The voice of banking
& financial services

LEGAL SERVICES BOARD CONSULTATION: ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS – WILL WRITING, PROBATE AND ESTATE ADMINISTRATION ACTIVITIES

Response by the British Bankers' Association

The British Bankers' Association (BBA) is the leading association for the banking and financial services sector in the UK representing over 200 banking organisations from 50 countries.

Following our response to the consultation published in April we welcome the opportunity to engage further on the LSB's proposals in this important area. It was helpful to have the chance to meet with LSB officials over the Summer and we look forward to further discussions as the exercise goes forward.

In responding to the previous consultation we raised a number of specific issues regarding the possible impact of the proposed way forward on retail banks providing will writing and estate administration services. Once again this is the key consideration for the BBA. However we comment also on some of the more generic elements of the further consultation.

In our earlier comments we recognised the case for according reserved status to will writing services though were not persuaded that this step was necessary for estate administration. This remains our view. However it is recognised that the LSB, without pre-judging the outcome of the current consultation, remains of the view that reserved status is appropriate for both the services under review.

Maintaining Market Access

We welcome the very clear statements in the Provisional Report that the intention of the LSB is to keep 'the market open to all types of will writing and estate administration providers' (Paragraph 3). As per our earlier comments we believe that the retail banks providing these services can make a real contribution to the future of the markets in question and confirmation that the advent of reserved status should not put a question mark over their continued participation is appreciated. In this regard we note the undertaking that reservation should only take practical effect once there is at least one designated regular/licensing authority for all current service providers (Paragraph 62 of the Report).

We have noted the list of existing legal services regulators currently approved by the LSB and those bodies that are planning to seek such status in regard to providers offering the proposed new reserved activities. It is our view that because of their particular orientation most of these organisations would probably not be suitable to regulate banks. If the LSB's proposals are taken forward we would welcome further discussions with the LSB on the possible options that could be available for the banks concerned (and any others that subsequently enter the market for the proposed new reserved services).

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Regulatory Overlap

In our response to the previous consultation we focussed attention on the banks' current regulatory status under the FSA – stressing that if banks providing will writing and estate administration services were also subject to legal services regulation the need would be to avoid duplication, potential conflicts and unnecessary complexity. At our meeting with LSB officials in August we were pleased to learn that the LSB was very much alert to these dangers and planned to address them in the proposed new arrangements. The recent consultation documents provided further comfort in this regard. Examples include the statement in the feedback document that in the circumstances posited the legal services regulator should take into account the broader regulatory scrutiny to which a service provider was subject and seek to achieve proportionate outcomes (Paragraph 25). Equally welcome was the assurance in the draft guidance document that each approved regulator and licensing authority would need to set out details of how they intended to prevent regulatory conflict and unnecessary duplication of regulatory provision – and the reference to possible memoranda of understanding (Paragraphs 95 and 96).

At this point it would be premature to speculate on the detail of any accommodation between respective regulators. But in broad terms we would hope for an outcome in which the application of 'legal services' rules/requirements was limited to areas specific to the proposed new reserved activities where the FSA framework could not provide sufficient comfort. In our view, as well as prudential supervision, the generality of conduct of business and related regulation would need to be left to the FSA for duplication and potential conflicts to be avoided.

It may be that in some areas there could be a need to strike a constructive compromise. Take complaints handling for example. The banks' internal complaints handling procedures are subject to fairly stringent FSA regulation and by common consent work well in practice. Accordingly, to avoid additional cost and potential confusion, we would hope that the same framework could be extended to any disputes arising from provision of reserved services. If a complaint reached the 'ombudsman stage' the issue would arise as to whether it would fall under the purview of the FOS or that of the Legal Ombudsman. Particularly in cases where a reserved activity was also an FSA regulated activity this would require careful consideration.

Reverting to the regulatory architecture more generally it is recognised that the FSA, the LSB and the legal services regulator concerned would all have to be comfortable with the apportionment of regulatory responsibilities should be the LSB's proposals be confirmed. In that event we would look forward to further constructive discussions on the issues arising. For avoidance of doubt we should make clear that while we have brought the matter to the attention of the FSA substantive discussions have not taken place.

Proposed Approach to Regulation

We think it would be better to defer substantive comment on the regulatory framework proposed by the LSB until it is clearer how this would dovetail with FSA regulation for banks that would be affected. However we are encouraged by the broad philosophy set out in the consultation documents. In particular we welcome the intention that regulation should be outcomes focussed rather than rely on prescriptive rules and the emphasis on facilitating a competitive environment. Similarly we support the proposition that regulation should be sufficiently flexible to adapt to the needs of a range of providers – this is particularly important given the heterogeneity of firms in the market.

We would offer the following further comments:

i) If the LSB's proposals are put in place it seems likely (depending on the shape of the implementation programme) that there would be a transitional period. Having reviewed the various options presented (Paragraph 64 of the Report) we agree that Option 2 (non

section 25 transitional process) would be a good model for a transition – on efficiency and competition grounds.

ii) It had been our understanding that where a firm outsources the will writing function it would not necessarily be deemed to be undertaking a reserved activity. Whilst a reference in Paragraph 25 of the Report appeared to cast doubt on this, the matter is addressed more explicitly in Paragraphs 82 and 83. The upshot there appears to be that provided a firm's customer knows that the will writing service has been outsourced the firm would not be undertaking a reserved activity. However the position is not wholly clear. In the scenario concerned set out in Paragraph 83 the firm points the customer in the direction of an external solicitor with whom the customer deals directly. This leaves the question of whether reserved status would apply if the firm itself engages with the external solicitor but does so with the full knowledge of the customer. Clarification is requested.

Wider clarification on outsourcing would also be useful – for example to cover the case of a firm outsourcing estate administration services (perhaps to another group company).

iii) Paragraph 22 of the Report states that legal activities provided ancillary to the writing of a will would also be reserved activities and suggests that wealth management would be one such ancillary service. We would question whether wealth management should be considered a 'legal' activity. If the LSB nevertheless remains minded to include wealth management in scope it needs to be made clear that reserved activity status would lapse as soon as a will was completed – so that the provision of wealth management services to the customer (perhaps of long standing) thereafter falls outside the net.

Even then, though, thought would need to be given to the practical impacts on firms of having relationships with individual customers subject to legal services regulation on a temporary basis, or even sliding in and out of scope. As above the main concern in this regard is wealth management services. In the first instance it would be helpful if the LSB could define/explain the term 'wealth management' in the context of the consultation.

iv) At various points in the consultation documents (e.g. Paragraphs 31 and 39 of the Report and Paragraph 6 of the Draft Guidance) the LSB notes that because probate is currently a reserved activity some providers of estate administration services outsource the probate element – and expresses concern that this can lead to delays and additional costs for customers. On this basis a preference is expressed that in the new framework each designated regulator should have a single set of regulatory arrangements covering probate and estate administration – and indeed will writing. We assume that his does not amount to saying that the three services should always be provided by the same firm – but would welcome confirmation.

We look forward to discussing these comments, and the various issues arising, with the Legal Services Board.

November 2012