E-Briefing – Detailed Version
(Covering the period from 15 May to 18 June 2009)

1. Professional Representation

1.1 Professional Rules and Regulation Committee (PR&RC)

The PR&RC responded to the Department of Business, Innovation & Skill's (formerly "*BERR*") consultation on the draft Services Regulations (which are expected to implement the Services Directive (Directive 2006/123/EC)). (See http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/implementation/page51289.html for the draft regulations and associated documents and http://www.citysolicitors.org.uk/FileServer.aspx?oID=592&lID=0 for the Committee's response.)

The PR&RC also responded to the Legal Services Board's consultation paper "*The Levy: funding legal services regulation. Consultation on proposed rules to be made under Sections 173 and 174 of the Legal Services Act 2007*" (see http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/consultation_on_the_levy.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=593&lID=0 for the response). The response stated, *inter alia*, that It did not agree with the proposal that the implementation costs should be "*front loaded*" in the manner suggested by the LSB in the Consultation, and that an opposite formula should be adopted, on the basis that *"[i]t would be unfair if incumbent providers of legal services were saddled with front-loaded start up costs for the new regime that were disproportionate to those to be contributed by ABS and other market entrants in later years."*

2. Specialist Committees

2.1 Financial Law

The Financial Law Committee responded to a BERR consultation regarding a draft statutory instrument, the Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009 (see http://www.berr.gov.uk/files/file50856.doc for the draft statutory instrument and http://www.citysolicitors.org.uk/FileServer.aspx?oID=601&lID=0 and http://www.citysolicitors.org.uk/FileServer.aspx?oID=600&lID=0 for the response).[1] The Committee commented on:

- The identification of overseas companies subject to the duty to register; and
- The oppressive nature of the obligation to register charges over intangibles.

In terms of the first point, the submission stated that it should be made clear that companies not registered in the UK should not be required to register charges over property in England and Wales.

In terms of the second point, as the submission stated, *"in view of the uncertainty about the location of intangibles… the most cost-effective approach would be to exclude the requirement for registration of security over intangibles altogether. This is because, as regards intangibles, registration is unlikely to be comprehensive or useful and because the penalties are disproportionate to any benefits that could be realised."* The submission also stated that *"if charges over intellectual property are*

1 Submission dated 30 April 2009, but not included in previous e-briefing.

retained as a registrable category, then the definition should be limited to intellectual property registered in a UK register".

2.2 Land Law

The Land Law Committee recently finalised three documents which have been placed on the Committee's webpage:

- Letter to Company - draft City of London Law Society Land Law Committee Long Form Certificate of Title (6th edition 2008 update) (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=530&lID=0)
- Letter to Company - final draft of City of London Law Society Land Law Committee Long Form Certificate of Title (6th edition 2008 update) (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=531&lID=0)

As the introductory text to the first letter states:

> The [Letter to Company - draft City of London Law Society Land Law Committee Long Form Certificate of Title (6th edition 2008 update)] is the first of two letters which may be sent by the solicitors giving the Certificate to the Company requesting relevant information and confirmations to enable the solicitors to prepare and issue the Certificate.
>
> This letter may be sent with the first draft of the Certificate and gives the Company the opportunity to highlight points in the Certificate which it cannot confirm. Once the solicitors have received the Company's response to the first draft, the solicitors can work through any issues with the Company and make appropriate qualifications in Schedule 5 to the Certificate.
>
> There may be further confirmations required of the Company as the form of the Certificate develops and this letter can be adapted accordingly for that situation.
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> The second letter, which can be found on the Land Law Committee section of the City of London Law Society's website, may be sent by the solicitors with the final form of the Certificate to the Company.
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> These letters will need to be amended where a company in the same group of companies as the Company provides documents or information to the solicitors, or where there is a corporate acquisition and confirmations will need to be obtained from the seller of the shares in the Company as well as the Company.
>
> There is no obligation to use these letters. Solicitors may wish to obtain the required information and confirmations from the Company using other documentation, such as questionnaires or other types of enquiries.

The Committee also drafted a questionnaire to accompany the Certificate of Title (CLLS Land Law Committee Long Form 6th edition - 2008 update) (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=594&lID=0)**,** which is the form of questionnaire to be sent to the Company in order to prepare the Certificate of Title (in the CLLS Land Law Committee 6th Edition - 2008 Update).

2.3 Regulatory Law

The Committee recently responded to the FSA's Consultation Paper 09/10 entitled *"Reforming remuneration practices in financial services"* (see http://www.fsa.gov.uk/pages/Library/Policy/CP/2009/09_10.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=577&lID=0 for the response). The FSA published a draft Code of practice on remuneration policies on 26 February, and in this Consultation Paper, set out its proposals to implement that Code. The FSA paper proposed, and formally consulted on, incorporating the Code into the FSA's Handbook (so that the FSA could enforce it directly) and applying it to large banks, building societies and broker dealers. The consultation paper also

reported on the findings of the FSA's review of remuneration practices in a group of major UK-incorporated banks and building societies, and invited general discussion and feedback on whether the Code should be extended to other FSA-authorised firms. One of the drivers for the consultation was apparently the *"widespread consensus that remuneration practices may have been a contributory factor to the market crisis"* by leading bank employees to engage in high-risk behaviour. The paper stated that the FSA would be *"consulting on the proposal that the Code's general requirement should become a Handbook rule"* and *"consulting also on the proposal that the remaining ten principles should be put into the Handbook as 'evidential provisions' to support the general requirement."* It further stated that the FSA would be *"taking steps to increase [its] focus within [its] supervisory programmes on the potential risks posed by inappropriate remuneration practices in all FSA authorised firms."*

The Committee responded to the specific questions in the consultation paper, and noted several areas of general concern, namely that:

- The proposed code is significantly more detailed and prescriptive than the FSF/CEBS sets of principles and the European Commission's recommendations. It was thought that *"the proposals have the potential to damage the competitive position of affected UK firms unless they are significantly modified"*;
- The *"FSA's proposals have been framed without adequate consideration being given to their potential consequences under employment law"*; and
- The FSA's recommendations were being suggested despite the fact that no causal link had been established between them and the recent market failure.

In relation to the specific consultation questions, the Committee's response stated that:

- The Committee was not convinced that there were significant gaps in the current regulatory framework; and to the extent that any gaps did exist, it did not consider that the Code as drafted was a proportionate means of filling those gaps. In any event, it was thought that the FSA had sufficient powers to regulate firms within the Handbook;
- The introduction of the Code as proposed would have adverse implications for the UK as a financial centre;
- If the FSA wished remuneration committees to take on a wider role, it should be clear about this;
- It was not clear under the proposals that separate provisions would be retained for larger banks and broker dealers;
- The content of the Code was more detailed than necessary, with some guidance appearing overly prescriptive;
- The Code's scope seemed too wide, covering a large range of employees;
- *"We are very concerned by the proposal that a single, high-level rule (which as drafted, is itself akin to a general statement of principle) should be linked to ten prescriptive, evidential provisions"*;
- The structure, and the level of detail and prescription, in the draft Code was inappropriate; and
- The Committee would favour an overall approach under which high-level principles, of the kind proposed by the Commission and the FSF, would apply to credit institutions, investment firms and (probably) insurers.

The Regulatory Law Committee also commented on the European Commission's Call for Evidence on the Market Abuse Directive 2003/6/EC (see http://ec.europa.eu/internal_market/consultations/2009/market_abuse_en.htm for the Call for Evidence and http://www.citysolicitors.org.uk/FileServer.aspx?oID=591&lID=0 for the response). The Committee responded to some of the specific questions contained in the Call for Evidence, and stated more generally that:

> .. we would like to comment on the following area of general concern which is not wholly captured by the questions.
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> There are cross-border differences which arise from the way in which the Market Abuse Directive has been implemented in practice across Member States. These differences can impose unnecessary burdens and costs on market players who operate on a cross-border basis, and in circumstances where the conduct falls within the remit of more than one competent authority, can leave them facing different and occasionally incompatible rules in respect of the same conduct.
>
> We appreciate that the call for evidence is not intended to address the issue of supervisory and enforcement powers under the MAD (which is to be addressed on a horizontal basis initially, through various initiatives aimed at responding to market, regulatory and supervisory weaknesses identified in the financial crisis, with the results to be used in the review of the MAD). However, we believe that the lack of harmonisation within supervisory practices across Member States remains an obstacle to the creation of a level playing field across the EU[1] - while some of these discrepancies can be appropriately tackled through the work referred in the call for evidence, we also believe that the root causes of some of the issues lie within the wording of the MAD itself. Specifically, the Level 2 implementing measures have allowed Member States to adopt some differing approaches, particularly in relation to determining when information is sufficiently precise to be inside information,[2] and as to whether a delay in disclosure will automatically mislead the public

The Committee also responded to FSA Consultation Paper 09/12 (Quarterly consultation (No.20)) (see http://www.fsa.gov.uk/pages/Library/Policy/CP/2009/09_12.shtml for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=590&lID=0 for the response). The response commended on two aspects of the consultation paper, namely "*the proposed revised PERG guidance on "arranging" (Chapter 6) and the proposed new guidance on packaged structured investment bonds (Chapter 7).*" ("*PERG*" is the Perimeter Guidance Manual, a guide to regulatory topics within the FSA's Handbook.)

In relation to PERG, the response stated generally that:

> We appreciate that you intend to alter the current PERG guidance, however the interpretation of Article 25 (2) is notoriously difficult and the current guidance, even in its amended form, is not particularly extensive. We do not think that small changes should be made to the existing guidance as is proposed, we consider that there should be a fuller review of issues related to Article 25 (2) and more comprehensive guidance. We think that the changes proposed raise many wider issues which ought to be considered carefully prior to the adoption of any amendments. The regulated activity of 'arranging' , in particular under Article 25 (2), is one on which there is no consensus amongst legal practitioners or the courts, and therefore the scope of the current PERG guidance is uncertain; the definition of 'arranging' in the current PERG guidance is unclear and unhelpful. We would very much welcome engaging in more detailed discussion with the FSA on this issue.

The response also called for the guidance to make reference to the recent High Court decision in Watersheds (Case No: HQ06X02904, High Court, Queen's Bench division, judgment of 13 February 2009, (not yet freely available)).

Furthermore, in relation to packaged structured investment bonds ("*PSIB*"), the response stated generally that:

We support the addition of guidance on this topic and (subject to certain reservations set out below) are broadly in agreement with the views expressed, although the draft is not always very clear and in certain areas creates uncertainty as regards a proper delineation between collective investment schemes (**CIS**) on the one hand and PSIB on the other.

Our main concerns relate to a lack of clarity as to how various key concepts of the CIS regime are interpreted (in the FSA's view) as applied to a typical PSIB. This is not helped by imprecise use of terms to describe investors' various interests in a PSIB and apparent restrictions as to the types of services that can be offered in connection with a PSIB. It may also be unnecessarily confusing to describe these instruments as "packaged" structured investment bonds when they are not "packaged products" and that term is also used to cover insurance company packaged structured bonds which are not addressed in this guidance