E-Briefing Detailed Version
(Covering the period from 1 December 2009 to 30 January 2010)

1. Professional Representation
1.1 Professional Rules and Regulation Committee

The Professional Rules and Regulation Committee ("PR&RC") responded to the SRA's consultation paper "Moving Toward a Fairer Fee Policy - Second Consultation". (See http://www.sra.org.uk/sra/consultations/fee-policy-second-december-2009.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=740&lID=0 for the response.) The response stated, in part, that:

> 1. We do not agree that a banded turnover model as currently proposed is the best model for the firm based fee. As stated in our response to the first consultation dated 21 September 2009, we believe strongly that Model 1 (a flat sum per FTE fee earner approach) would be best until a risk-based approach is adopted.
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> Moving to the banded turnover model currently proposed has a disproportionate impact on the most efficient firms, which are also typically those who have invested in effective risk management processes and systems, have higher ratios of qualified to unqualified fee earners, and so require least supervision.
>
> We are supportive of the principle that the cost of regulation should be spread more fairly but are concerned that City firms are likely to incur significant increases applying the current proposal; the calculations undertaken by some of our member firms are showing very significant increases which cannot be justified (see our answer to question 6.1). This very real concern has to be set against the background of general disquiet amongst City firms about the current cost of regulation, in absolute terms and in comparison with other professions, and the value this represents.

The submission also referred to the other specific questions in the consultation, and in response to question 16, stated that:

> We reiterate our comment in response to questions 1,3 and 5. There needs to be a clear commitment to moving towards a risk-based approach on the part of the SRA and in the meantime the fairest approach would be for firms to contribute on a flat fee per fee earner basis.
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> With reference to the move to a risk-based approach; we would like to have a clearer understanding of the SRA roadmap for achieving this and the estimated timeframe.
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> We would also like to suggest that a third consultation on the fee policy should be undertaken following the 2010 renewal.

2. Specialist Committees
2.1 Financial Law Committee

David Ereira, a member of the Financial Law Committee, attended the House of Commons Financial Services Bill Committee oral evidence session on 10 December 2009 as a panel member on behalf of the CLLS. The Hansard link covering the comments made during the session can be found at (http://www.publications.parliament.uk/pa/cm200910/cmpublic/finser/091210/pm/91210s01.htm).

2.2 Insolvency Law Committee

The Insolvency Law Committee responded to the Insolvency Service consultation on the Cross Border Insolvency Regulations 2006 (“CBIR”). (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=737&lID=0 for the response.) The response referred to the specific questions, and stated, inter alia, that:

> In general the CBIR provide a helpful addition to the framework for recognition of foreign insolvency proceedings and foreign representatives. The procedure for recognition in practice seems to work

> efficiently in terms of timing and the fact that the process is by way of a prescribed format means that it is relatively straightforward and cost effective to pursue. At the same time it should be recognised that the CBIR are limited in their scope and do not provide substantive law provisions for cross border cases but are nonetheless a useful gateway into the English Court system.

2.3 Litigation Committee

The Litigation Committee also made a submission to the House of Commons Financial Services Bill Committee on certain aspects of the Bill. The Committee's response focussed on the collective action proposals set out in the Bill, insofar as they concern commercial litigation. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=745&lID=0 for the submission.) The Committee's response stated, *inter alia*:

> The provisions in the Financial Services Bill (the **"Bill"**) relating to consumer redress would, if enacted, have far reaching implications for the financial services industry. The Bill proposes two major changes in the area of consumer redress. First, it contains provisions that would introduce a "collective action", enabling a representative claimant to bring proceedings on behalf of a class of customers or other claimants. Secondly, it would give the FSA unprecedented new powers to impose redress schemes upon the industry. Although framed as relating to "consumer redress", these provisions go far beyond consumers and are of relevance to the wholesale side of the industry, as much as the retail side.
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> As a general point, it is not clear to us whether the government, in formulating these provisions, has considered the European dimension. Given the attempts to create a harmonised financial services market in the EU (by way of measures such as MiFID, for example), consideration ought in our view to be given to whether the collective redress provisions for financial services proposed in the Bill are consistent with the collective redress regimes in that sector operated elsewhere in the EU.
>
> Overview
>
> We have two over-arching concerns about clauses 18-26 of the Bill: (i) they are out of step with the proposed development of a framework for collective actions as set out in the Ministry of Justice's July 2009 response (the "Government's Response") to the paper "Improving Access to Justice through Collective Actions" published by the Civil Justice Council (the "CJC Recommendations") in December 2008 and (ii) they leave a number of extremely important matters to be dealt with by regulations and/or court rules which should, instead, be given proper legislative scrutiny.

The response also made a number of detailed comments regarding the following clauses within the Bill:

- Clause 18 (Collective proceedings orders)
- Clause 19 (Collective proceedings: "opt-in" and "opt-out" bases)
- Clause 20 (Judgments and orders: effect on represented persons)
- Clause 21 (Meaning of "financial services claim")
- Clause 22 (Regulations about collective proceedings)
- Clauses 22(2)(e) and (3) (Modification of effect of any limitation provision)
- Clauses 22(2)(f) and 23 (Regulation of damages)
- Clause 24 (Rules of court about collective proceedings)
- Clause 25 (Definitions)
- Clause 26 (Consumer redress schemes)

2.4 Regulatory Law Committee

The CLLS Anti-Money Laundering Working Sub-Group of the Regulatory Law Committee responded to HM Treasury's Review of the Money Laundering Regulations 2007 (see http://www.hm-treasury.gov.uk/fin_crime_review.htm for the Call for Evidence and http://www.citysolicitors.org.uk/FileServer.aspx?oID=732&lID=0 and http://www.citysolicitors.org.uk/FileServer.aspx?oID=731&lID=0 for the response.) By way of background, HMT's site states that:

> HM Treasury, assisted by colleagues in the Better Regulation Executive, is reviewing the anti-money laundering regime under the 2007 Money Laundering Regulations.
>
> The review will focus on the full scope of the 2007 Regulations (not simply changes made in 2007), on guidance, and on other communication and engagement with stakeholders. The review will also consider supervisory arrangements, industry practice and the customer experience under the regulations.
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> On 9th October 2009, we issued a Call for Evidence in order to capture views on how the regulations are designed as well as how they work in practice, in terms of how effective and proportionate they are and how much engagement there has been....
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> ... The Call for Evidence document was published in two parts.
>
> Part A was aimed at professionals familiar with the Regulations and their implementation including policy makers and commentators, Regulated Firms, Supervisors and academics. We asked that corporate responses reflected the views of both technical experts (e.g. money laundering reporting officers - MLROs) and those in client facing roles.
>
> Part B was aimed at customers of regulated firms including business customers and private individual customers.

Part A of the Call for Evidence went on to state that that document:

> ask[ed] questions to draw out evidence for all three principles in relation to the money laundering 'life cycle' from the Regulations to the customer experience on the ground:
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> - the Regulations themselves;
> - the Guidance that flows from the Regulations;
> - the Supervision framework;
> - how regulations translate into Industry Practice;
> - the Customer Experience; and
> - the Overall Perspective stakeholders have on the Regulations, the Guidance, the Supervision framework and Industry Practice.

The Committee's submission responded to the specific questions in the HMT document

The Regulatory Law Committee also responded to the CESR Consultation Paper "Understanding the definition of advice under MiFID" (See http://www.cesr-eu.org/data/document/09_665.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=733&lID=0 for the response.) The response stated, in general, that:

> We support the main analysis set out in the Consultation Paper. In particular:
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> - the diagram of the five key tests is helpful;
> - the distinction between presenting information and making a personal recommendation is helpful, in particular the acknowledgement that advice requires an element of opinion on behalf of the advisor, and is distinct from the provision of information;
> - the fact that, to be advice, the recommendation must be based on information about a person's circumstances is helpful, because without knowing a person's circumstances it is difficult for information to amount to a personal recommendation;
> - the distinction between advice relating to a particular financial instrument and generic advice is helpful.

The paper also made detailed comments in response to some of CESR's questions, namely:

> Question 5: Are the circumstances where "it is clear the firm is making a personal recommendation" sufficiently clear. Would further clarification be helpful?

> Question 6: Are there other criteria you believe should be considered when determining whether messages to multiple clients constitute investment advice?
>
> Question 7: What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?

The Regulatory Law Committee also responded to the CESR consultation paper "Inducements: Good and poor practices" (See http://www.cesr-eu.org/popup2.php?id=6146 for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=738&lID=0 for the response.) The Committee's document responded to some of the specific questions in the consultation document, and stated under "Other general comments and observations" that:

> We consider that whether or not a firm is also complying with the suitability and best execution regime is a relevant factor in taking into account whether the payment or benefit impairs compliance with the firm's duty to act in the best interests of its client. In our view, the compliance with these rules is relevant to an overall assessment of compliance with the MiFID inducements rule, albeit that it is not alone sufficient.
>
> In the summary of Poor Practices we think it would be helpful if CESR were to clarify its use of the term "rebate", for example as used in Example 5 on page 25. We would agree that any monetary payment direct to the investment manager in return for volume would be a poor practice, indeed we would go further and suggest that it might be more than a regulatory issue. However we wonder if this is what firms meant when they replied to the questionnaire. If they meant that commissions vary with volume then this is standard and a benefit to the client who pays the commission; if they meant that the client receives a rebate (commission recapture is practised by a number of institutional investors) then this would not be a "rebate", nor would the provision of research etc. to the manager as referred to elsewhere in the Paper. We suggest therefore making it clear that this comment is directed at cash payments to the manager.

The Regulatory Law Committee also made a submission to the House of Commons Financial Services Bill Committee on certain aspects of the Bill. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=744&lID=0 for the submission.) The response stated, *inter alia*, that:

> We set out below our comments on a number of provisions in the Bill. It is a common theme that many provisions amount to a transfer of fundamental legislative responsibilities from Parliament directly to the Financial Services Authority **("FSA")** without the intervening constitutional protections provided by Parliamentary scrutiny of delegated legislation. It is of course the case that the FSA currently has extensive rule making powers, but the exercise of these powers is subject to a number of legislative constraints within the Financial Services & Markets Act 2000 (the **"FSMA"),** which, as we note below, appear to be missing from the Bill. As drafted the FSA has extraordinarily wide rule making powers (and in some cases is required rather than empowered to make rules) without much, if any, direction within the statute as to any limitations on its use of them. This will result in an increasing lack of predictability in dealing with the regulator. In our view the Bill represents the high water mark of an increasing tendency to eliminate substance from primary legislation and to confer executive power without proper Parliamentary scrutiny at the level of either primary or secondary legislation. The specific issues we raise below in this context are in our view particularly serious and we very much hope that these defects are amended before the Bill becomes law.

The response also made specific comments in relation to:

- Section 1. Objectives, scope and rule-making powers
- Section 2. Remuneration of executives of authorised persons
- Section 3. Short selling - Clause 13.
- Section 4. Recovery and resolution plans
- Section 5. Proposed FSA information gathering powers

The Regulatory Law Committee also responded to the Commission paper, "An EU Framework for Cross-Border Crisis Management in the Banking Sector" issued on 20 October 2009 (the "Paper"). (See http://ec.europa.eu/internal_market/bank/docs/crisis-management/091020_communication_en.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=747&lID=0 for the response.) The Paper made certain proposals in relation to the crisis management, resolution and winding up of failing cross-border banks. Among other things, the Paper proposed establishing early intervention steps to reduce the risk of bank failure, and changing existing insolvency frameworks to make them more relevant to banks.

The response stated generally that:

> The Committee agrees with the central tenet of the Paper, namely that there is need for greater harmonisation of supervisory powers and practices across European Member States insofar as they relate to the crisis management of systemic financial institutions, and commends the Commission for opening the debate with an early stage consultation rather than rushing to legislate in this complex area. Notwithstanding this, we are concerned that a number of the proposals in the Paper, if enacted as contemplated, could pose significant risks to legal certainty in the United Kingdom. The overriding of private law rights under intra-group transfer and/or resolution regimes, in particular, are potentially very dangerous developments which merit deeper and careful analysis.

The response also commented on the issues of:

- Early intervention by supervisors
    - Living wills
    - Intra-group asset transfers

- Bank resolution
    - Devising a resolution framework
    - Powers and safeguards

- Insolvency

2.5 Revenue Law Committee

The Revenue Law Committee wrote to HMRC regarding dividends paid following reductions of capital (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=742&lID=0). The document stated, in part, that:

> This issue is of great importance to companies and their shareholders, and potentially has very significant compliance implications. Public companies frequently reduce capital in order to create distributable reserves so that they can continue to pay normal levels of dividends to their shareholders. Reductions of capital are particularly common where there has been a merger or demerger resulting in a new parent company being created with little or no reserves. Such a company will need to create reserves in order to be able to pay normal levels of dividends following the merger or demerger. It cannot simply rely on dividends received shortly after the transaction from its subsidiaries to create distributable reserves because the reserves created by such dividends are likely to be matched by an impairment charge for the reduction in value of the subsidiaries following the payments of the dividends. Reductions of capital are also frequently undertaken within groups of companies in order to remove “dividends blocks”, intermediate holding companies with deficits on reserves which would mean that dividends cannot be paid through them by their subsidiaries to their parent companies.
>
> The general understanding among advisors has until very recently been that dividends paid out of reserves created on a reduction of capital are income in nature and attract the normal tax treatment afforded to dividends paid out of income profits. This has been the generally understood position for many years and we are not aware of HMRC challenging the position before the introduction of the new exemption for corporate dividends.

We consider that it is of the utmost importance that the generally understood treatment of transactions should not be disturbed without full consultation. We also consider that it is in the general interest of tax payers and HMRC to avoid changes which would have significant compliance implications….

… we do not believe that existing case law justifies any change of approach in relation to dividends paid out of reserves arising on a reduction of capital. If policy compels a change, we believe that in view of the wide importance of the issue the change should be made as a result of legislation after appropriate consultation.