To:	Board		
Date of Meeting:	13 June 2011	**Item:**	Paper (11) 44
Title:	Applications by the SRA for approval of changes to regulatory arrangements and to be designated as a Licensing Authority		
Workstream(s):	3B Widening Access to the Legal Services Market		
Introduced by:	Crispin Passmore, Strategy Director crispin.passmore@legalservicesboard.org.uk / 020 7271 0086		
Author:	Emily Lyn emily.lyn@legalservicesboard.org.uk / 020 7271 0090		
Status:	Protect		

Summary:

The Board has two decisions to make. One on the application for approval of changes to regulatory arrangements and the second on the Licensing Authority application. The Handbook is common to both applications as it represents both the change to regulatory arrangements and the licensing rules for the licensing framework for Alternative Business Structures (ABS).

The criteria and statutory basis for each of these decisions are distinct from one another but the process we have followed and the issues we have looked at are to a significant extent interrelated. We are therefore presenting the Board with a single paper, with a separate annex for each application setting out the process, authority for approval and our recommendations.

Annex A: Handbook approval paper

Annex B: Licensing Authority Designation paper

Annex C: Responses to advice from Mandatory Consultees (from SRA and TLS)

Appendix A(1): Summary of types of change within the Handbook
Appendix A(2): Summary of the main changes
Copies of the final issues logs will be circulated separately ahead of the meeting.

Risks and mitigations	
Financial:	None
FoIA:	Need to be determined in the light of the outcome
Legal:	Briefing to be provided in the Board meeting as needed and in the light of any developments emerging after the issuing the paper
Reputational:	Equal risk of criticism for undue delay and for moving too quickly
Resource:	N/a

Consultation	**Yes**	**No**	**Who / why?**
Board Members:	√		The Board was involved in a workshop session ahead of the decision making meeting
Consumer Panel:	√		The Consumer Panel has provided advice in its role as statutory consultee
Others:	√		Advice from the Lord Chief Justice and OFT

Recommendation(s): The recommendations are included in the relevant section of the main report.

LEGAL SERVICES BOARD

To:	Board		
Date of Meeting:	13 June 2011	**Item:**	Paper (10) 44

Executive Summary

1. In preparation for making an application to become a Licensing Authority, the Solicitors Regulation Authority (SRA) has undergone significant change to introduce an outcomes-focused regulatory regime (OFR). This represents a change not only in the introduction of a new licensing regime for Alternative Business Structures (ABS), but also a fundamental change in the way the SRA regulates solicitors and their firms. The SRA has made two applications. The first for approval of changes to regulatory arrangements for the existing regulated community and the second to be designated a Licensing Authority for the reserved legal activities for which The Law Society is an approved regulator. The Board therefore has two decisions to make.

2. The criteria and statutory basis for each of these decisions are distinct from one another but the process we have followed and the issues we have looked at are to a significant extent interrelated. We are therefore presenting the Board with a single paper, with a separate annex for each application setting out the process, authority for approval and our recommendations.

3. The Handbook is common to both applications and for the first time brings together all of the regulatory requirements in one place. The Handbook represents an overall change in approach, with a greater emphasis on principles and outcomes even where underlying rules remain unchanged.

4. The Board will first assess the proposed changes to the regulatory arrangements applying to solicitors and traditional firms (Authorised Persons and Recognised Bodies)[1]. This assessment is one of the changes only and the core test is being satisfied that the proposed arrangements are not in breach of the criteria within paragraph 25, part 3 of schedule 4. Unless any of these criteria are met, the Board must approve the application. For more detail please see the section titled 'Authority for the Decision' in **Annex A**.

5. The Handbook also forms the licensing rules for ABS so having approved the Handbook as a change to regulatory arrangements for Authorised Persons and Recognised Bodies the Board needs to consider the Licensing Authority application. As part of the assessment of the Licensing Authority application we have considered the Handbook against our Rules for Licensing Authority Designation Applications and Guidance on the contents of licensing rules. More detail on this process is contained within **Annex B.**

6. The Licensing Authority application is essentially an incremental application and the Board is therefore assessing the additional rules required of ABS, the 'dual purpose' rules that apply to all regulated bodies and the effect of these rules on

[1] Both entities and individuals

all of the other unchanging rules. A summary outlining the effects of the proposed changes is provided at **Appendix A1**.

7. The Board has to be satisfied that the ABS specific changes and any 'dual purpose' rules are suitable licensing rules. However this is based on a narrow set of criteria (specified in Schedule 10, paragraph 11) and is to be made using an assessment of the position at the date the changes come into effect (i.e. the point of designation) and not the date of the Board's decision. This assessment is outlined in the table in **Annex B** of this paper.

8. The SRA has done a lot of work rewriting its rules but that is only one element of the change, both in terms of the existing framework and its new functions as a Licensing Authority. The change of approach and increased flexibility means that the SRA will have to exercise judgement and improve its operational repertoire to embrace risk-based ongoing supervision in addition to crisis intervention. To prepare it has undertaken a significant internal reorganisation, supported by a major programme of cultural change and staff development. Aligning its organisational structures, responsibilities and capabilities with its three primary functions: authorisation, supervision and enforcement.

9. To an extent, the transformation programme is not yet complete and we are therefore making decisions on the basis of what will be in place by the time the proposed arrangements take effect. There is more to do before the new rules come into force and as the SRA starts to make authorisation, supervision and enforcement decisions based upon the outcomes-focused framework (for ABS and traditional firms). For this reason, the issue of **capacity and capability** has been a major theme in our discussions and analysis and we have asked the SRA to set out its key risks and mitigation. Consequently a key part of our assessment is our confidence in how the rules will be applied in practice and whether they are followed slavishly or on a more principled manner.

10. The other theme is considering any **exclusionary effects** and inconsistency of treatment. We have been mindful of situations in which the rules may stifle some organisational models, including Not for Profit agencies considering charging clients, traditional law firms looking for external investment and new market entrants who already provide non-reserved legal activities.

11. We have also received a letter from the Law Society covering how the SRA will take account of and assess the impact on access to justice in its licence application decisions; risks around Multi-Disciplinary Practices and the importance of the MDP Memorandum of Understanding; approach to fitness to own and oversight. All of these issues have been covered.

12. The Board was provided with an overview of the applications and an introduction to key issues at the workshop session on 26 May. Following this session, we have held further discussions with the SRA at both CEO and Chair level and sought additional information and assurance from them. The detail of these issues and how they relate to the two decisions are set out in the relevant annex to this paper.

13. To an extent these decisions are only the start of the process and we will need to maintain oversight of how the SRA is progressing with implementation of the

OFR programme and preparations for becoming a licensing authority. We have therefore agreed an ongoing programme of monitoring and information sharing with the SRA. More information can be found at **Annex B** to this paper but specific actions include:

- Dashboard reports to be provided between now and the commencement of OFR

- A full set of management information and reporting (based on SRA's own reporting) to be agreed by the end of June. This will include a suite of information (both quantitative and qualitative) that SRA will provide in the first two years of OFR, including ABS specific information

14. We have also agreed for the following public statements to be made by the SRA. These address specific concerns about the potential exclusionary impacts of the regime:

    - Statement on the general approach to waivers and in particular how they will be used in relation to the separate business rule

    - Statement that SRA will consider applications from listed business and those that are considering IPOs

    We are working with the SRA on developing the drafts and an oral update will be given at the Board meeting.

15. We have considered all of the options available in respect of each application. For the application for approval of changes to regulatory arrangements, the Board has four options: to approve the changes to regulatory arrangements, to refuse, to part approve or to issue a Warning Notice which would extend the decision period beyond the 90 days (to a maximum of 18 months)[2]. For the Licensing Authority application the Board has three options: to approve (and make a recommendation to the Lord Chancellor), to refuse or to delay the decision[3].

16. It is the recommendation of the executive that we approve *both* applications. We are therefore recommending that the Board agrees to:

    - Grant the application for approval of the SRA Handbook as a change to regulatory arrangements for solicitors and Recognised Bodies
    - Grant the application for the SRA to become a Licensing Authority and make a recommendation to the Lord Chancellor that they are designated
    - Agree that in making a recommendation for the Lord Chancellor to make an order, the proposed licensing rules (comprising the already approved regulatory arrangements for solicitors and Recognised Bodies as augmented by the rules which are specific to Licensed Bodies) are at the same time treated as having been approved by the Board

[2] The Decision Period for the application for approval of changes to regulatory arrangements ends on 17 June 2011
[3] The Decision Period for the Licensing Authority application ends on 25 March 2012

17. The Board should note that we will not be approving the guidance in the Handbook (insofar that it provides an explanation of the rules) or the Qualified Lawyers Transfer Regulations 2009 and Higher Courts Qualification Regulations 2000 (which were not repealed by the SRA Board).

ANNEX A: Application for approval of SRA Handbook as a change to regulatory arrangements (under Part 3 of Schedule 4 to the Legal Services Act 2007)

Recommendation(s)

1. The Board is invited to:
   - Approve the changes to the Handbook as under Part 3 of Schedule 4 to the Legal Services Act 2007. The Board should note that since the SRA repealed all previous rules this is in effect approving all but two sections of the entire Handbook[4].
   - Delegate authority for agreeing the final Decision Notice to the Chairman and Chief Executive.

Background / context

2. The SRA has developed a new Handbook which, for the first time, brings together all of the SRA's regulatory requirements in one place. These changes are largely driven by:
   - The introduction of a new, outcomes-focused approach to regulation (primarily expressed in the draft SRA Principles, SRA Code of Conduct and the introductions to each section of the Handbook)
   - Revisions required to accommodate Alternative Business Structures (ABS) should the SRA be successful in being designated as a Licensing Authority (as covered in **Annex B**)
3. The Handbook is therefore an integral part of an overall change, with a greater emphasis on principles and outcomes even where underlying rules remain unchanged. This represents a major change for traditional firms and regulated individuals. This section of the paper will consider the change in that context.
4. The SRA believes in a level playing field for solicitors, Recognised Bodies and ABS. The move to principle-based regulation for traditional firms has been driven by the need to ensure that they have the flexibility to compete with ABS on equal terms. This has been achieved by having a unified Code of Conduct so that the bulk of rules for traditional law firms and ABS are common, despite the difference in statutory basis for regulation.
5. The starting point has therefore been the development of a new set of principles, some but not all of which derive from the previous Handbook. However, in developing the implications, the SRA has started from the existing Code of Conduct and the prescriptive rulebook. Arguably this is a sensible place to start given the SRA's experience and the scale of the task but has also meant some constraints and restrictions in how it operates in practice. For example, evident in the final version of the Handbook is the practical issue of multiple authors of different sets of rules and the impact upon overall consistency. There have also been technical issues to overcome in setting a level playing field such as ensuring the extension of ABS statutory role holders (HoLP and HoFA) to

[4] The decision of the SRA Board was to repeal all rules (except for the Qualified Lawyers Transfer Regulations 2009 and Higher Courts Qualification Regulations 2000

traditional firms in a proportionate and appropriate way whilst not watering down the statutory requirements for ABS.

6. We agree with the SRA that a level playing field is the right approach. Consumer protections should be consistent across different types of firms and a more flexible and outcomes-focused approach to regulation will allow the SRA's regulatory response to be tailored to specific risks posed, both by ABS entering the market as well as traditional firms. However we recognise that the significance of the change for solicitors has presented some challenges and that, given the wider context, the version of the Handbook represents as far as the SRA can reasonably go in modernising the current detailed framework at this stage. The Board should also note The Law Society's view (provided in the response to mandatory consultee advice) that the SRA has taken a "sensible and pragmatic approach" in adapting the existing code and that the changes represent a move to a "different balance".

Summary of the changes

7. An overview of how each set of rules has changed (i.e. only to include ABS, technical amendments (e.g. a change in definitions for consistency rather than making a substantive change) or more significant changes) has been provided at **Appendix A1**. More detail on the main changes is available at **Appendix A2** and a tracked copy of the Handbook is available to Board members before and during the meeting.

8. The shift to outcomes-focused regulation is the most significant change as opposed to any detailed changes within the rules. This makes the application different to a usual application for approval of changes to regulatory arrangements which are generally focused on implementing a particular policy change. The SRA considers that outcomes-focused regulation should concentrate on providing positive outcomes which, when achieved will benefit both clients and the public.

9. The new SRA Code of Conduct sets out the new outcomes-focused requirements in the form of Principles, Outcomes and Indicative Behaviours. The ten Principles apply to all solicitors (whether working in a body regulated by the SRA or as in-house solicitors) and to all bodies regulated by the SRA (including ABS) and those working within them. These Principles are mandatory and there is no differentiation in their application to different types of bodies – i.e. ABS or traditional firms (although there are variations for in-house law departments). The Principles are a new set of regulatory requirements but are mostly based on Rule 1 of the current Code of Conduct.

10. All Outcomes are considered mandatory but they are not an exhaustive list and in practice there may be other outcomes which are consistent with the Principles. The Indicative Behaviours are non-mandatory but attempt to set out how the Outcomes may be met. Any guidance notes contained within the Handbook are also non-mandatory and the SRA will be completing an audit of any remaining guidance to ensure that the Handbook remains the single source of its regulatory arrangements.

11. The new Code of Conduct is divided into chapters dealing with particular regulatory issues, for example client care, conflicts of interests and publicity.

Each chapter shows how the Principles will apply through mandatory and non-mandatory provisions.

12. The Handbook will come into force for all firms in October 2011 and will introduce different systems, supervisory and reporting requirements from that date. One of the most significant changes for traditional firms is the requirement to appoint a Compliance Officer for Legal Practice (CoLP) and Compliance Officer for Financial Administration (CoFA) to be in place from October 2012. Before this the reporting requirements will be the responsibility of the firm. These roles mirror the responsibilities placed upon the equivalent statutory role in an ABS, i.e. HoLP and HoFA, and are arguably central to the supervisory and enforcement components of OFR. This is discussed in more detail later in this annex.

Authority for the Decision

13. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (the Act) to review and approve or reject proposed changes to the regulatory arrangements of the approved regulators.

14. The SRA, in its capacity as the regulatory arm of The Law Society, submitted an application for approval of changes to the regulatory regime in the form of the new Handbook on 17 March 2011.

15. Paragraph 25 of Schedule 4 explains that the LSB must approve a proposed change to the Regulatory Arrangements unless we are "...satisfied that..." the approval would fall within one or more of the criteria specified in sub paragraph 25(3)[5]. If the LSB is not satisfied that one or more of the criteria are met, then it must approve the application in whole, or at least the parts of it that can be approved when only part of the application meets the criteria. In practice this means that the onus is on us to approve applications unless one or more of the refusal criteria are met, as opposed to designation decisions (including Licensing Authority applications) where the test is different and we must ensure we are positively satisfied on the much narrower and largely ABS specific requirements laid down by the Act.

16. Our Rules for Rule Change Applications state that we will approve Regulatory Arrangements in so far that they appear to achieve their intended outcome and satisfy the sub paragraph 25(3) criteria. Most notably there must be no adverse impact on the Regulatory Objectives overall and the alterations and the process by which they have been produced must be consistent with Better Regulation

[5] The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the Regulatory Objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

Principles. We must also ensure that the designation requirements continue to be met[6].

17. We have considered the changes to the regulatory arrangements submitted to us as part of the Handbook insofar that it is impacted by or impacts upon these changes. We have therefore asked questions and raised issues on the entirety of the Handbook.

LSB Process

18. The application was formally received on 17 March 2011. As with the Licensing Authority application this was the culmination of a lengthy engagement with the SRA going back 18 to 24 months. We have had positive interaction at all levels and significant discussion regarding the shift towards outcome-focused regulation and how this might be expressed in the new Handbook.

19. The designation and rule change team undertook a thorough review of the draft Handbook between October 2010 and March 2011. This resulted in 147 issues being raised with the SRA in relation to the Handbook and a further 27 for the licensing authority application. A number of changes have been made as a result. An example is the approach to equality and diversity set out in the Code of Conduct. Originally the SRA proposals required firms to have in place equality and diversity policy. As a result of our comments, the position is now much more focused on the outcomes the firms and their staff will deliver and the consumer will experience. The SRA is also developing a single glossary of the Handbook to remove any duplication in defined terms which has been highlighted during our assessment process. The Board has seen the full issues log from the formal assessment process.

20. As the Handbook also contains the licensing rules (should the SRA become a Licensing Authority), it has also been the subject of the Mandatory Consultees advice in relation to the Licensing Authority application. Key issues have been covered in the relevant sections of this paper. The Board has already seen the advice from Mandatory Consultees but copies are available on request. The SRA and Law Society responses to the advice are attached at **Annex C**.

21. The SRA has repealed and reissued the Handbook. We have therefore looked at the full Handbook in the context of the new framework of principles and risk-

[6] For the purposes of sub-paragraph (3)(b) the designation requirements are—
(a)a requirement that the approved regulator has appropriate internal governance arrangements in place,
(b)a requirement that the applicant is competent, and has sufficient resources to perform the role of approved regulator in relation to the reserved legal activities in respect of which it is designated, and
(c) the requirements of paragraph 13(2)(c) to (e).
13 (2) Rules under sub-paragraph (1) must, in particular, provide that the Board may grant an application in relation to a particular reserved legal activity only if it is satisfied:
(c) that the applicant's proposed regulatory arrangements make appropriate provision,
(d) that the applicant's proposed regulatory arrangements comply with the requirement imposed by sections 52 and 54 (resolution of regulatory conflict), and (e) that those arrangements comply with the requirements imposed by sections 112 and 145 (requirements imposed in relation to the handling of complaints).

based supervision and enforcement. However, as the SRA has not taken a 'first principles' approach to developing the new Handbook (i.e. how they would write the rules if they were to start again from a blank sheet of paper) we have looked at all provisions within each set of rules but only considered the changes against the criteria.

22. A number of technical and relatively minor issues have been raised and resolved during the formal assessment process. The most significant issues arising from the assessment process are set out below. It should be noted that as the Handbook also forms the proposed licensing rules for ABS, a number of Handbook issues have also been raised in relation to the Licensing Authority application. These issues are discussed in **Annex B.**

Issues arising from assessment of the application

Delivery of OFR - Capacity and Capability

23. The new Handbook, with its unified structure, will have differing effects depending on who is regulated. Already there is significant difference within the SRA's regulated community between city and multinational law firms, high street solicitors, sole practitioners and employed in-house solicitors and the risks they present. Currently, the SRA regulates approximately 125,000 individual solicitors and 10,000 firms. The changes to regulatory arrangements the Board is asked to consider will have a major impact upon the existing market

24. The SRA is part way through a root and branch review and internal reorganisation to facilitate the shift to outcomes-focused regulation. There are arguably risks for any organisation doing this but these risks are undoubtedly heightened if the internal transformation is taking place at the same time there are changes in the market. There is no doubt that the SRA has come a long way but there is still some way to go before the transformation programme is complete.

25. We have sought to establish the links in its transformation programme to better understand where the SRA is now and what still needs to be delivered. There are two main strands to the SRA transformation programme. The first is the OFR programme, which will deliver the necessary changes to the way the SRA regulates, including the changes to the organisational structure and ways of working. The second part is the Enabling Programme, which is essentially about the technology needed to enable the delivery of OFR. We have also sought assurance from the SRA that is has appropriate contingency plans in place for the delivery of the Enabling Programme.

26. Although the criteria for assessing the Handbook as a change to regulatory arrangements are limited, this change is about more than a change to the rules. The capacity and capability of the SRA will be central to the success of outcomes-focused regulation and is not an issue that is exclusive to ABS.

27. Within the new regulatory framework, decision-making will become more important. The capability of the SRA as a whole and the ability of individual staff to exercise judgement and discretion will therefore be fundamental. The new approach to authorisation and supervision of firms will lead to a more active

approach to understanding businesses and the risks they pose rather than as now relying on enforcement activity to deal with rule breaches. The SRA will know more about the business it regulates and will need to know what to do with this information.

28. The SRA has provided us with additional information on both the delivery of OFR and the Enabling Programme. We have received confirmation that the recruitment of staff to the key senior posts in the authorisation and supervision directorates has been completed, and both directorates are already operating. A recruitment strategy, including contingency plans, has been produced to ensure that lower level staff will be in place. The timescales are challenging but SRA has confirmed it is on track. In parallel, the wider leadership group (the top 30 executives) are undertaking further leadership training to support them in the challenge of delivery.

29. The SRA has also commissioned a series of checkpoint reports which have been carried out by an external assurance provider. These reports have provided the SRA Board with regular progress updates and a mechanism for addressing any issues.

30. There is still some way to go between now and October but the SRA project team has developed a dashboard reporting process which will give the SRA Board the information they need to ensure that things remain on track or allow them to take action where there is slippage. The SRA has agreed to share reports with us.

31. Beyond October, we have agreed in principle with SRA that they will provide us with regular information on how OFR is being implemented and a degree of qualitative information on key issues and how they are tackled. This will complement any ABS specific information we will receive as part of the same package of reporting. The intention is that this reporting will extend over a two-year period and include specific milestones at which specific parts of the operation will be evaluated, prior to a wider review of the effectiveness of the OFR framework towards the end of 2013. We will agree this suite of information by the end of June.

Delivery of OFR - CoLP and CoFA requirements

Impact on firms

32. One of the more significant changes for traditional firms will be the regulatory requirement to appoint a CoLP and CoFA by October 2012. This is perhaps the strongest example of how the level playing field approach will operate in practice as these roles only have a statutory basis with regards to ABS.

33. It will be the responsibility of the CoLP and CoFA to record and report instances of non-compliance to the SRA. These individuals must be authorised by the SRA and may also be held personally accountable in the circumstances that systemic failures are found. Although the CoLP and CoFA will have specific responsibilities, this does not remove from management the overall responsibility for the proper running of the firm (and in fact the reporting requirements will rest with the governing body of the firm until the compliance roles are in place). Nor does it remove the individual responsibilities of individual practitioners.

34. This change has been the subject of much comment amongst the profession, particularly regarding the SRA's approach to enforcement. To an extent it is to be expected that there will be reluctance amongst the existing regulated community about OFR and a desire for certainty on precisely what approach the SRA will take in each situation. However this also shows the challenge that the SRA face in delivering OFR and the serious lack of confidence in SRA that exists in the regulated community. This supports both our focus on capability and capacity in order to ensure that SRA become increasingly effective in defining and delivering regulatory outcomes.

35. Fundamental to the change is the enhanced reporting requirements on firms which may cause concern, particularly within firms that do not already have compliance and reporting processes in place. However the SRA considers, and we agree, that this is the right approach to take in encouraging a culture of compliance. It will also allow resources to be targeted in areas presenting most risk. Additionally, the obligation to report is already one which rests on each individual lawyer. What has changed essentially is simply a sharper focus on personal responsibility for delivery at the entity level.

36. The SRA has undertaken several rounds of consultation, starting with the principles behind the move to OFR and moving towards more detail on both the Handbook and broader approach. A series of communications activity including roadshows, webinars and information to raise awareness of the changes and invite feedback from the profession has also taken place. This communication programme is continuing.

Impact on SRA

37. As this will also be a major change to the way the SRA operates, we have sought assurance on its competence and resources in relation to these new requirements. In particular we have sought assurance on its ability to manage mandatory disclosure of non-compliance and whether the present arrangements can be adequately scaled up to reflect potentially larger volumes of information. We have also sought further information from SRA on how the information will be utilised in the new risk framework and inform the approach to supervision and enforcement.

38. The SRA has assured us that although the requirement to appoint certain individuals in compliance roles is new, a reporting requirement has always existed (through the professional duties). That said the new Handbook has significantly tightened up existing requirements by placing greater emphasis and responsibility for reporting on firms. There is therefore some risk that the SRA will be deluged with information. The SRA is seeking to mitigate this risk by enabling online information returns and development of system based prioritisation criteria, which will continue to evolve as more data is collected from firms. It has also developed a flexible approach to resourcing which enables staff to be reallocated if necessary.

39. In our discussions on CoLP and CoFA, we have also raised a technical issue in relation to the Authorisation Rules that has resulted in amendments to the version presented for approval. These changes ensure that the statutory functions for compliance officers in an ABS are accurately reflected in the regulatory arrangements, whilst ensuring the equivalent requirement for

traditional firms is proportionate and the principle of the level-playing field can be maintained. The SRA will be requiring CoLPs (including HoLPs) to record all incidents of non-compliance but only material issues will be reported immediately. Non-material matters will be reported on an annual basis as part of the standard return. We agree that this is a proportionate approach without watering down the statutory duties where they apply (i.e. for HoLP and HoFA).

40. Both the Law Society (in a letter from Linda Lee) and the Consumer Panel (in its advice to us), comment on the importance of the enforcement policy to the success of OFR. The SRA proposes to take a risk-based approach to supervision and enforcement. Depending on the risk rating of the firm, supervision may involve desk-based approach; risk based visits to firms and relationship management. As far as possible the approach will be the same for ABS and traditional firms, so tailored to the risks posed as opposed to the particular organisational model.

41. In making our decision, we need to be satisfied that the SRA will be competent to implement the proposed regulatory arrangements. However the test for approving changes to regulatory arrangements requires us to approve unless we are satisfied that one or more of the refusal criteria are met. Based on the information we have seen from the SRA we have found no reason to conclude that the SRA will not be competent to deliver OFR, including specific changes to reporting requirements.

SRA Waiver Policy

42. Historically, there does not appear to have been much transparency around the SRA's general approach to waivers and where they have been issued. If used effectively, waivers can be a powerful regulatory tool to ensure avoidance of the potential perverse impact of a 'one size fits all' approach.

43. As discussed throughout this paper, and echoed in the advice from the Consumer Panel, the proof of OFR will be in the way the rules are used in authorisation, supervision and enforcement approaches. We consider that an effective waiver policy may be key to this and may also mitigate some of the potential exclusionary effects we have identified in the Handbook.

44. We have therefore agreed with SRA that a public statement will be made on its general approach to waivers and, in particular, how they will be used in relation to the Separate Business Rule. The Board will be given an oral update on the substance of this statement.

45. More detail on the specific issues around the Separate Business Rule can be found in the relevant section of **Annex B** to this paper.

Restriction on fee charging for solicitors employed by Not for Profits

46. One of the issues we have raised in relation to an unintended but potential exclusionary component of the Handbook is the restriction on the ability of solicitors working in Not for Profits to charge. This is not a new provision but has been carried over into the new Handbook on the basis that the issue will be

considered more widely as part of the work on the Special Bodies regime. Although this rule is not changing we have raised the issue in relation to the wider context of the rules and in relation to the waiver policy.

47. Currently Not for Profit agencies employing solicitors are unable to charge for their services even on a non-profit basis. An identical agency (in terms of services provided) which does not employ any solicitors can charge a contribution towards costs or full cost recovery subject to charity commission rules because it will be outside of SRA regulation.

48. The SRA is of the view that as Not for Profit bodies often deal with vulnerable consumers it is not appropriate to enable them to charge in the absence of a regulatory framework.

49. Following discussion, the SRA has further considered this matter and is still of the view that the restrictions on solicitors working in Not for Profit bodies should remain as they are and has noted that bodies wishing to charge would be able to apply for ABS licence. The SRA has however confirmed that it would be possible to apply for a waiver during this period.

50. We do not agree with the SRA's arguments that the risks posed by charging or securing a contribution to fees are such that it should prohibited. Particularly as there are already exemptions for SRA regulated NfPs which allow them to charge through public funding (which has in practice meant legal aid, local authority funding, national lottery and other charitable sources of income). We consider the rule to be contradictory and as public funding streams come under pressure, potentially exclusionary to those NfPs that may wish to operate some kind of cross subsidy in order to continue providing services. Furthermore we consider the option for these bodies to be brought within the full licensing regime to be potentially disproportionate.

51. In discussions with SRA we have put forward our view that this restriction is unjustified and in its effect may be inimical to the regulatory objectives. Although the SRA has confirmed that waiver applications will be considered (and has in fact granted such waivers in the past), senior staff are concerned about making an overt public statement as it may provide an opportunity for certain organisations to try and avoid the rules.

52. We have doubts about whether the limited statement in the current draft of the waiver paper, although welcome, will necessarily have the right profile nor, of itself prompt change in regulatory behaviour. However we do not believe that it would be proportionate to inject delay into decision making in relation to an issue which is essentially about the exercise of regulatory discretion. We therefore propose to ensure that future reporting will include data on waivers and pursue in the longer term in the context of the Special Bodies regime. We will also continue dialogue with Advice Services Alliance so that we have awareness of any supply side issues. However, we would like Board authority for David Edmonds and Chris Kenny to continue to progress this issue with the SRA in the short term albeit outside of the rule approval process.

Registered Foreign Lawyer (RFL) ownership

53. This issue arose during the Board workshop as concerns were expressed about the potential restrictions on foreign ownership. The SRA has confirmed to us that the rule relates only to Recognised Bodies (traditional firms) and not to ABS.

54. Rule 23.3(a)(iii) of the Authorisation Rules reflects the provisions of the Administration of Justice Act in relation to Recognised Bodies. The Access to Justice Act requires all Recognised Bodies to have at least one “relevant lawyer” defined as a (Registered European Lawyer or qualified lawyer other than a RFL).

55. For the avoidance of doubt the SRA has confirmed that it does not place restrictions on RFLs having an ownership interest in an ABS, including a 100% ownership. We therefore no longer consider this to be an issue.

Conclusions

56. The new Handbook represents a significant change, both in approach and in the number of detailed changes to the rules. We have focused in this paper on what we consider to be the key issues. However during the assessment we have raised a range of issues and have concluded a satisfactory position with the SRA, all of which are covered in the issues logs.

57. Responses to the SRA consultation have identified concerns amongst the regulated community about some specific proposals, e.g. overseas offices, conflict rules, pro-bono and in-house. We are satisfied that the consultation process followed by the SRA has properly considered all of the responses, albeit they have not necessarily agreed with all of the issues raised.

58. We have assessed the changes against the refusal criteria (in paragraph 25(3) of Schedule 4). This includes an assessment against all of the regulatory objectives and better regulation principles. We have also assessed whether the SRA will in place the appropriate arrangements to allow them to competently and effectively regulate against outcomes.

59. We are satisfied that none of the refusal criteria are met and that therefore that the Board should approve the application.

ANNEX B: Licensing Authority application

Recommendation(s)

60. The Board is invited to:

- Grant the application and make a recommendation to the Lord Chancellor (under paragraph 14(2) of schedule 10 to the Legal Services Act 2007 (the Act)) that The Law Society be designated as a Licensing Authority for its existing reserved legal activities (listed below in paragraph 54).
- Agree that in making a recommendation for the Lord Chancellor to make an order that the proposed licensing rules are at the same time treated as having been approved by the Board (under paragraph 16(1) of Schedule 10, Part 1 of the Act). This includes the entire SRA Handbook.
- Agree to delegate authority to approve the Licensing Authority Decision Notice and the wording of the recommendation to the Lord Chancellor to the Chairman and Chief Executive

Background

61. This application was received formally from The Law Society on 25 March 2011.

62. At the May workshop session, the Board was given an update on progress with the Licensing Authority application and the process we have followed.

63. Although the formal assessment process has taken only three months, as with the Handbook this process is the culmination of months of work with the SRA. Discussions have taken place from an early stage at all levels. Ideas and approach have developed through formal ABS implementation group meetings (beginning August 2009) and regulator bilateral between SRA and the ABS team on the new approach.

64. As referred to in the Handbook paper, the team responsible for designation and rule change applications have been involved since October 2010. Work has included a detailed review of the Handbook (which sets out the licensing rules) and a series of meetings, including a walkthrough of the new ABS authorisation process in March 2011. We have therefore been able to resolve a number of issues ahead of formal submission of the application.

65. The initial project plan assumed that formal assessment process would take six weeks. In practice this has increased to three months. We have assessed the application against the LSB's Rules and Guidance, including an assessment of the capacity and capability of the SRA should The Law Society be designated as a Licensing Authority and consideration of any potential exclusionary effects. These matters are considered under the relevant sections of this paper.

The Application

66. Under Schedule 10, Part 1 of the Act, bodies may apply to the LSB to become a Licensing Authority. The Law Society is an Approved Regulator for the following reserved legal activities[7]:

    - the exercise of a right of audience
    - the conduct of litigation
    - reserved instrument activities
    - probate activities
    - the administration of oaths

67. The Law Society as the Approved Regulator has delegated its regulatory functions to the SRA but not the decision to make an application to be a Licensing Authority. The Law Society Council made this decision on 23 March 2011 and formally made the application on 25 March 2011.

68. The SRA prepared both the application and the Handbook (to be considered in this section as its proposed licensing rules). While The Law Society is formally the applicant, the application itself refers to the SRA as the applicant as does this paper.

Authority for the Decision

69. The LSB can make a recommendation to the Lord Chancellor that the body is designated as a Licensing Authority (for all or some of the reserved legal activities applied for) once it is satisfied that the application meets the Act's and our requirements. These are set out in our Rules for Licensing Authority Designation Applications. We must also satisfy ourselves that the applicant has in place appropriate licensing rules to regulate the proposed activities. We are doing this on the basis that the underlying content of the Handbook which applies to solicitors and Recognised Bodies is competent because it consists of material that was either automatically approved on 1 January 2010 or of material that we have just approved under the regulatory arrangements application; and nothing in those parts of the Handbook when they are also applied to Licensed Bodies becomes incompetent as a consequence of it being approved also for Licensed Bodies.

70. We have also considered the proposed arrangements against the LSB's guidance on the contents of licensing rules and ensured that the additional elements that apply only to Licensed Bodies satisfy the explicit tests laid down for those elements in the Act.

71. The LSB must be satisfied that the applicant will be competent and have sufficient resources to perform the role of Licensing Authority at the time the order takes effect.

72. The analysis of these requirements is set out below.

Assessment against LSB Rules and Guidance

[7] The application makes reference to Immigration advice and services but this is not a reserved legal activity

73. In assessing the application against the LSB's Rules for Licensing Authority Designation Applications and Guidance on the contents of licensing rules, the following have been considered:

    - The application and supporting documents (including the Handbook)
    - The advice from the mandatory consultees and responses to the advice from both SRA and The Law Society (available as appendices to this paper)
    - Further information provided by the SRA in response to our issues logs on the main application and the Handbook and information received during the assessment period

74. Schedule 10, paragraph 11(2) sets out the matters on which the Board must be satisfied when granting an application for designation of a Licensing Authority. The following table summarises our conclusions against each of those matters:

Matter to be satisfied	**Conclusion**
Compliance with section 83 requirements	
Contain appropriate qualification regulations for Licensable Bodies	In our Guidance on the contents of licensing rules we said that we considered it to be a matter for each ABS to decide the qualifications and experience they need for their particular business model. The SRA Authorisation and Practice Framework Rules set out the requirements for the Head of Legal Practice (HoLP) and Head of Finance and Administration (HoFA). Under these provisions the HoLP must be a lawyer. In the case of a HoFA, the SRA will consider the applicant's accountancy experience or qualifications to do the role. The SRA's determination will be informed by the structure and profile of the entity and will be used to inform the risk profile of the licensed body.
Provision for how the Licensing Authority, when considering the regulatory objectives in connection with an application for a licence, will take account of the objective of improving access to justice	As part of the application process for ABS licences the SRA will require a statement from each applicant setting out how they anticipate their business model could improve or impinge on access to justice. This will be considered during the authorisation process. The SRA has confirmed that it will conduct periodic research beginning after a period of 12 months from designation to review the legal services market and the impact of the changes, including on access to justice.
Contain appropriate arrangements (including conduct rules, discipline rules and practice rules) under which the Licensing Authority will	The SRA has presented its entire Handbook as the licensing rules. A summary of the contents of the Handbook is provided at Appendix A1.

be able to regulate the conduct of bodies licensed by it and their managers and employees	We have determined that the general arrangements are competent on the basis explained above and that the licensed body specific arrangements meet the standards required by the Act.
Contain appropriate indemnification arrangements	The SRA Indemnity Rules have been amended to incorporate ABS within their scope.
Contain appropriate compensation arrangements	The SRA Compensation Fund Rules have been amended to incorporate ABS within their scope. The section 69 order (laid on 17 May) enables a single compensation fund for all SRA regulated firms.
Provision required by sections 52 and 54 regarding the resolution of regulatory conflict	The SRA is a signatory to the ABS Multi-Disciplinary Practices Memorandum of Understanding (MoU). The MoU seeks to clarify so far as is practicable the roles of the regulators and professional bodies in the oversight of licensed bodies. It provides a framework for cooperation, coordination and exchange of information. The SRA also has in place a series of information sharing agreements supporting the MoU.
Provision required by sections 112 and 145 in relation to complaints handling (including compliance with our signposting requirement)	The SRA's complaints handling arrangements will apply to ABS firms. We are satisfied that the SRA meet our requirements for First Tier Complaints handling and we (with the SRA) will be continuing discussions with the Legal Ombudsman in relation to how complaints against multidisciplinary practices will be handled.
Any other provisions required to be contained in the licensing rules	The SRA Handbook will apply to all SRA regulated entities and individuals
That if an order were to be made designating the SRA as a Licensing Authority, there would be a body with the power to hear and determine appeals	The SRA has identified the Solicitors Disciplinary Tribunal as the appellate body for its licensing regime. The Section 80 order is the subject of a separate paper for the Board's consideration on 13 June 2011.
That if an order were to be made designating the SRA as a Licensing Authority, the SRA would be competent and have sufficient resources to perform the role of Licensing Authority in relation to the activity at the time the order takes effect	Refer to the section below: *Capacity and capability of SRA as a Licensing Authority*
The exercise of regulatory functions is not prejudiced by representative functions	We were comfortable with where the SRA and The Law Society have got to in the October 2010 IGR assessment process. Discussions continue as part of this year's process to continue to strengthen the independence of the SRA.
Decisions relating to the exercise of the regulatory functions are taken (as far as possible) independently from decisions relating to the exercise	

75. The Board should note that the provisions described above in relation to the appeals function are dependent on the Section 80 order which is the subject of a separate paper. The section 69 order was laid on 17 May.

76. The Board should also refer to the section at the end of this paper on the Rehabilitation of Offenders Exemption Order.

The Mandatory Consultees

77. When considering an application to become a Licensing Authority, the LSB is required to seek the advice of the Lord Chief Justice, the Office of Fair Trading (OFT) and the Legal Services Consumer Panel (collectively referred to as the "Mandatory Consultees"). In addition, the LSB can seek advice from a selected consultee though no such advice has been sought in relation to this application.

78. Advice was received from each of the Mandatory Consultees and none opposed the application. Both the SRA and The Law Society submitted a response to the advice (within the required timescale). **Copies of the responses are in Annex C.**

79. The Board was provided with copies of the advice from Mandatory Consultees in advance of the May workshop.

80. Specific issues raised are covered in the relevant section of this paper.

Issues arising from the assessment of the application

81. In the May workshop, we identified three key issues for resolution by the time of the Board decision. Two of the three were around capacity and capability: SRA road-map to the autumn and medium term organisational development; and evaluation strategy (including LSB reporting). The third was around minimising exclusionary effects, which has been covered in relation to specific issues in this paper (Separate Business Rule and Ownership Requirements for ABS).

Capacity and capability of SRA as a Licensing Authority

82. The Act requires that, in making a recommendation to the Lord Chancellor, the Board must be satisfied that a prospective Licensing Authority will be competent and have sufficient resources to perform the role of Licensing Authority at the time the order takes effect (schedule 10, paragraph 11(2)(d)).

83. The process for designation of licensing authority therefore means that SRA has had to submit its application before it has fully developed all of the functions and processes that it will need to regulate ABS. We are therefore making this recommendation on the basis of what will be in place at the time of designation should the Lord Chancellor accept the Board's recommendation.

84. Due to the interdependency between OFR and ABS, we have already covered many of the key points in relation to capacity and capability (for example staffing arrangements and implementation of the Enabling Programme) in **Annex A** to this paper. In this section we will focus on the ABS specific elements.

85. The SRA has confirmed that it is on track to launch the online ABS application form in August 2011. Ahead of the formal launch, testing will be carried out and

paper based forms developed as contingency should there be any problems with the IT. Based on its planning assumptions about the number of applications, the SRA has said that they will be able to complete the process manually if needed. We are therefore confident that the SRA will have the ability receive and process applications at the point of designation.

86. Although much of the authorisation process will be automated, a degree of judgement will be required. The SRA Board has approved a proposal under which a member of the Senior Management Team will approve all applications for ABS for at least the first six months. The SRA is taking this approach to ensure robustness and consistency of approach. In addition, the SRA has assured us that all decisions will be reviewed for consistency and will inform future approach.

87. The SRA is also in the process of developing a draft set of decision-making criteria but this is very much in its infancy. The criteria will be developed over time as the SRA builds experience and a final version will be submitted to the LSB for approval (as it will form a regulatory arrangement requiring approval under Schedule 4, Part 3).

88. Over the summer all decision makers will go through scenario-based training covering competition and human rights law as well as law on public decision making. All staff will be assessed following completion of the training.

89. We agree with the approach the SRA is taking to the first applications but acknowledge there is some risk in terms of over reliance on key people and the ability of the SRA to scale up should there be higher numbers of applications than expected. We are confident that the SRA has in place key staff with the necessary knowledge and expertise to take these decisions but the number of people is small. Until the point at which decision-making criteria have been developed and integrated into SRA systems and processes, and the staff training is complete, these risks will remain. To an extent the SRA has provided mitigation by engaging with potential applicants so that it can target resources accordingly. The risk is also mitigated by the relatively limited number of applications expected in the first few months. We have now received and reviewed the SRA's plans for emergency succession planning, noted their clear approach for broadening their pool of skills and the management development plans to underpin them. We have also received assurances on their approach to retention, but noted their views that the inflexibility of the Law Society's employment structures may present some risks. This is an issue which is being tackled in dialogue on internal governance issues between LSB, SRA and The Law Society.

90. While we recognise that there is still some work to do, we are confident that our conversations with the SRA combined with the information they have provided enable us to make a designation recommendation. It is our view that the SRA would not be able to operate as a licensing authority without wholesale change as the current regime would not have provided sufficient flexibility to respond to the challenges of regulating ABS. We made clear two years ago in our ABS decision document that we would require both OFR and increased capacity and capability to supervise firms and the SRA has risen to that challenge. That said we have also placed some reliance on the experience of the SRA, as highlighted in the advice from the Lord Chief Justice. We have therefore discussed with the

SRA how it has used its past experience to inform its approach to ABS. The shift to OFR is just one example of how the SRA is learning from experience.

91. We are satisfied that at the point of designation the SRA will have all it needs to be a competent Licensing Authority but a number of risks remain. The importance of key individuals has already been discussed in this paper but remains fundamental to the competence of the organisation. We are also placing reliance on the SRA to deliver the remainder of the transformation programme, including implementation of the IT infrastructure to support the delivery of OFR, embedding the new culture throughout the organisation and recruiting and retaining the right staff at the right levels. The SRA has identified these areas as key risks. The SRA has also identified they will need to manage down the legacy work and will monitor this through the dashboard. We have sought specific assurances on the SRA's identification of key risks and have reviewed their mitigation approached for all of them.

92. We have sought assurance from the SRA on its approach to review. The dashboard reporting referred to earlier in the paper will include updates on the ABS specific elements of the programme between now and the point of designation. The management of risk will form part of this ongoing reporting.

93. We have agreed in principle with the SRA that a full suite of reporting will be provided post designation. As highlighted in the Consumer Panel's advice, evaluation will be an essential part of making OFR a success. The details of this will be developed by the end of June but will include both quantitative and qualitative data. A formal review will take place two years into the new regime, by which time the SRA will have experience of a full year's reporting cycle.

Separate Business Rule

94. As outlined at the Board workshop, we have significant concerns about the potential implications of the separate business rule in the ABS licensing framework. These concerns have focused on specific high profile examples such as professional services firms but potential wider implications such as pushing legal services providers outside of reserved legal activities (and therefore regulation) remain.

95. An example might be where the ABS New Ltd runs two separate businesses within its group. One is the ABS New Ltd will writing services. The other is ABS New Ltd conveyancing services. Both use the ABS New Ltd brand; both are available on the same website; both are available and advertised in local ABS New Ltd banks and at other ABS New Ltd ventures. Consumers are likely to see this as the same 'company' and therefore expect the same level of protection. It would therefore be reasonable for a licence condition to say that all ABS New Ltd legal services are regulated however the business is structured.

96. Another example might be where a private equity group buys two separate businesses. One is online will writing business called 'will writers (non-lawyer) inc'. The other is a regional commercial law firm serving the SME market. Under the current rule this would mean that both have to be regulated within the same entity even though consumers are unlikely to be confused because they are accessing different services and different brands. In fact it is unlikely that any consumer would use both providers.

97. It is our view that the rule was devised as a way of stopping solicitors from separating non-reserved activities to reduce costs through lower regulation. However in practice, particularly in the ABS environment, it has exclusionary side effects on legitimate business structures that have the potential to bring significant consumer benefits through diverse delivery methods, new investment, and new ways of running firms with better links to clients through association with other services.

98. This is an issue on which all of the Mandatory Consultees comment. The Consumer Panel supports the SRA's objective of ensuring that all legal services are regulated by the SRA and therefore supports the maintenance of the rule. This view was echoed in the advice from the Lord Chief Justice.

99. The OFT expressed concern that this rule may impose regulation that is not necessary to consumers and therefore create a barrier to entry that limits competition. The advice further noted that the provisions might have a "limited negative impact against competition."

100. We have also raised a concern that the impact of the Separate Business Rule combined with the basis on which turnover based fees are calculated may pose a barrier to entry through the disproportionately high cost of regulation.

101. The SRA is of the view that the Separate Business Rule is necessary to mitigate a number of risks. The first is the risk that statutory protections attached to the provision of mainstream legal services will be lost if businesses sever part of their work into an unregulated firm to avoid regulations. By requiring all SRA regulated activities to be provided within the same entity, consumer protections (such as indemnity insurance, access to compensation fund, complaints) will apply to all activities and not just the reserved legal activities. Secondly, the SRA is concerned that an unregulated provider will not be able to guarantee such level of protection and that this would not be evident to consumers as the entity would be under no obligation to disclose the fact. Finally the SRA believes that these protections should be available in respect of mainstream legal services, not just reserved legal activities. It considers that where a business is regulated by the SRA then all legal services provided by connected entities with common ownership should be regulated in the public interest. The SRA considers this is what consumers expect and believe, pointing to research highlighting the level of confusion amongst consumers.

102. We do not agree with the SRA's approach and consider that the licensing regime could be used to address these risks without the existence of a bright line rule. For example, where a separate business is providing unreserved legal activities in an entirely different context and under different branding, we see no reason why this should be prevented. Where specific risks to consumers are presented by a particular model, the SRA could use licence conditions to ensure firms are not seeking to avoid regulation to the detriment of consumers.

103. Furthermore, we remain concerned that the rule has the potential to achieve what it seeks to prevent by driving legal services providers outside of provision of reserved activities in order to avoid regulation altogether. We are also concerned that in the ABS context in particular, the rule may provide a barrier to entry for

certain business models – particularly those that are already delivering services defined as prohibited separate businesses[8].

104. We have pushed the SRA on this issue but the executives of each organisation fundamentally disagree over Separate Business Rule. While this is a far from desirable element of the licensing framework, we have focused on minimising the risks by seeking assurance from the SRA on its approach to using waivers where unintended restrictions are created. We have also sought and received assurance from the SRA that the list of 'permitted' separate businesses[9] is not exhaustive and that the rule only relates to the provision of *legal* activities, i.e. that a waiver would not be required for a firm to be owned by a business not on the list of permitted separate businesses.

105. One of the agreed outcomes of the approval process is for the SRA to issue a public statement on waivers, making clear its willingness to consider waiver applications generally, and particularly in relation to the Separate Business Rule where potential applicants consider the rule to restrict their chosen business

---

[8] "***prohibited separate business activities***" means for the purpose of Chapter 12 of the *SRA Code of Conduct:*
(a) the conduct of any matter which could come before a *court*, whether or not proceedings are started;
(b) advocacy before a *court*, tribunal or enquiry;
(c) instructing counsel in any part of the *UK*;
(d) *immigration work*;
(e) any activity in relation to conveyancing, applications for probate or letters of administration, or drawing trust deeds or *court* documents, which is reserved to *solicitors* and others under the *LSA*;
(f) drafting wills;
(g) acting as nominee, trustee or executor in England and Wales, where such activity is not provided as a subsidiary but necessary part of a *separate business* providing financial services; and
(h) providing legal advice or drafting legal documents not included in (a) to (g) above where such activity is not provided as a subsidiary but necessary part of some other service which is one of the main services of the *separate business*;

[9] "***permitted separate business***" means, for the purpose of Chapter 12 of the *SRA Code of Conduct*, a *separate business* offering any of the following services:
(a) alternative dispute resolution;
(b) financial services;
(c) estate agency;
(d) management consultancy;
(e) company secretarial services;
(f) acting as a parliamentary agent;
(g) practising as a lawyer of another jurisdiction;
(h) acting as a bailiff;
(i) acting as nominee, *trustee* or executor outside England and Wales;
(j) acting as a nominee, *trustee* or executor in England and Wales where such activity is provided as a subsidiary but necessary part of a *separate business* providing financial services;
(k) providing legal advice or drafting legal documents not included in (a) to (j) above, where such activity is provided as a subsidiary but necessary part of some other service which is one of the main services of the *separate business; and*
(l) providing any other business, advisory or agency service which could be provided through a *firm* or *in-house practice* but is not a *prohibited separate business activity*;

model. The SRA is likely to do this with a series of high-level examples. The SRA has confirmed to us that waivers will be granted in relation to the Separate Business Rule.

106. We have also discussed with the SRA the possibility that in the future it may want to draw on its experience of waivers and common conditions placed on licences in order to bring about a change to the rules, based upon the actual risks posed. The SRA's view is that the issue should be considered in the light of the outcome of the LSB's work on the scope of regulation.

107. We have seen a draft of the waiver paper and will continue to discuss drafting with the SRA. An update will be provided at the Board meeting.

Ownership requirements for ABS

108. This is a technical issue but is of great importance as it is the ownership requirement that present one of the main changes and biggest challenges in the new regime. We therefore need to be satisfied that the SRA has appropriate arrangements to apply the ownership tests properly.

109. Schedule 13 of the Act is extremely complex and sets out various tests to establish whether a person holds an interest in an ABS. These tests involve an individual's associates (which includes a wide range of people ranging from a spouse/partner and children/stepchildren to employees and those acting in concert with them in terms of voting arrangements).

110. In our guidance on licensing rules we suggested that Licensing Authorities should apply a 3% de minimis test in order to make the associate test workable in practice, i.e. checks do not need to be made for associates with a holding of less than 3%. The 3% was based on listing authority rules and the approach taken by the Gambling Commission.

111. The SRA does not think that the Act allows a de minimis to be provided in the rules but will try to achieve this through working practices. Originally we raised this as an issue due to the potential (unintended) restriction on listed companies or those that are considering IPOs as the arrangements set in the rules appeared to be unworkable in practice. This issue applies to initial authorisation but also to the ongoing notification requirements under Schedule 13.

112. We have sought and received explicit assurance from the SRA that it is open to applications from listed companies and those considering IPOs. While the SRA feels strongly that the rules must provide the ability for all associates to be checked, no matter how small their holding, in practice it will make a judgement on who the ownership tests will apply to and how the ongoing notification requirements will work in practice.

113. We have also learned that the SRA is developing a guide to authorisation for prospective ABS which will set out how the process might work in practice. We will provide an update on the content of this guide at the Board meeting having reviewed a draft copy provided by SRA.

114. Work is also underway on information security, particularly with regard to stock exchange rules in respect of information that may be received from listed companies which demonstrates the SRA's willingness to consider these applications.

115. Whilst we have been reassured by the SRA's position on IPOs and listed company applicants, our discussions have raised additional concerns. The first concerns the transparency of approach and the potential for the rules to put off potential applicants or their advisors, particularly in circumstances where they do not wish to speak with the SRA for reasons of commercial sensitivity.

116. We have therefore secured a commitment from the SRA that it will make clear its intent by publishing a statement on this issue along with a further commitment to review the rules if in practice their application process deters applicants. We have seen a draft and will provide an update at the meeting.

117. Our second concern is around the potential risks arising from the potential difference between the approach as described in the rules and the 'working practice' outlined in the guide. We have highlighted the potential risk of challenge arising from the SRA being seen to take a different approach to the rules. For example, a Judicial Review threat may occur should someone wish to delay an IPO by claiming the SRA's decision to grant a licence was unfair as it did not apply its rules properly. The SRA accepts this risk but has maintained that on balance, its approach is right until it has more information and experience. Although we may not have reached the same conclusion ourselves, this is arguably a risk for the SRA to take. We are also reassured by the SRA's commitment to consider whether revisions to the rules may be needed in the future if they appear to be deterring applicants or lead to challenge.

Access to Justice

118. The impact of ABS on access to justice is much debated and has featured in the advice received from the mandatory consultees. The Lord Chief Justice has advised the SRA that access to justice should be broader than access to legal services. This view is reiterated in his advice to us. The Law Society has also raised the matter of how the SRA will take account of and assess the impact on access to justice in its licence application decisions.

119. In July 2010, the Board set out its view of access to justice in the paper on the regulatory objectives. We agree that the definition of access to justice should be broad and note the SRA's response to the advice. The SRA accepts the view of the Lord Chief Justice and has committed to determine applications on a broad interpretation of access to justice.

120. The potential exclusionary effects set out in this paper, such as the impact of the Separate Business Rule, also raise access to justice issues. We have therefore sought assurance from the SRA that it will consider the wider impact of its approach as well as the impact of individual applications.

121. The SRA plans to conduct periodic research beginning after a period of 12 months from designation to review the legal services market and the impact of the changes including the impact on access to justice.

Rehabilitation of offenders

122. In making its decision on the Licensing Authority application, the Board must consider the implications of the exemption to the Rehabilitation of Offenders order being sought. The current proposal is that the exemption order will relate

only to HoLPs and HoFAs and not to owners and managers. A business case is being developed to attempt to secure a second order for exemption of owners and managers but there is a risk that this may not be successful.

123. Notwithstanding this, it is recommended that we should go ahead with the Licensing Authority recommendation even though at this stage it is not certain that the SRA will be able to undertake the full range of checks on owners and managers at the point of designation.

124. In making its recommendation to the Board, the management is content that the SRA's Suitability Test will only apply as far as is permitted by law. However the Board should be aware that this is a different position to that originally put forward in the application.