

SRA response

Setting the maximum financial penalty for ABS licensing, Legal Services Board consultation

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Introduction

- 1.

The Solicitors Regulation Authority (SRA) is the independent regulatory body of the Law Society in England and Wales.

- 2.

We welcome the Legal Services Board's (LSB) consultation and share the LSB's desire for an enforcement regime which allows for proportionate and credible deterrence in all circumstances.

Question 1

Do you think that the maximum set by the LSB is sufficiently high to ensure that penalties are able to be proportionately applied by licensing authorities (LAs)?

- 3.

The analysis provided by the LSB at paragraph 19 of the consultation is very helpful. Clearly, in the current market, a limit of £50 million for individuals and £150 million for entities would serve as a significant deterrent for any regulated person.

- 4.

However, it must be remembered that the alternative business structure (ABS) regime will introduce new entrants to the market. It is perhaps dangerous to rely too heavily upon turnover figures in the current market to assess appropriate fining powers for ABSs. A fine commensurate to 10 per cent of a small firm's turnover, for example, may be thousands of pounds but to achieve the same deterrent effect in respect of some of the largest commercial entities might require a fine of hundreds of millions of pounds. If the intention is that the maximum figure cover all possible scenarios then this should take into account the fact that the market could change dramatically.



- 5.

We would also suggest that further consideration be given to the earnings of the firms involved in the miners' compensation cases. It was reported in December 2010:

"The five firms that earned the most from the COPD scheme were Doncaster firm Keypoint Law (formerly Beresfords) (£135m); national firm Thompsons (£123m); Cardiff firm Hugh James (£103m); Yorkshire firm Raleys (£83m); and Newcastle firm Mark Gilbert Morse (£59m)." ¹ [#_ftn1]

- 6.

A key principle is that regulated persons should not profit from their misconduct. Professor Richard B Macrory in his November 2006 report "Regulatory Justice: Making Sanctions Effective" highlighted that a "sanction should aim to eliminate any financial gain or benefit from non-compliance" in order to "reduce the financial incentive for firms to engage in this type of behaviour". A cap of £150m could be too low to deal with a scandal equivalent to miners' compensation, particularly if fewer firms gain contracts to carry out high volume work. £1 billion was paid to 500 law firms in miners' cases. A similar scheme in the future might involve a much smaller number of firms with consequential rewards being much higher.

- 7.

A higher figure would therefore be appropriate to ensure that a proportionate and consistent deterrent effect can be achieved regardless of future market developments.

- 8.

A limit of £50 million pounds for individuals would appear to be sufficient regardless of medium-term market developments.

Question 2

What are your views on the fixed amounts proposed for entities and individuals?

- 9.

We firmly support the proposal to set a fixed maximum for fining ABSs rather than specifying a calculation based on turnover.

- 10.



We agree that requiring such a calculation within the statutory instrument which sets out maximum fining powers could lead to significant costs being incurred in debating turnover quite separate to any discussion as to the overall appropriateness of a penalty. Factors such as there being domestic and international turnover to consider, the fact that a firm may have ceased trading at the time of a fine being levied and the potential for distorting turnover figures are all practical concerns. It must also be borne in mind that some ABSs, such as wholly owned subsidiaries funded to provide legal services to a parent company, will have little if any "turnover" as such.

- 11.

We agree that the more efficient method for prescribing the maximum within the statutory instrument is simply to set an overall maximum aimed at covering all eventualities. Whilst the figures sound very high, the LSB is right to stress that the maximum is simply there to ensure that all potential scenarios can be dealt with proportionately and that there is a credible deterrent for all future market participants.

- 12.

Our draft Financial Penalty Criteria (which are annexed to the draft SRA (Disciplinary Procedure) Rules 2011) include a requirement that each financial penalty should be proportionate to the means of the paying party. Clearly then, in the vast majority of cases, there will be no need to approach the maximum limits set.

- 13.

Our new financial penalty criteria and enforcement strategy [<https://www.sra.org.uk/sra/strategy/sub-strategies/sra-enforcement-strategy>] are being put in place to ensure that, amongst other things, the issuing of penalties is consistent, fair, proportionate and transparent. There are also rights of appeal internally and externally in respect of fines levied against ABSs under section 96 of the Legal Services Act. We agree that such safeguards are sufficiently robust to allow licensing authorities the flexibility to levy fines within a set limit rather than requiring potentially problematic calculations as a matter of law.

Question 3

Do you have any comments on the draft statutory instrument?

- 14.

We assume that a section is to be added to deal with the interpretation of the terms used in the statutory instrument.

- 15.

We would query whether, for the avoidance of any doubt, it would be helpful to stress in the wording of 2(b) that fines can be levied in respect of former employees and managers as well as those currently holding such posts. This power is put beyond any doubt in section 95 of the Legal Services Act and it would be useful if this were stressed in the statutory instrument also. We appreciate that the intention may be to provide for this once the definitions are added to the instrument.

Note:

"£1bn paid out to law firms for handling coal miners' claims", Law Society Gazette, 16 December 2010