E-Briefing Detailed Version
(Covering the period from 22 October to 30 November 2009)

1. Professional Representation
1.1 Professional Rules and Regulation Committee

The Professional Rules and Regulation Committee ("PR&RC") responded to the SRA's consultation on "Handling complaints about the SRA". (See http://www.sra.org.uk/sra/consultations/handling-complaints-about-sra-august-2009.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=718&lID=0 for the response). The consultation paper stated:

> Background
> 8. To date, we have developed a number of different mechanisms for handling complaints about our service which vary from one directorate to another.
> 9. We have decided that a single complaints-handling policy across the SRA (which will include discrimination complaints) will make it easier for people to raise their complaints with us and will help us to manage and monitor our responses more effectively.
> 10. One of the key features of the proposed new policy will be the introduction of independent oversight provided by the appointment of an independent reviewer to be commissioned by the SRA. This will be available alongside the current Legal Services Ombudsman and any other arrangements that may be set up by the Legal Services Board.
> 11. The independent reviewer is intended to have two distinct roles:
> to provide independent oversight of the way that we are carrying out our complaints handling function, and
> to provide a final independent response for those complaints that we cannot resolve internally.

The response dealt with some of the specific questions in the consultation paper.

2. CLLS Specialist Committees
2.1 Construction Law Committee

The Construction Law Committee responded to the proposed reforms to the limitation of actions the impact on the construction industry (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=655&lID=0 for the response). The Committee responded to the specific questions, and stated:

> We are doubtful as to whether the potential impact of the proposed reforms is really capable of evaluation on a cost/benefit basis, given that there are so many variables involved. However, as indicated above, we believe that, in general, they are likely to be detrimental to claimants and result in greater cost.
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> ....The Committee is concerned that confusion caused by the proposals could lead to a reduction in non-UK parties choosing to contract using English Law. Choice of law for contracts is commonly debated by contracting parties (including occasionally for major projects in the UK) and uncertainty over such a basic issue is likely to be used as an argument in favour of other systems, particularly on projects having no obvious UK connection. Also, fewer contracts may specify England as the forum for the settlement of disputes (whether by Court proceedings or arbitration). Accordingly, there could be a reduction in the invisible earnings from using English-qualified lawyers for English law contracts and England as a disputes forum.
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> We are unclear as to the rationale for saddling the claimant with the burden of proof for the primary period. It is considered that it should always be for the defence to show that any limitation period has expired.
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> As mentioned above, we are not aware of any current demand for change in contractual limitation periods. If (as seems to be the case) the driving force behind the proposed changes is rooted in personal injury claims, we suggest that any changes could be so confined.

2.2 Planning & Environmental Law Committee

The Planning & Environmental Law Committee responded to the Communities and Local Government ("CLG") consultation "Policy Statement on Regional Strategies and Guidance on the establishment of Leaders' Boards". (See http://www.communities.gov.uk/documents/planningandbuilding/pdf/1303429.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=719&lID=0 for the response.)

The Consultation Paper stated:

Topic of this consultation:	New draft policy statement to replace existing Government policy on preparing Regional Spatial Strategies (Planning Policy Statement 11), the related technical amendments and Guidance to Regional Development Agencies on Regional Economic Strategies. Main aim is to consult on principles to be applied in relation to the preparation of Regional Strategies.
Scope of this consultation:	Purpose of consultation is to obtain stakeholder views on: scope and approach taken in this policy statement (separating out policy from advice), and • principles which responsible regional authorities and other stakeholders will need to adhere to in reviewing, revising, implementing and monitoring regional strategy. In addition, responses are invited on: • draft regulations to support the implementation of Part 5 of the Local Democracy, Economic Development and Construction Bill • draft guidance on the preparation of Schemes for the establishment of Leaders' Boards, and • draft supplementary guidance on undertaking sustainability appraisal of Regional Strategies.

The Committee's response stated, *inter alia*:

> The Committee welcomes the opportunity to comment on the policy statement and the guidance, both of which will be important in helping the regions to take forward the new single regional strategies and the working arrangements which will underpin them.
>
> The Committee has chosen only to respond to those questions in the consultation where we have something material to add to the points that have been raised.

The response also responded to the following questions:

> 1 DRAFT POLICY STATEMENT ON REGIONAL STRATEGIES
>
> 1.3 Do you agree with the sub-regional approach at Paragraph 3.6. If not, what do you think needs to be improved?

1.4 Is the policy framework at Paragraphs 4.8 and 4.9 on the content of Regional Strategies appropriate to ensure Regional Strategies focus on the key priorities for the region?
1.5 Is there a need for more detail in the policy on how responsible regional authorities should decide on the priorities for their Regional Strategy? If yes, what should this detail comprise?
1.9 Is the policy framework to guide the Examination in Public process appropriate?
1.10 Appendix A describes the broad stages of the Regional Strategy revision process. Does this provide the appropriate level of detail to guide responsible regional authorities in preparing their Strategies? If not, how can it be improved?
1.11 Paragraph 5.49 sets out the key expectations of Implementation Plans. Are these appropriate and do they provide sufficient clarity?
1.12 Paragraph 5.60 sets out the broad policy for the preparation of annual monitoring reports. Is this appropriate and does it provide sufficient clarity?
3. ESTABLISHMENT OF LEADERS' BOARDS: DRAFT GUIDANCE ON THE PREPARATION OF SCHEMES
3.1 Do you agree with the range of considerations under each of the three board criteria that the Secretary of State will take into account when considering schemes for the establishment and operation of a Leaders' Board, as set out in the guidance at Annex 3? If not, how should they be changed?
4. SUSTAINABILITY APPRAISAL OF REGIONAL STRATEGIES: DRAFT SUPPLEMENT TO "A PRACTICAL GUIDE TO THE STRATEGIC ENVIRONMENTAL ASSESSMENT DIRECTIVE"

4.2 Do you think that the Practical Guide and the Supplement together provide enough guidance to undertake Sustainability Appraisal that are compliant with legislation and meet the Regional Strategy's objective of promoting sustainable development?

The Committee also responded to the CLG consultation on "Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy". (See http://www.communities.gov.uk/publications/planningandbuilding/infrastructurelevypartial for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=722&lID=0 for the response.)
The Consultation Paper stated:

What is the problem under consideration? Why is government intervention necessary?
The current system of planning obligations by which developers contribute funding for infrastructure is often slow and unpredictable, based on ad hoc negotiations conducted in private. Research shows the burden of funding is unfair, falling primarily on major developments. Only 14 per cent of residential planning permissions and 7 per cent of those for offices contributed to local infrastructure through planning obligations. Government intervention is necessary to create a simpler, fairer, more transparent and predictable system of standard charges, capable of unlocking additional funding for infrastructure that is required to deliver sustainable local communities. Intervention will also ensure better pooling of funding for larger items of infrastructure.

What are the policy objectives and the intended effects?
The policy objective is to better resource public authorities to deliver infrastructure. CIL does this by simplifying the way contributions are made by developers, and mitigating the pooling failure that results because the cumulative impact of individual developments necessitates infrastructure, which individual developers lack the incentive or the resources to fund by themselves. The incidence of a Community Infrastructure Levy (CIL) is expected to rest with landowners ultimately. CIL provides a fairer, faster, more predictable and more transparent system of securing developer contributions which preserves incentives to develop.

What policy options have been considered? Please justify any preferred option.
The option of implementing a CIL has been considered. CIL is a voluntary mechanism that will empower local authorities to levy a standard charge on most types of new development, to fund the infrastructure needed to support development in their area. The 'Do Nothing' option would be to continue to rely solely on the current system of planning obligations for securing developer contributions. The preferred option is to implement CIL, because it offers a simpler, fairer, more transparent and more predictable way of funding local infrastructure. CIL will also speed up the development process by providing greater certainty for developers, and CIL revenues will fund the infrastructure that

authorities and developers consider is a priority to support the area's development.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? A formal evaluation will be held five years after regulations come into force. The Government will be continuing to work closely with industry and local government to ensure CIL is implemented effectively.

The Committee's response stated, *inter alia*:

> The Ministerial Foreword states that the proposals for the Community Infrastructure Levy (CIL) are:
>
> " … a fairer, clearer, more legitimate and more predictable way of seeking contributions from developers towards the costs of local infrastructure compared with the existing system … [The] priority in this first set of regulations is to ensure the right balance between the objectives of simplicity, flexibility and fairness".
>
> The current system of infrastructure deylivery is based upon an assessment of the impact of developments on existing infrastructure followed by a dialogue between regulators and developers set within the parameters of established planning policy. Although the process can be slow and does not always produce uniform outcomes it is fair, democratic and reasonably clear to those involved.
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> We believe that the CIL proposals can achieve the Government's aims provided that flexibility and fairness are not sacrificed for over-simplicity and administrative convenience.
>
> In particular, we recommend that further consideration is given to:
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> - The continued use by LPAs of Grampian style conditions for infrastructure which may be funded by CIL.
> - EIA consequences from funding infrastructure through CIL.
> - The "broad brush" approach proposed for infrastructure planning and CIL rate setting. In particular, the failure to include any mechanism for charging authorities to identify in any detail the items of infrastructure to funded by CIL, how these will be delivered and in what timeframe.
> - The lack of flexibility from the Government's unwillingness to introduce an exceptions policy to mitigate the unforeseen, particularly where viability issues are paramount. An exceptions policy will enable authorities to set a sensible CIL rate having a longer shelf life before review becomes necessary.
> - The potential for double charging from the proposals to scale back the use of planning obligations.
> - The removal of the option to introduce CIL as a result of the transitional arrangements for the scaling back of planning obligations.
> - CIL being levied on net increase in development and not on the gross amount of development.
> - CIL being tax deductable.

The document also responded "to those of the consultation questions which fall within the expertise of the Committee."

The Committee also responded to the CLG consultation "Improving Permitted Development". (See http://www.communities.gov.uk/documents/planningandbuilding/pdf/improvingdevelopmentconsult.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=723&lID=0 for the response.)
The Consultation Paper stated:

> This paper is the Government's response to the Killian Pretty recommendation that.. ..the number of minor applications that require full planning permission should be substantially reduced.4 This paper also responds to Sir Michael Pitt's Review of the summer 2007 floods by proposing changes to the regulation of hard-surfacing that may be laid for certain non-domestic uses.5 The proposals take account of the economic downturn by proposing that business be allowed to undertake minor extensions to their premises without the costs of preparing and submitting a planning application.
>
> The proposals in this paper apply to England only, and would be incorporated in an.. ..amendment to secondary planning legislation – the Town and Country Planning (General Permitted Development) Order 1995 (GPDO).6

The Committee's response stated, *inter alia*:

> General
>
> We are generally supportive of the proposals, subject to a number of suggested amendments that are set out in our response to the consultation questions below. Our general comments are as follows:
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> - Bringing Permitted Development Rights (PDRs) for commercial uses more in line with those existing for non-commercial uses seems fair and reasonable and would contribute to the objective of easing the burden of handling planning applications of this nature.
> - Most of the proposals are sufficiently clear to give certainty and a more standard application of conditions would increase the consistency of the proposals. We have suggested a number of changes that would achieve this.
> - The proposals are likely to have a number of commercial implications that are not addressed in the draft Order. For example, where many small to medium sized businesses take advantage of the new PDRs, this gives rise to potential intensification of uses as a result of cumulative effects of changes.
> - Such intensification may have implications for matters such as reduced local car parking on individual premises (where construction occurs on areas currently used for car parking), noise (from installation of equipment) and traffic generation arising from cumulative take-up of the procedures. At present, such material considerations are assessed as part of the procedure for deciding such applications. However, there is no such provision for managing the consequences of PDRs, other than imposing a blanket Article 4 Direction.
> - The proposals must be readily and effectively enforceable (which may reduce the resource "savings" anticipated) and the simplified application of standard conditions would assist this.
> - Consideration should be given to the need for different levels of control where neighbours are residential rather than other commercial occupiers.
> - The prior approval mechanism may not be effectively implemented or enforceable.
> - We have concerns over the proposed changes to Article 4 procedures.

2.3 Regulatory Law Committee

The Regulatory Law Committee responded to FSA CP09/19 "Enforcement Financial Penalties". (See http://www.fsa.gov.uk/pubs/cp/cp09_19.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=697&lID=0 for the response.) As the FSA Consultation Paper stated:

> Purpose
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> This Consultation Paper (CP) seeks views on proposals to change our current policy on the determination of the level of financial penalties in enforcement cases. We are also seeking views on our proposed alternative approaches in cases where a person claims that paying a financial penalty may result in serious financial hardship. Our policy on these matters is currently set out in our Decision Procedure and Penalties manual (DEPP) and in our Enforcement Guide (EG). In addition, we have taken this opportunity to consider our approach to publicising our action in criminal investigations, which is currently set out in EG.
>
> Key changes
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> The changes we propose to make to DEPP and EG fall into three categories:

- a new framework in DEPP for determining the appropriate level of financial penalty in enforcement cases, with the intention of improving the transparency and consistency of our penalty-setting process, and increasing penalties in line with our credible deterrence strategy;
- an explanation in DEPP of our approach in cases where a person claims the imposition of a financial penalty will cause serious financial hardship; and
- amendments to the statement in EG of our policy in relation to publicising our action in criminal investigations.

The response stated, *inter alia*:

> General comments
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> We support the FSA's efforts to make its approach to setting financial penalties more transparent and consistent - so that the outcome of an enforcement action becomes more predictable. We also support the FSA's overarching principle that wrongdoers should be punished appropriately.
>
> ...However, we believe there is further work to be done before the FSA is able to achieve its objectives in relation to financial penalty setting. In our view, the FSA's proposals do not take account of its specific statutory obligations and of more general public law duties. This is of particular concern in the proposed treatment of individuals in the context of market abuse cases...
>
> FSA's legal obligations in formulating policy
>
> ....The FSA's proposed approach for individuals facing a penalty for market abuse contrasts markedly from the approach proposed for other contexts. In the latter contexts, the approach is one similar to that published by the Sentencing Guidelines Council - that is, the appropriate category of seriousness is identified, taking account of whether the wrongdoing was deliberate, reckless or "negligent". In the context of an individual facing a penalty, the FSA's proposed approach is to attach the same level of seriousness to all market abuse cases. The only policy justification given in the Consultation Paper is that "market abuse is often a pre¬meditated act".
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> ...We are also concerned that the Consultation Paper does not contain an adequate justification for the FSA's proposed criteria to determine the income-related "bands", nor why the "bands" are so different as between firms and individuals.
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> ...(Whilst we agree that the enforcement process should reflect the FSA's credible deterrence strategy, we believe that it must be balanced with fairness towards the individuals/firms in question and their financial circumstances.)

The Committee also responded to FSA CP09/21 "Transparency as a Regulatory Tool and Publication of Complaints Data". (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2009/09_21.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=698&lID=0 for the response.) As the consultation paper stated:

> 1.12 We are ..consulting.. on a revised proposal to require certain firms to publish their own complaints figures, along with the data necessary to put their complaints numbers into context. We intend to consolidate this information and produce comparative tables every six months. In line with the original proposals, this requirement would be limited to the firms accounting for the largest numbers of complaints, although we would also publish figures on an aggregate basis showing the comparable data for the remaining firms. These arrangements would enable the firms involved to control the presentation of their own data in the first instance, giving additional explanation or messages at the same time, but would also provide for regular publication of tables making it easier for interested parties to draw comparisons between different firms.
>
> ... Background
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> 3.2 Our original proposal set out in the Discussion Paper, DP08/3 (DP), was to publish the data provided to us by firms in their regular six-monthly complaints returns. We recognise the legal constraints provided by European Directives, particularly from the Markets in Financial Instruments Directive (MiFID) but also from

similar provisions in other Directives. These Directives limit our ability to publish information provided in confidence by firms.

...3.3 Nevertheless, we still believe that it would be beneficial for this information to be more widely available. If firms publish information themselves, it can no longer be considered as confidential information, even if they have also provided it to the FSA. This consultation is therefore on a proposal to require firms to publish their own complaints information, shortly after they have provided it to us.

... 3.5 Our proposals for the information to be published are based on the original proposals set out in the DP, but we have adapted them in light of the responses received. We are also basing our proposals on the information that will be available through the use of the new complaints return, which comes into force on 1 August 2009.

The Committee's response stated, *inter alia*:

We note and welcome the fact that the FSA proposals include the same product/service groupings as those employed by the Financial Ombudsman Service. We are, however, concerned that these groupings differ from the analysis criteria proposed in the European's Commission's recently-published Communication on a harmonised methodology for classifying and reporting consumer complaints and enquiries. We believe that it would be appropriate for an alignment of the UK and EU groupings/criteria in order both to facilitate comparison by consumers and to ensure that the firms themselves are not unduly burdened with the responsibility of producing two separate sets of data. Accordingly, we would urge the FSA to liaise with the Commission, with the aim of agreeing upon a consistent approach before proceeding with its own proposals.

The Committee also commented on the legislative framework for the regulation of alternative finance investment bonds (sukuk). See http://www.hm-treasury.gov.uk/d/consult_sukuk141009.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=716&lID=0 for the response.) The consultation paper contained a draft statutory instrument, revised in the light of the joint HM Treasury and Financial Services Authority (FSA) "Consultation on the legislative framework for the regulation of alternative finance investment bonds (sukuk)", and invited further comments. It stated:

Islamic Finance and sukuk

1.3 The term Islamic finance encompasses any type of financial activity that is undertaken in accordance with Islamic law (Shariah). Sukuk is a generic term used to encompass a broad range of financial instruments designed to conform with the principles of Islamic law (Shariah). Although many sukuk structures are designed to replicate the economic function of conventional bonds, their legal structures are different. Classifying Islamic financial instruments, including sukuk, under existing regulatory frameworks has posed challenges in the UK and other jurisdictions. The proposed regulatory changes seek to introduce clarity and create a level playing field between comparable instruments.

The response stated, *inter alia*:

We welcome the decision to implement Option 1 of the four policy options set out in the Initial CP, which is the option we favoured in our response last March. The Annex to this letter contains our full comments on the draft Statutory Instrument which is annexed to the Feedback Statement. These are summarised below:

We have some significant concerns about the "reasonable commercial rate of return clause" which we consider inappropriate in determining the regulatory perimeter, particularly given the criminal law consequences of breach of the perimeter - we believe this approach is unprecedented.

We consider that the definition could be improved in several other respects which are consistent with the policies stated in the Feedback Statement; and

We mention some corrections to, and other points on, the Consequential Amendments set out in the Schedule to the draft Statutory Instrument annexed to the Feedback Statement.

The Committee also responded to the Tribunal Procedure Committee consultation on amendments to the tribunal procedure (upper tribunal) rules 2008 to accommodate the transfer of the financial services and markets tribunal to the upper tribunal (See http://www.tribunals.gov.uk/Tribunals/Documents/Rules/FINSMATconsults.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=714&lID=0 for the response.)

The consultation paper sought views as to whether there are:

- Any areas in the Upper Tribunal Rules that should be amended to incorporate the jurisdiction of the FinSMAT in the Upper Tribunal.
- Any specific additions that are necessary to the Upper Tribunal Rules in order to incorporate the jurisdiction of the FinSMAT in the Upper Tribunal.
- Any current Upper Tribunal rules that should not apply to the jurisdiction in the Upper Tribunal.

The response stated, *inter alia*:

> In the consultation document the Secretariat asks for views on whether the existing Upper Tribunal rules need amendment, supplementing or disapplication to any extent in order to accommodate the migration of the Financial Services and Markets Tribunal (FSMT) to the Upper Tribunal. The existing Upper Tribunal Rules contemplate either an appellate or a judicial review jurisdiction. The FSMT is, however, a tribunal that is set up to provide the fair hearing protections required under the European Convention on Human Rights. Accordingly, its jurisdiction is for a complete rehearing of matters between the Financial Services Authority (FSA) and those against whom it has taken formal action. It is not alone in having this kind of jurisdiction - the Pensions Regulator Tribunal has the same kind of jurisdiction and (like the FSMT) is scheduled to become part of the Upper Tribunal.
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> We note that one of the objectives in creating a new framework for tribunals was to simplify it. As part of that the Tribunals Service wish to have a single set of rules applicable to the Upper Tribunal. In principle we agree that this is a sensible objective. However, as a result of the different kind of jurisdiction for the FSMT, it is our view that the existing rules will need significant amendment, although we also anticipate that many of the more general provisions will be applicable or readily adaptable for the FSMT. In particular, the rules will need to cater for reference notices and the way these interact with statements of case, for disclosure and for handling applications by parties not directly involved in action by the FSA but to whom rights to apply to the FSMT are given. We anticipate that the Upper Tribunal Rules would draw upon the existing FSMT rules on these matters. We suggest, given the potential application of the additions to other tribunals, that the draft revisions to the rules are consulted upon in due course.

ROBERT LEEDER
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