

**RULE CHANGE APPLICATION MADE BY THE PATENT REGULATION BOARD
AND THE TRADE MARK REGULATION BOARD
AS THE INTELLECTUAL PROPERTY REGULATION BOARD
TO THE LEGAL SERVICES BOARD
UNDER SCHEDULE 4, PART 3, PARAGRAPH 20(1)
LEGAL SERVICES ACT 2007**

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**APPLICATION TO AMEND REGULATIONS TO PREVENT
REGISTRATION LAPSES**

CONTACT DETAILS

Fran Gillon

Chief Executive

The Intellectual Property Regulation Board

Fifth Floor, Outer Temple

222-225 Strand

London

WC2R 1BA

Tel: 020 7632 7176

Email: fran.gillon@ipreg.org.uk

1. Introduction

- 1.1 IPReg's regulatory arrangements as currently drafted do not allow the Registrar to prevent a registrant from removing themselves from the register at will, or otherwise prevent a registrant from being removed from the register due to failure to renew their annual registration.
- 1.2 Conversely, IPReg (via the Registrar) can control the removal of registered and licensed bodies from the register so that it can be done in circumstances "*where it is satisfied that revocation would not present a risk to clients, to the protection of client money, or to any investigative process*" (Regulation 10.1(j) of the IPReg Registered Bodies Regulations 2015 ("the Registered Bodies Regulations")).
- 1.3 IPReg is seeking to amend its regulatory arrangements to allow the Registrar to prevent a registrant from removing themselves from the register in circumstances where the Registrar considers that such removal may pose a risk to clients, to the protection of money or to any of IPReg's investigative processes.
- 1.4 The change would enhance public protection as individual registrants will be prevented from removing themselves from IPReg's regulatory jurisdiction when they are under investigation or at risk of being investigated for a breach of one of IPReg's regulatory arrangements. It would also bring the power to control removal from the register in line with the power the Registrar currently has in respect of registered and licensed bodies, and therefore achieve consistency.
- 1.5 The proposed amendments sought will result in changes to the Patent Attorney and Trade Mark Attorney Qualification and Registration Regulations 2009 ("Qualification and Registration Regulations").

2. Details of existing arrangements

- 2.1 Section 21 of the Legal Services Act 2007 (“the Act”) provides that the regulatory arrangements of an applicable regulatory body include its arrangements for authorising persons to carry on reserved legal activities and qualification regulations (which include any requirements which must be met in order to be authorised to carry on reserved activity).
- 2.2 Section 275A(1) of the Copyright, Designs and Patents Act 1988 (“the CDP Act”) provides that the keeper of the register may make regulations which regulate the keeping of the Patent Attorney register and the registration of persons. It includes at section 275A(2)(e) specific provision to authorise erasure of registration.
- 2.3 Similarly, section 83A of the Trade Marks Act 1994 (“the TM Act”) provides that the keeper of the register may make regulations which regulate the keeping of the register and the registration of persons. provision to remove or suspend a person’s registration from the Trade Mark Attorney register. It includes at section 83A(2)(e) specific provision to authorise erasure of registration.
- 2.4 These powers are pursuant to the Act at s184 and s185.
- 2.5 The regulations which govern the registration of individual patent and trade mark attorneys are the Qualification and Registration Regulations which are made pursuant to section 21 of the Act. The Qualification and Registration Regulations set out the circumstances in which individual attorneys can be admitted to the registers. It prescribes the method by which attorney registrants can renew their registration and confirms the continuing professional development requirements set out in the Continuing Professional Development Regulations 2013.
- 2.6 Removal from the register is dealt with at Regulation 9 of the Qualification and Registration Regulations:
- “9.1 Where IPReg has reached a decision in accordance with its Rules of Disciplinary Procedure that a registered patent attorney or a registered trade mark attorney has been guilty of misconduct or other material breach of any of its rules and regulations, it may direct that the entry for that person be removed from the relevant register, and may further direct that the entry for that person shall not be restored during such period as may be specified; and upon such a direction the Registrar concerned shall accordingly remove the whole entry for that person from the relevant register and the relevant Registrar shall not, except with the prior consent of IPReg, register the name of that person whilst the direction remains in effect.
- 9.2 IPReg shall maintain a Special Record containing the name and particulars of any person whose name has been removed from either of the Registers together with the reason for the removal and such other particulars as are considered appropriate.
- 9.3 The Special Record shall be freely available for public inspection at such times and in such manner as IPReg may direct.”
- 2.7 The Qualification and Registration Regulations are otherwise silent as to the manner in which registered attorneys (as distinct from registered firms or licensable bodies) can seek to be removed, or otherwise be removed, from the registers.
- 2.8 In contrast, the Registered Bodies Regulations at Regulation 10 set out at some length the various ways in which the registration of licensable bodies and registered bodies may be suspended or revoked. The wording makes it clear that it is IPReg that controls the removal of bodies from the register. Attention is drawn specifically to Regulation 10.1(j):

- “10.1 IPReg may suspend or revoke a body’s Registration, if:*
- a. Registration was granted as a result of error or fraud;*
 - b. The body’s application for Registration would be refused under regulation 4 if it were at that time applying for Registration;*
 - c. The body has breached one or more terms or conditions of its Registration including any of the obligations imposed by regulation 7.2 above;*
 - d. The body has a temporary emergency Registration but has not, within the initial 28 day period or any extension of that period, commenced a substantive application for Registration;*
 - e. A Non-Authorised Person is an Owner of the Registered Body in breach of these regulations and/or Schedule 13 of the 2007 Act;*
 - f. A Non-Authorised Person who is subject to the duty in section 90 of the 2007 Act fails to comply with that duty;*
 - g. The body, or a Manager, an Owner or an employee of the body (including, for the avoidance of doubt, the HoLP or HoFA) fails to comply with the duties imposed by IPReg or under any enactment including section 176 of the 2007 Act;*
 - h. The body has ceased to practise;*
 - i. An approved regulator (as defined in the 2007 Act) other than IPReg has authorised the body;*
 - j. IPReg has received an application by the body to revoke its Registration and is satisfied that revocation would not present a risk to clients, to the protection of client money, or to any investigative process; or*
 - k. for any other reason, it would be against the Regulatory Objectives for the body’s Registration to continue.” [emphasis added]*
- 2.9 IPReg can control the means by which a registered body can remove itself from the register to ensure that the body has in place sufficient safeguards in relation to succession planning, run-off insurance and client care so that there is reduced risk to the public as a result of removal. Registered firms are not able to simply remove themselves, thus avoiding regulatory scrutiny in the knowledge that there may be anticipated or outstanding client complaints.
- 2.10 Individual attorneys however can simply advise that they wish to retire or remove themselves from the register, and the Registrar has no power to prevent their removal or to keep them registered with IPReg.

3. Details of proposed changes

- 3.1 The core elements of the proposed changes will be:
- 3.1.1 A registered attorney will formally apply to IPReg to have their name removed from the register. An attorney may make an application at any time and in any circumstances, including where they are already under investigation by IPReg or undergoing disciplinary proceedings.
 - 3.1.2 Upon receipt of such an application, IPReg will undertake enquiries to satisfy itself that removal of the registrant’s name from the register would not present a risk or potential risk to clients, the protection of client money or to any investigative process;

- 3.1.3 If IPReg is so satisfied, the Registrar will remove the registrant's name from the relevant register(s). In satisfying itself, IPReg will usually:
- i. Publish on its website notification of the removal application (though not the reasons given for the application (if any), for a period of three months;
 - ii. Undertake any enquiries as may be deemed appropriate, including enquiries with the Legal Ombudsman, to ascertain whether any other agency is aware of any concerns which may suggest that IPReg should not remove the attorney from the register without further investigation.
- 3.1.4 If information comes to light that suggests that removal of the registrant's name from the register may present a risk or potential risk to clients, public money or to any investigative process, IPReg may suspend the application for removal from the register to carry out any such enquiries or regulatory activity as it deems appropriate.
- 3.1.5 If a registrant makes an application for removal from the register in circumstances where they are under regulatory investigation or subject to disciplinary proceedings, the Registrar will consider carefully, based on all the relevant factors, whether it would be appropriate to grant the application notwithstanding the outstanding concerns. Applications made in these circumstances may be granted where the registrant has evidenced significant ill health or other factors which may deem it appropriate to grant the application in the public interest.

4. Rationale for changes

Consumer protection

- 4.1.1 Under the present arrangements, an individual attorney can indicate they no longer wish to remain registered with IPReg and that they wish to have their name removed from the register. The Registrar has no power to refuse this request and compel an attorney to stay subject to IPReg's regulatory jurisdiction. If an attorney fails to undertake the registration renewal process as the beginning of each year, IPReg's only option is to remove them from the register for failing to renew registration.
- 4.1.2 If an attorney is under investigation by IPReg, or by another organisation such as the Legal Ombudsman who may wish to consider referral to IPReg as part of its sanction, there is nothing to prevent the attorney from removing themselves from the register to avoid regulatory scrutiny. While ultimately this would have the same effect of achieving IPReg's most severe sanction of removal from the register and so achieve a degree of consumer protection, it prevents IPReg from being able to exercise a number of other powers in relation to sanction, such as disqualification from holding a statutory role or being employed by a registered person (including a registered firm or licensable body).
- 4.1.3 If an attorney is under investigation and they choose to remove themselves from the register, they may make an application for readmission at a later date. Depending on the passage of time and the circumstances of the case, this may mean that IPReg is prevented from undertaking a full investigation into the attorney's previous conduct which could mean IPReg is not in a position to refuse the application for registration.
- 4.1.4 IPReg considers that these issues pose a real risk to the protection of consumers and is accordingly seeking to mitigate the risk by authorising all applications for removal from the register following appropriate checks.

Consistency

- 4.1.5 In contrast to individual registrants, IPReg has the power to control removal of registered

firms and licensable bodies from the register. The regulatory arrangements provide that the registered body should apply for removal from the register, and only where IPReg is satisfied that to grant the application would pose no risk to the public, will the removal be authorised.

- 4.1.6 This is inconsistent with the current process in relation to individual registrants, and there appears to be no sound basis upon which this distinction should be maintained. IPReg would like to remove this inconsistency which will address the consumer risks identified above.

5. Regulatory Objectives

- 5.1.1 IPReg believes that its proposals are compatible with the regulatory objectives set out in the Act.

Protecting and promoting the public interest

- 5.1.2 It is self-evident that preventing attorneys from removing themselves from regulatory oversight to avoid regulatory intervention protects and promotes the public interest. If IPReg is not able to investigate concerns about regulated individuals because they have chosen to remove themselves from its regulatory jurisdiction, the fundamental principle of regulation in the public interest is undermined and consumer confidence in the regulated professional community is put at risk.

Supporting the constitutional principle of the rule of law

- 5.1.3 The impact on this objective is broadly neutral but preventing registered attorneys who may seek to evade regulatory scrutiny from being able to do so, underscores the importance of compliance with regulatory rules which are designed to protect the public.

Improving access to justice

- 5.1.4 Preventing attorneys who may wish to lapse their registration to avoid the scrutiny of their regulator is a bar to justice for their clients who may have been put at risk or suffered loss. This rule change will allow consumers the opportunity to have their complaints fully investigated and action taken against the registered attorney where appropriate.

Promoting competition in the provision of legal services

- 5.1.5 There is no impact on this objective.

Encouraging an independent, strong, diverse and effective legal profession

- 5.1.6 Preventing registration lapses to avoid disciplinary scrutiny emphasises the important role of regulation and the principles of professional responsibility and accountability. The proposed change will encourage a strong and effective legal profession by reinforcing the importance and significance of legal regulation and what it means to be a professional member of a regulated community.

Increase the public's understanding of a citizen's legal rights and duties

- 5.1.7 There is no impact on this objective.

Promoting and maintaining adherence to the professional principles

- 5.1.8 The public expect that those who are part of a regulated community are held to a higher standard of professional conduct than those who are not. This higher standard recognises the unique privilege that comes with professional status and reflects the expectations of the public that those who are regulated by IPReg act with independence and integrity, maintain proper standards of work and will serve the interests of their clients to the exclusion of their

own.

- 5.1.9 The rule change promotes and maintains adherence to the professional principles by ensuring that registered attorneys cannot seek to avoid regulatory intervention by unilaterally removing themselves from regulatory oversight.

6. Better regulation principles

- 6.1.1 IPReg considers that this proposal is consistent with the better regulation principles.

Proportionate

- 6.1.2 IPReg considers that undertaking checks to ensure that there is no risk to consumers, their money or to any investigative process before removing an attorney from regulatory locus is a legitimate and proportionate regulatory measure. To the extent that it could be said that there is any regulatory burden on the registered attorney¹, this is outweighed by the clear benefit to the public who can be assured that registered attorneys cannot freely evade disciplinary intervention by removing themselves from the register.

Accountable

- 6.1.3 All decisions made by IPReg in relation to applications to leave the register, will be supported by reasons and communicated to the applicant in writing.
- 6.1.4 A registrant may challenge IPReg's decision to refuse an application for removal from the register, by seeking a judicial review.

Consistent

- 6.1.5 By making this application, IPReg is resolving an inconsistency as between treatment of registered attorneys and registered firms/licensable bodies who are seeking to cancel their registration. By removing registered attorneys from the register only when satisfied that there would be no public risk in doing so, IPReg is making the removal process consistent with that for registered firms and licensable bodies.

Targeted

- 6.1.6 The proposed amendments are targeted to remedy a risk that IPReg has identified in the way in which registrants can choose to lapse their registration to avoid undergoing a disciplinary investigation or proceedings. The changes will address only this aspect of IPReg's regulatory arrangements will only have a significant impact on a registrant who is seeking to evade disciplinary scrutiny.

Transparent

- 6.1.7 A consultation was launched on 16 August 2018, a copy of which is attached at Annexe A. The consultation was published on our website and advance notice was sent to the Approved Regulators, the Chartered Institute of Patent Attorneys ("CIPA") and the Chartered Institute of Trade Mark Attorneys ("CITMA").
- 6.1.8 There was one response to this consultation, made by CIPA who supported the proposal. CITMA confirmed in writing that it did not object to the proposed amendments. CIPA's response is discussed further below.

¹ The registrant will be on the register and therefore bound to continue to abide by IPReg's Rules of Conduct and other regulatory arrangements until such time as IPReg satisfies itself that there is no risk in removing the registrant from the register. They will not be required to pay a practising certificate fee if this becomes due for renewal during the period in which IPReg is undertaking its enquiries

6.1.9 If the rule change was to be approved, IPReg would publish this on our website to ensure that registrants were aware of the consequences of non-compliance.

7. Desired outcome

7.1.1 The desired outcome of the proposal is primarily to better protect the public and achieve consistency in relation to the process involved in removing registered attorneys and registered firms / licensable bodies from the register.

8. Impact upon other regulators

8.1 This proposal has no impact on any other regulator.

9. Implementation timetable and operational readiness

9.1 If this application is granted, IPReg will be ready to implement the changes immediately upon receipt of the Legal Services Board's decision. CIPA has offered to assist IPReg by publishing IPReg guidance on the new rule change once implemented. This will also be published on IPReg's website.

10. Consultation process

10.1 On 16 August 2018, IPReg published a consultation paper on the proposed changes [Annexe A]. The consultation set out the existing regulatory framework and the suggested draft of the new Regulations.

The response

10.2 CIPA responded positively to the proposed amendment, and CITMA indicated it did not oppose any application made by IPReg and so would not be providing a formal response.

10.3 CIPA indicated that it shared IPReg's concerns about the current regulatory framework which allows, and in one case did allow, a patent attorney to remove himself from the register when he could reasonably have anticipated that a complaint was to be made to IPReg about his conduct². CIPA said:

"We believe that it is important that attorneys are not able to avoid disciplinary action by removing themselves from the regulatory regime. We support IPReg's proposal to improve regulation by satisfying itself that any attorney seeking to end active registration would not, in doing so, present a risk to clients, to the protection of the public or to any investigative process".

11. Submission

11.1 The LSB is asked to approve this application.

² In this case the complaint was received by IPReg three days after the patent attorney was removed from the register for failing to renew his registration

Annexe A