function of an approved regulator, section 29(2)(a) also states that 29(1) does not prevent the LSB from exercising its functions for the purpose of ensuring that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions. Consequently, the matter of derivative income and the way in which TLS use it is within the LSB's regulatory oversight remit.

6. The Act is silent on whether income derived from permitted purposes activity can be used in the way in which TLS wants. Deciding any application for PCF approval will be an exercise of the LSB's functions and we must therefore act in way that is compatible with the regulatory objectives. Whilst using income in the way proposed by TLS is not explicitly prohibited, since solicitors have no choice but to pay the PCF, we should question whether it is right that income from activities funded by this non-optional fee can be used for optional activities for which there may be little or no benefit to fee payers. So, while on the face of it this is a technical matter on the PCF Rules, it is a potentially high profile and contentious issue.
7. In addition to the issues raised by TLS derivative income proposals, the PCF rules are in any case overdue for a review. They were made in 2009 and many matters arising from our scrutiny of applications have subsequently been the subject of comment in our decision letters. For example, the transparency of approved regulators' spend of the PCF. It seems sensible that we now review the rules in the light of five years' experience to test if they continue to meet the purpose for which they were intended and whether further clarification is required.
8. Our Business Plan for 2015/16 includes an objective to conduct "a review of processes for handling our statutory decision making responsibilities", and we consider this project sits firmly within the general review of statutory decision processes and can contribute to that plan milestone. Furthermore, the rules the LSB must make in discharging its functions under section 51(3), must be compatible with the regulatory objectives. A review would help the LSB test the extent to which the rules continue to promote the regulatory objectives, particularly in respect of protecting and promoting the public interest, protecting and promoting the interest of consumers and encouraging an independent, strong, diverse and effective legal profession.
9. We will review the current rules and, if necessary, propose changes. This might include providing greater clarity as to the criteria we will use when deciding whether to approve a PCF application, without fettering our discretion in relation to a specific application. The overall aim of any revision to the PCF rules would be to provide greater clarity and transparency to our decision-making. The review will not be looking at the nature of the PCF more generally, nor PCF levels.

10. If one option to come out of the review is to redraft the rules, sufficient time needs to be built into the review for a consultation. If this proves to be the case we plan to go out to formal consultation in January 2016. If new rules were to be published, we will need to allow adequate time for approved regulators to take account of these for their budget and PCF setting cycle for the 2016/17 practising year.
11. The Board should be aware that the review is only focussed on the clarity of criteria we use when deciding whether to approve a PCF application. It is separate from the wider planned thematic review of approved regulators' treatment of underspend of PCFs.
12. The review will be of greatest interest to TLS/SRA, Bar Council/BSB and CILEx/CILEx Regulation, as these approved regulators can spend money on non-regulatory permitted purposes. For the other regulators, PCF income is solely used by the regulatory arms for activities falling within the permitted purposes. We will engage with approved regulators in an appropriate and proportionate way, given the other calls on approved regulator time and resources, such as the regulatory standards work and review of our process for assessing rule change applications.

### **Recommendation**

13. The Board is invited to note that the Legal Services Board intends to review the Practising Fee Rules 2009.