ALTERNATIVE BUSINESS STRUCTURES: APPROACHES TO LICENSING

Response to Consultation Paper by Liverpool Law Society

Liverpool Law Society has a membership of approximately 2000 solicitors. Its membership is made up of sole practitioners and small firms and also large commercial/corporate Practices. As a Society we are concerned that the interests of all of our members are protected. As a profession we are also concerned that the interests of the general public are also protected.

In view of the diverse characteristics of the Society's membership, we have not felt able to respond to the individual questions in the Consultation Paper because of the difficulty of representing all of our members' views. We have therefore confined our comments to a limited number of discrete issues of general application.

1. **Turnover-based fee structure**

The SRA's second discussion paper "Moving towards a fairer fee policy" set out a preferred model for sharing the costs of regulation, based on the turnover of the regulated firm. We find it difficult to see how this will operate in relation to an ABS which is in the nature of a Multi-Disciplinary Practice, with several different types of professional (for example solicitors, accountants, estate agents and surveyors) all being part of the same organisation. Typically, in transactional work, the client will expect to receive one bill, not separate bills for each type of work involved in the transaction. There will therefore be considerable difficulties for the ABS to determine how much of a bill is to be allocated to the part of the work undertaken by the part of the firm which is regulated by one Approved Regulator and how much by a different part of the firm which is regulated by other ARs. Neither the discussion paper nor the Consultation Paper appear to address this issue.

2. **Multiple Regulators**

Again in relation to MDPs, we have concerns about the adequacy of the type of Memorandum of Understanding referred to in the Consultation Paper. There are echoes of the unsatisfactory situation which developed under the Financial Services Act 1984, when different parts of the same firm could be regulated by different Regulatory Bodies, such as LAUTRO, IMRO, TSA and FIMBRA. This imposed enormous regulatory burdens on the firms concerned, and the situation was only

resolved (if that is the right word) by the creation of the Financial Services Authority under the Financial Services & Markets Act 2000: not that we are suggesting that the creation of single regulator to replace the separate regulators listed in Annex C to the Consultation Paper is the right solution.

3. International issues

Several of our members firms have overseas operations, some operated through branches of the UK firm and some through separate firms or subsidiaries of the UK firm. In the case of branch operations, there are (as is referred to in the Consultation Paper) some jurisdictions, both within and outside the EU, which will not allow ABSs to practise there, and while this remains the case there will be significant obstacles to such firms converting to ABS status. We think it likely that many large firms which might otherwise have considered becoming ABSs and obtaining a listing will find this a major difficulty. It is clear that, even at this late stage, there is much work to do on the international front.

4. Referral fees

Leaving aside the question of whether, as recommended by the Council of the Law Society, referral fees should be banned altogether, there is clearly an issue about how any restrictions would operate in relation to ABSs, particularly those which are MDPs. At present, the restrictions in Rule 9 of the Solicitors' Code of Conduct do not apply to referrals between lawyers (including businesses carrying on the practice of lawyers), and "lawyer" is defined in Rule 24 to include (*inter alios*) "a member…entitled to practise as such…[of] a profession whose members are authorised to practise by an approved regulator other than the Solicitors Regulation Authority". "Practice" is in turn defined in Rule 24 but not in a way which makes it easy to work out how the following types of referral will be treated:

4.1 a referral by a part of an ABS (not regulated by an Approved Regulator) to another part of the same ABS (regulated by an Approved Regulator);

4.2 a referral by a part of an ABS (not regulated by an Approved Regulator) to another ABS (regulated by an Approved Regulator);

4.3 a referral to a non-ABS firm (regulated by an Approved Regulator) by a part of an ABS (regulated by an Approved Regulator);

4.4 a referral to a non-ABS firm (regulated by an Approved Regulator) by a part of an ABS (not regulated by an Approved Regulator).

There are other permutations, but the principal question of the treatment of referrals remains the same.

5. Conflicts of interest

There are in the ABS environment increased risks of conflicts of interest. This will be particularly acute when the ABS is an MDP, with different parts of the ABS acting for different clients and/or types of client, whose interests may conflict. These issues need to be addressed more carefully.

6. Ownership tests

There may well be difficulties in identifying "owners" of ABSs and their associates. Solicitors are already encountering difficulties in this regard in their efforts to comply with the requirements of the Money Laundering Regulations to identify beneficial owners.

7. Conflicts of duties

Paragraph 73 of the Consultation Paper states that "the principle must be that a duty to a shareholder or other stakeholder [of a listed ABS] does not compromise the duties owed to the court and to a client. LAs should consider whether this should also be required for other ABS." We have concerns that this seems to be saying that the regulatory duties owed by a listed ABS (and possibly others) must "trump" duties to shareholders and other stakeholders (we suggest that the reference should really be to the duties owed by company directors to the ABS, as it is that direction that duties lie under sections 170 to 187 of the Companies Act 2006). This we suggest conflicts with the codified duties laid down by those sections, particularly the duty to promote the success of the company imposed by section 172.

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