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David Hobart
Chief Executive

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c/o Carol Westrop, Head of Legal Policy
Solicitors Regulation Authority
The Cube
199 Wharfside Street
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By post and email (consultation@sra.org.uk)

Dear Ms. Westrop

Response of the CLLS Professional Rules and Regulation Committee to the Proposal to increase the SRA's internal fining powers (the "consultation paper")

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its specialist committees. This response to the Consultation has been prepared by the CLLS Professional Rules and Regulation Committee.[1]

The Consultation Questions

We turn now to the specific questions raised in the Consultation.

Question 1

There is no doubt that a two tier system whereby disciplinary matters involving an ABS are handled differently from those involving traditional law firms is inequitable. We also agree that a moderate increase in the fining powers of the SRA, to £10,000, which allows the regulator to deal with the majority of less serious matters is appropriate.

We do not agree with the presumption made throughout the consultation paper that the solution to this inequity is to extend the ABS regime to all regulated firms, and we share the concerns expressed in some quarters about due process.

We consider a system whereby the regulator is put in the position of being policeman and judge and jury in serious disciplinary matters would be a retrograde step notwithstanding any internal segregation of these conflicting functions

[1] A list of the members of the CLLS Professional Rules & Regulation Committee can be found here: http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=151&Itemid=469

within the SRA. Nor do we see the right of appeal to the Solicitors Disciplinary Tribunal ("SDT") as an adequate safeguard. Many firms and individuals faced with an adverse decision from the SRA would find the prospect of appealing, and thus challenging the regulator with whom they would have to continue to work at the end of that process, daunting and perhaps prohibitive.

Our strong preference would be to retain the SDT as the default disciplinary body for serious matters, and to extend the remit of the SDT to ABS firms which would, at a stroke, address any perceived inconsistency or unfairness in the current regime and the risk of regulatory arbitrage. Re the latter, we would seriously question whether the fining powers of the SRA has any material influence on the choices a firm make when structuring its business and the SRA has not presented any evidence to validate such a concern.

The solicitor and lay members of the SDT are appointed by the Master of the Rolls. This ensures the independence of the SDT from both the regulator and the profession which, along with its clearly defined processes and the transparency of its operations, is calculated to win the support and confidence of all stakeholders.

We do not have the information to dispute your assertions as to the comparative costs or timeframe of the two procedures, we would however anticipate that constructive engagement with the SDT in developing its processes could deliver efficiencies. That said, given the seriousness of disciplinary matters and the potential impact on individuals, consideration of cost cannot be allowed to undermine the rights of individuals to effectively defend themselves or the perceived and actual transparency and fairness of the process by which decisions are made.

Question 2

We draw attention to the views we expressed in the response to the SRA consultation on indicative guidance on financial penalties - which is attached for ease of reference (the "**2013 Response**").[2] We identified a number of concerns arising from the SRA's proposed indicative guidance, the final version of which was published on 13 August 2013 (the "**Guidance**"). We are disappointed that the SRA did not take the opportunity to align its Guidance more closely with the approach of the SDT, which would have helped remove any perceived inequity in having two parallel disciplinary paths. We do not intend to set out all of our comments again, but we do note the following points of particular importance.

(a) The Guidance has a very limited scoring approach to the seriousness of the conduct, which recognises only two categories of conduct and scores deliberate misconduct only 2 points higher than standard misconduct. The lack of differentiation has the potential to produce unfair penalties at both ends of the scale.

(b) In the 2013 Response we objected to the SRA's approach to the assessment of "Harm" which was based wholly on financial loss rather than the harm caused to public trust and confidence in, and the reputation of, the profession. In our view the concept of harm should be separate from that of financial loss to the extent relevant to culpability. Although the SRA did add a footnote to the Guidance indicating that harm should be construed broadly, that has not satisfactorily addressed our concerns. The SRA's process for assessing financial penalties is still principally, and incorrectly in our view, focused on the concept of financial loss as evidenced in Step 3 of the Guidance which effectively requires the decision maker to impose a penalty which eliminates any financial benefit or gain resulting from the relevant misconduct. The purpose of sanctions is to punish misconduct not to provide redress and we have already expressed the view that it would be wrong to focus purely on the profit or gain (which in many cases is likely to be recovered by victims in a civil action).

Question 3

As above, we agree that a moderate increase to £10,000 is appropriate and represents an equitable balance between the saving of costs and the maintenance of an independent, fair disciplinary process.

The supporting data provided by the SRA for 2010-30 July 2013 suggests that an increase of this level would allow the SRA to resolve the majority of financial penalty cases, leaving a minority of more serious cases to be prosecuted before the SDT. For the reasons set out in this response we think it is right that serious disciplinary matters are prosecuted before the SDT. Moreover in more serious matters it may be appropriate for the SRA to seek non-financial penalties which only the SDT is empowered to make.

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[2] See http://www.citysolicitors.org.uk/attachments/article/108/20130418-1131-Con-response-re-guidance-on-financial-penalties-(908154599-2).pdf

Question 4

Our concern about due process generally has especial relevance to consideration of regulatory settlement agreements ("RSA"). We would not in principle support the imposing of higher fines by agreement for the following reasons although we accept that, in certain situations and for some firms or individuals, these might represent a suitable and appropriate solution.

Our first concern is that firms or individuals faced with disciplinary action and faced with the option to enter into an RSA or going before the SDT might accept the former for the wrong reasons. They might feel pressurised by the situation and/or the regulator into settling the matter by agreement, or they might be tempted to accept such an agreement simply to avoid the SDT and/or to avoid confronting the SRA in an adversarial environment notwithstanding the fact that this might deliver a fairer outcome.

The realisation by the firm or individual involved that they will have to work with the SRA after the matter has been concluded will, inevitably, impact on behaviour and the decision arrived at by some. This is particularly likely to influence the behaviour of those members of the regulated community who are most vulnerable.

Secondly, this introduces inconsistency into the disciplinary process. The penalties imposed for precisely the same misconduct or breach are likely to be different, dependent on whether the firm or individuals involved chose to accept an RSA or exercise their right to refer the matter to the SDT.

Thirdly, RSA's do not expose the conduct, or the decisions and penalties arrived at, to independent adjudication. This is a critical element in any fair and transparent disciplinary process, and in securing stakeholder confidence in that process.

There are parallels to be drawn between this proposal and corporate Foreign Corrupt Practices Act ("FCPA") investigations and settlements in the United States. It has proved to be the case in practice that few corporations, if any, are willing to take a criminal FCPA case to trial which has meant that companies often have only one chance to argue and vindicate their interests – at the Department of Justice. This has resulted in the Department of Justice being characterised as the investigator, prosecutor, judge and jury when it comes to corporate FCPA investigations and settlements. This, and the absence of judicial oversight in these settlements, has been heavily criticised by civil liberties groups, judges, and other interested parties in the US.

Question 5

We repeat our response to question 2 above.

Question 6

We do not think that an increase in the SRA's fining powers to £10,000 is likely to have a negative impact on a particular type of law firm.

Yours sincerely

David Hobart
Chief Executive