

## FACULTY OFFICE

### APPLICATION TO LEGAL SERVICES BOARD FOR AN ALTERATION TO REGULATORY ARRANGEMENTS

#### Amendment to the Notaries Accounts Rules 1989

On behalf of the Master of the Faculties I am making the above application under Part 3 of Schedule 4 of the Legal Services Act 2007 ('LSA 2007') and the rules made by the Legal Services Board under that part. Two copies of the proposed amended Rules are annexed.

#### Reason for the proposed alteration in regulatory arrangements

The Notaries Accounts Rules 1989 have been in force since 1 April 1990 and set out the procedures which all Public Notaries must adopt when dealing with both client money and money for disbursements and fees received as part of his or her practice. They have been operating successfully since that time and I am not aware of any complaints having been made by any client of a public notary arising from the manner in which funds paid to the notary have been dealt with.

The proposed changes, however, are intended to rectify a perceived lacuna in the Rules by requiring any public notary who, acting in that capacity, holds or receives monies on behalf of a client to provide an Accountant's Report to the Registrar of the Court of Faculties when applying for the renewal of his or her notarial practising certificate. The Rules already provide that appropriate books of account should be maintained and the Accountant's Report is intended to provide an independent check that the Rules have been complied with and thus provide additional protection to consumers.

A very significant majority of public notaries do not hold any money that would be defined as "client money" under the Rules as part of their notarial practice and the proposed amendments will have little or no impact on the majority of the profession. It is anticipated that the main impact will be on those notaries who undertake probate activities or reserved instrument activities (conveyancing) in their capacity as public notaries rather than those undertaking pure notarial activities. By far the vast majority of public notaries who do hold client money, do so in their capacity as "dually-qualified" solicitors rather than as notaries and the proposed amendments will not affect them; the proposed amendments will, however, bring the notarial accounts regime into closer alignment with those of their solicitor and licensed conveyancer colleagues. The Master is keen to ensure that the very small percentage of what is a small part of the wider legal profession who undertake work which involves holding monies belonging to a client are regulated to the highest achievable standard.

#### Compliance with the regulatory objectives

Section of the LSA 2007 requires approved regulators to comply with the following objectives:-

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;

- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services;
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

In light of the regulatory objectives I have the following comments:-

(a) protecting and promoting the public interest

The amendments are designed to provide an additional independent check on the accounting records maintained by all public notaries who, in that capacity, hold or receive monies on behalf of their clients. They will, therefore, provide additional protection to the public.

(b) supporting the constitutional principle of the rule of law

By providing additional scrutiny of a public notary's accounts the rule of law will certainly be upheld but it is not anticipated that the rule changes will have any specific positive or negative effect.

(c) improving access to justice

The amended Accounts Rules will have a neutral effect on the public access to notaries. Although affected notaries will have to allow for the expenditure in time and money incurred in obtaining an Accountant's Report, it is not expected that the burden will be so significant as to discourage notaries from renewing their practising certificates or ceasing to undertake probate activities or reserved instrument activities and therefore a contraction in the provision of notarial services is not anticipated.

(d) protecting and promoting the interests of consumers

As indicated above, the Rules as they exist already provide protection to and promote the interests of consumers. However, it is submitted that by providing for additional scrutiny of a public notary's client account, the protection and promotion of the interests of consumers will be further enhanced.

(e) promoting competition in the provision of services

It is expected that the amended accounts rules will have a neutral effect on the competition between legal professionals. They will have the effect of bringing the rules applicable to public notaries who hold or receive client monies into closer alignment with those of solicitors and licensed conveyancers.

(f) encouraging an independent, strong, diverse and effective legal profession

The proposed amendments to the Accounts Rules will have a neutral effect on the independence, strength, diversity and effectiveness of the notarial profession.

(g) increasing public understanding of the citizen's legal rights and duties

The proposed amendments are unlikely to affect public understanding of citizens' legal rights and duties but, as indicated above, will provide enhanced protection to citizens' making use of notarial services in the areas of probate activities and reserved instrument activities.

(h) promoting and maintaining adherence to the professional principles

The 'professional principles' are:-

- (a) that authorised persons should act with independence and integrity,
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of their clients,
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice,
- (e) that the affairs of clients should be kept confidential.

The rationale behind the amended Accounts Rules are to provide an additional level of scrutiny of a public notary's client account to ensure that the notary is fulfilling his or her duties in the specific area of maintaining accounts but these are underpinned by the general duty to promote and maintain those professional principles which are contained in rules made by the Master of the Faculties, in the general law, and which notaries ought to follow because of their membership of an ancient and distinguished profession.

Compliance of the Regulations with the Better Regulation Principles

Section 28 of the Act imposes a duty on an approved regulator, so far as is reasonably practicable, to act in a way—

- (a) which is compatible with the regulatory objectives, and
- (b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.

The approved regulator must have regard to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
- (b) any other principle appearing to it to represent the best regulatory practice.

I have explained how the amended Accounts Rules comply with the regulatory objectives.

The amended rules arise following the identification of a perceived lacuna in the 1989 Rules which do not *require* an independent third party to scrutinise a notary's accounts, particularly those relating to client monies. In practice, many notaries do of their own volition have professionally prepared or audited accounts and it is thought that this is even more prevalent amongst those public notaries who undertake probate activities and reserved instrument activities in their notarial capacity. However, to ensure that the small minority of public notaries who do not routinely have their accounts checked now do so, the amended Rules are proposed. The first draft of the amended Rules was submitted to the two representative societies who provide some initial feedback. A second draft was prepared and this was checked and amended further by a committee of three senior public notaries on behalf of the Notaries Society. The Rules have also been and scrutinised by the Master's Advisory Board which contains representatives of both societies.

It is my opinion that it is desirable to make the proposed amendments by way of a formal Rule change rather than merely issue guidance to notaries. Otherwise there is the risk that the small minority of notaries who do not have their accounts professionally prepared or audited will continue to avoid doing so.

The Faculty Office amended its Practising Certificate renewal application form this year to obtain information on the numbers of notaries who are undertaking probate activities and/or reserved instrument activities in addition to pure notarial activities as it is those who are most likely to be affected by the rule change. A further amendment will be made to ensure that all notaries who hold client monies as defined in the Rules will, upon making application to renew their practising certificate after the amendments have come into effect, produce an appropriately qualified professional's Accountant's Report to confirm compliance with the Rules.

#### How will the Faculty Office determine whether the Rules have been successful in meeting their objectives?

It will be clear once the Rules have been made and the Accountant's Reports are submitted whether they have been effective in meeting the objectives of ensuring that the accounts of notaries holding or receiving client monies have been independently scrutinised and whether the Notaries Accounts Rules 1989 have been followed. In addition, the maintenance and improvement in professional standards can be judged indirectly through the number and type of complaints received against notaries. These complaints will be monitored under our complaints handling procedures. As I have already stated, I am not aware of any substantive complaints against any public notary arising from the manner in which they have dealt with or treated client monies since the inception of the 1989 Rules.

I shall also invite the representative societies to provide feedback on how the amended Rules are working, especially through discussions at the Master's Advisory Board and the Notarial Open Forum which takes place annually and at which a wide selection of notaries are invited to meet the Master.

#### Impact on other approved regulators

Most other authorised regulators already require their authorised persons to provide some form of confirmation that their accounts, particularly those relating to client monies, have been independently reviewed. When drawing up the amended Rules the

Faculty Office examined the rules governing solicitors and licensed conveyancers and the proposed amendments follow closely those of the Council for Licensed Conveyancers which were thought to better mirror the regulatory requirements of the notarial profession. The amended Rules have no expected adverse effects on other approved regulators and it is not anticipated that they will give rise to regulatory conflict. The Rules will only apply to work carried out by notaries acting exclusively in their capacity as a public notary. Any dual-qualified notaries who hold client monies *only in connection with activities which are regulated by another regulator* (e.g. the SRA or CLC) will continue to be obliged to fulfil the requirements of their regulatory regime and will not require duplication of those requirements to comply with these proposals.

### Timetable

The amended Rules are intended to commence as soon as approval has been given and then signed by the Master. In view of the link to a notary's accounting year, the requirement will be introduced in two stages: (1) all affected notaries who are able to do so will be *invited* to supply an Accountant's Report with their renewal for the practising year 2012/3; and (2) all affected notaries will be *required* to supply an Accountant's Report with their renewal for the practising year 2013/4.

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