By e-mail and post

6 October 2009

Dear Sirs,

Response to consultation paper "Designating new approved regulators and approving new rule changes"

The Society of Scrivener Notaries would like to like to make the following comments on the above consultation paper.

1. Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board's approach to its requirements for the content of Applications?

3. What additions to or alterations to the Application process would you suggest?

We acknowledge that the approach taken is consistent with the Regulatory Objectives and Better Regulation Principles. We welcome the provisions to allow the Board to retain advisors for the purpose of considering Applications.

We have some concerns in relation to the detail of the proposed Rules:

C. 10 *"The Applicant should also consult with members of, and representative bodies for, professions that may be affected by the Application and with the regulators on these professions."*

There should be greater clarification as to the level of consultation required and the timescale applicable.

C. 13 "no major valid objections have been made to the Applicant's Application by the Consultees..."

We would delete the word "major". If an objection is "valid", the degree of its validity is irrelevant.

4. What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

We favour the second option, i.e. a set fee that can be adjusted to reflect the actual work involved.

If the applicant is already an Approved Regulator and has a strong record of performance, the fee is likely to be proportionately lower.

We strongly object to any arrangement that results in costs being covered by the overall Levy. The intention of the Act is to improve standards by allowing an element of competition into regulation. This being the case, any entity wishing to become an Approved Regulator must put together a proper application and treat the associated costs as an overhead. It would not be acceptable for practitioners to be indirectly subsidising any inadequate or inappropriate applications.

5. Do you think we should reduce the Prescribed Fee for Applications from existing Approved Regulators to take on Additional Legal Activities?

We do not see why this should be policy.

6. Do you agree that the Board should use external advisors when necessary with the cost of these being met by way of an adjustment to the Prescribed Fee?

Yes. The costs should be borne by the applicant. In taking advice, the Board should consult associations that represent practitioners, as it is the latter which will be primarily affected by any change.

7. Do you agree with the approach taken to oral representations?

Yes.

8. Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the suggested process.

The scope of this question is too broad for us to be able to comment meaningfully.

9. Do you consider that [the Criteria for determining applications set out in Section G] are appropriate?

We remind the Legal Services Board that notaries have a particular function within the legal system as a public, independent certifying officer. Notaries are prohibited by their Practice Rules from "doing anything in the course [of practice] … which compromises or impairs … the notary's independence or integrity." We therefore believe that it should not be possible for any new approved regulator to develop a parallel system of regulation that compromises the fundamental role of the notary as a public, independent certifying officer, his duty to all parties to a transaction and, crucially, his duty of care as enshrined in the Notaries Practice Rules 2001 (r. 5.6) "to persons in all jurisdictions who may place legitimate reliance on his notarial acts."

We would also remind the Legal Services Board that notaries are not a profession which is in regulatory disarray. The Regulatory Arrangements for notaries already comply with the Regulatory Objectives. The strength of the profession and the existing Arrangements were recognised in the LSB's recent publication on the Levy, which exempted notaries from having to contribute to the costs of establishing the Office for Legal Complaints.

We also draw the attention of the Legal Services Board to the fact that notaries practise at the "interface" between the common law and civil law systems, with the latter being dominant throughout the rest of Europe and the European Union member states in particular. The creation of a level playing field for English and Welsh notaries within the EU ultimately depends upon the perceived independence of notaries from commercial and other external pressures.

Nearly all UK consumers require assistance from notaries only when they are required to deal with business in another country, i.e. a property matter in Spain, an inheritance in Italy. The impartiality of the notary is particularly important in civil law jurisdictions. As it is, notaries in England and Wales are not always given the respect they deserve by their counterparts in other EU countries. Civil law notaries in other countries will be confused by multiple regulators. We strongly suspect that a proliferation of regulators will not help English notaries in their campaign for fair treatment and recognition across the EU. Indeed, it is to be expected that some civil law notaries (and/or their representative organisations) will use "regulatory confusion" in the UK as an excuse to spread disinformation about the standard of notarial services provided by notaries in England and Wales.

The consultation paper assumes that some new Applicants will view the status of Approved Regulator as an entrepreneurial opportunity. We have concerns as to commercial pressures and would assume that a commercial regulator would have a conflict of interest in relation to regulatory duties and representative priorities. We believe that the Board should only grant an application if it can be shown that the exercise of the Applicant's regulatory functions would not be prejudiced by any representative functions. The provision contained in section G.52 (that there should be independence only "so far as is reasonably practicable") does not look sufficiently robust.

We therefore urge the LSB to treat new applications with the utmost caution. The existing Regulatory Arrangements offer consumers effective redress and access to a high quality service in a competitive market.

10. Do you agree with the Board's view that the process suggested is the most effective way to address the Regulatory Objectives and the Better Regulation Principles in relation to approaching potentially low impact changes? If not, then please can you suggest how the Objectives and Principles could be better addressed?

We would welcome further clarification of the meaning of "non-material" (section C. 10).

Section C. 10 sets a very low "ceiling" for exempt applications. An alteration is only exempt if the Board "receives no representations from any other Approved Regulators or any ...(… Authorised Person)." This provision could quite easily be abused by any disgruntled individual or entity, simply to delay a matter that would otherwise be dealt with promptly. We would suggest that there should be objections from more than one source for the Board to decide that an Alteration requires further consideration.

11. Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the requirements [for the Contents of Applications for Rule Changes]? If not, why not? What alternative or additional requirements would you recommend?

We acknowledge the intentions of the Rules contained in Section D, but note the complexity of the requirements. Rule 13 requires an applicant to indicate how the Alteration will be positive, neutral or detrimental to each of the Regulatory Objectives. This will create an additional burden for approved regulators, as will the requirement to "provide evidence of consultation with ... approved regulators".

We also have concerns in respect of the burdensome requirements of Section G. 14, whereby an Application should only relate to Regulatory Arrangements of the same type, such as training, client monies etc. An Approved Regulator wishing to amend several Arrangements at the same time would be unable to do so in a single Application, leading to more regulatory complexity and more work.

12. Do you agree with the approach taken to oral representations?

Yes.

13. Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the suggested process.

The scope of this question is too broad for us to be able to comment meaningfully.

14. Do you consider that [the Criteria for determining applications set out in Section G] are appropriate?

Yes, the criteria seem reasonable, as there is a presumption that a Rule Change Application should be approved unless there is a valid reason for refusal.

Yours faithfully,

Jonathan Coutts
Secretary
The Society of Scrivener Notaries