



APPLICATION BY ICAEW TO BECOME AN
APPROVED REGULATOR AND LICENSING
AUTHORITY FOR PROBATE ACTIVITIES
UNDER THE LEGAL SERVICES ACT 2007

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1. EXECUTIVE SUMMARY

Introduction

- 1.1. The Institute of Chartered Accountants in England and Wales (ICAEW) wishes to apply to become an approved regulator and licensing authority for probate activities under the Legal Services Act 2007 (the Act). The application is made with a view to extending ICAEW's regulatory expertise into legal services and to help government in its aim of promoting competition in the market for legal services.
- 1.2. The application is made in accordance with Part 2 of Schedule 4 and Part 1 of Schedule 10 of the Act which enables the Lord Chancellor, on the recommendation of the Legal Services Board (LSB), to make orders designating bodies as approved regulators and licensing authorities.
- 1.3. 'Probate activities' is defined in Schedule 2 of the Act as the preparation of probate papers for the purposes of the law or in relation to any proceedings in England and Wales. The scope of this application, however, is restricted to applications for a grant of probate or letters of administration only (ie, non-contentious probate work). ICAEW is not seeking authority to accredit firms wishing to oppose a grant of probate or letters of administration.
- 1.4. In preparing this joint application for approved regulator and licensing authority status, ICAEW has developed a single regulatory framework that will apply for the most part equally to firms wishing to become accredited for probate as either:
 - authorised firms in which all principals and owners are individually authorised to conduct probate work; or
 - licensed firms in which **not** all principals and owners are authorised for probate; these firms are also known as Alternative Business Structures (ABS) under the Act.
- 1.5. In accordance with the principles of better regulation, and for the purposes of consistency, we have sought to ensure that, where possible, the firms we authorise and license will be subject to the same regulatory requirements and processes. In the limited circumstances where additional requirements apply only in respect of licensed firms (for example, to appoint a Head of Finance and Administration and Head of Legal Practice) this is to comply with requirements laid down in the Act.

Structure of the application

- 1.6. This application is intended to provide a comprehensive overview of ICAEW's activities, and our proposed regulatory arrangements for probate.
- 1.7. Parts 1 – 3 of this application contain an introduction and background to ICAEW: our history, membership profile, activities as a professional body and current regulatory processes and responsibilities.
- 1.8. Part 4 sets out our proposed regulatory arrangements as an approved regulator. We explain in detail how we intend to authorise firms to carry out probate work, and the processes we will use to ensure that the Act's regulatory objectives and better regulation principles are upheld.
- 1.9. In Part 5 we set out our proposed regulations for licensed firms (referred to as ABS under the Act). We address each of the Act's requirements for these rules and explain how they are consistent with both the Act and the LSB's guidance on licensing rules.
- 1.10. In Parts 6 – 7, we include a further discussion on the way in which our proposed arrangements are consistent with the Act's regulatory objectives and better regulation principles. We also provide commentary on our proposed business plan for this work, and discuss the resources that will be used to ensure that we discharge our responsibilities properly and effectively as a regulator.

- 1.11. In Parts 8 - 9, we provide details of our governance arrangements, and how we propose to address and mitigate the risk of regulatory conflict arising in relation to our authorised and licensed firms.
- 1.12. In Parts 10 – 11, we discuss the outcome of our public consultation on the application, and set out the powers that we consider we will need to become an approved regulator and licensing authority for probate.
- 1.13. Our draft probate regulations are contained in Annex 1 of the application. Also included in the annexes is documentation relevant to our constitution, governance and management structure, and our proposed business plan for accrediting firms to conduct probate work.

Scope of regulation

- 1.14. ICAEW is aware that a number of accounting practices already engage in some of the unreserved legal activities related to probate. Market research conducted in 2011 indicated that firms engage routinely in tax and trust planning, along with estate administration work. Conscious of the need to ensure that the Act's regulatory objectives of consumer protection and protection of the public interest are fostered, ICAEW has elected to include estate administration within the scope of its regulation where this activity is conducted by an accredited probate firm. This means that ICAEW's arrangements for professional indemnity insurance (PII), compensation and consumer complaints will extend to estate administration where this is conducted by an accredited probate firm. ICAEW's Practice Assurance (PA) arrangements will also operate to ensure this activity is reviewed where it forms a significant part of a firm's fee income.
- 1.15. In cases where firms elect not to seek probate accreditation but carry on estate administration as they do now, this work will also be reviewed through the Practice Assurance scheme where it forms a significant part of a firm's fee income.

Proposed regulatory arrangements

Authorisation and qualification requirements

- 1.16. Under the proposed regulatory arrangements, firms will be able to apply to ICAEW for authority to deliver probate services as accredited probate firms. If individuals working within these entities wish to conduct or supervise probate work, they will need to apply to the ICAEW for approval as 'authorised individuals'. A person may apply to ICAEW to become an authorised individual if they:
- are a member of ICAEW or a select number of other international chartered accountancy bodies and can demonstrate to ICAEW that they have attended a bespoke course in wills, probate and estate administration; or
 - are authorised to conduct probate work by another approved regulator; or
 - hold another appropriate probate qualification and/or have experience in probate and estate administration.
- 1.17. The educational platform for the effective delivery of probate services is important to ensure the quality and integrity of service, and protection for the consumer. ICAEW considers that the training and existing skills and competencies of chartered accountants makes them well placed to conduct non-contentious probate work, which essentially involves an assessment of the assets and liabilities of a deceased's estate, completion and filing of IHT returns and the completion of the application of a grant of probate or letters of administration.
- 1.18. Having assessed the skills and competencies required to supply non-contentious probate services, ICAEW considers that the rigorous professional training of a chartered accountant, culminating in the award of the prestigious ACA qualification, provides most of the essential ethical, technical and administrative skills necessary to deliver this service, and that a bespoke course in wills, probate and estate administration will

provide the necessary technical layer to enable the probate practitioner to deliver a professional and efficient service.

Monitoring and quality assurance

- 1.19. The quality and rigour of the application process is recognised as not being sufficient on its own to ensure that the quality of service is continued throughout the lifetime of accredited probate practices. Accordingly, ICAEW will extend its existing processes for monitoring and quality assurance to firms it accredits for probate. Practitioners will be required to submit an annual return containing details specific to their probate practice, and monitoring reviews of firms will be targeted dependent on an assessment of risk. For the sake of efficiency, reviews will be carried out where possible in tandem with ICAEW's existing PA scheme, although ICAEW aims to conduct an initial review of the majority of firms during their first 24 months of accreditation.

Consumer redress

- 1.20. Consumer protection is also addressed through special compensation and PII arrangements for accredited probate firms. Those firms authorised or licensed for probate will be required to carry a minimum of £500k PII per claim and comply with ICAEW's existing PII requirements. In addition, a compensation scheme will be in place, underwritten by a master insurance policy held by ICAEW, to provide redress for consumers on a comparable basis in cases where PII is invalidated (ie, in some cases of fraud).
- 1.21. For many years, ICAEW has set the requirements for PII for the accountancy profession and monitored compliance with those arrangements. The ethical and professional backdrop, together with an annual review, has resulted in a low claims history. The arrangements in place are expected to provide an effective consumer protection platform at inception, which will continue to grow in strength as the accreditation process reaches maturity.

Complaints redress

- 1.22. Accredited probate firms will be required to operate fair, efficient and effective internal complaints-handling processes to comply with the Act's requirements and those of the Legal Ombudsman. Signposting arrangements will be in place to notify clients of their right to refer matters to the Legal Ombudsman, both at the beginning of the engagement and at appropriate stages during the complaints-handling process. Issues of improper professional conduct will be dealt with under ICAEW's existing disciplinary processes.

Enforcement

- 1.23. For more than 130 years, ICAEW has had in place disciplinary arrangements for ensuring that members who engage in unprofessional conduct are called to account. ICAEW will extend its existing disciplinary powers and processes to firms it accredits for probate where there is a breach of our regulatory arrangements. In addition, in cases where there has been a breach of our regulatory arrangements, the proposed probate regulations set out a range of regulatory powers which ICAEW may draw upon to protect the consumer and the wider public interest. This includes the imposition of conditions or restrictions on a firm's accreditation; the power to suspend or withdraw accreditation, the power to disqualify individuals from holding particular posts or to intervene into firms in certain circumstances.

Business plan

- 1.24. As with any new organisation, the set-up costs and first years of trading are delicate and some financial support is necessary to enable the necessary platforms to be built and consumer protection to be made available from day one. The business plan seeks to balance these requirements with a commercially viable charging mechanism to members that, in particular, seeks to promote the first time sole practitioner and builds on the ready access to market envisaged by the legislation. The set-up arrangements in

particular are facilitated by a ready operational platform for other regulatory regimes that can be leveraged with minimum disruption and timely input.

Internal governance

- 1.25. As a membership and representational organisation, as well as a regulatory body, ICAEW has developed management structures that have served well in ensuring appropriate rigour and quality across all areas, as well as ensuring independence of process where this is required. In particular, the regulatory committees have been ring-fenced to enable them to operate independently from ICAEW's representative arm. Oversight bodies such as the Financial Reporting Council (FRC) and the Financial Services Authority (FSA) have been content with these structures.
- 1.26. Nevertheless there has been a recognition that further adjustments need to be made to comply with the spirit of the principle of regulatory independence, whilst retaining the integrity of the underlying existing structure. Accordingly it is proposed that a committee – to be known as the Probate Committee – should be convened with full delegated responsibility for dealing with matters concerning probate practitioners including rule making, policy/strategy setting, budget setting and day-to-day casework. Although under the proposed terms of reference the Probate Committee will be obliged to consult with the Professional Standards Board (PSB) and other stakeholders on matters of policy or where amendments to the probate regulations are proposed, it will have full independence and ultimate responsibility for ensuring that matters concerning probate are conducted in accordance with the Act's requirements and the regulatory objectives.

Conclusion

- 1.27. ICAEW's application for designation as an approved regulator and licensing authority for probate has been prepared with care and reference to a number of stakeholders as well as drawing on the considerable in-house expertise as a result of many years of regulatory oversight. The content of the application and the draft regulations, combined with ICAEW's regulatory experience and the integrity of the accountancy membership should, in our view, provide the LSB with the necessary assurances required to approve this application.

2. WHO WE ARE

Royal Charter and constitution

- 2.1. ICAEW was founded by Royal Charter in May 1880 and received a Supplemental Charter in 1948. As a chartered body, we work in the public interest to further the profession of accountancy worldwide.
- 2.2. A copy of our Charter, Supplemental Charter, Principal and Disciplinary Bye-laws are attached in Annex 2.
- 2.3. As a world-leading professional accountancy body, we provide leadership and practical support to over 138,000 members in more than 160 countries, working with governments, regulators and industry in the UK and abroad to ensure the highest standards are maintained. We have over 19,000 ACA students; nearly 25% of new students registered in 2011 were from outside the UK.
- 2.4. As a regulator and professional membership body, we undertake a range of activities to support members and students internationally. This includes:
 - educating and training chartered accountants;
 - facilitating members' continuing professional development; and
 - supporting members through the provision of advice and services.
- 2.5. We also play a key role in thought leadership on a range of technical accounting issues. Recent publications have focused on issues such as reporting on business risks; creating an effective finance function; and improving security and the use of digital information.
- 2.6. We engage regularly with governments, professional membership organisations and other bodies on issues affecting the accountancy and finance profession both within the UK and around the world. We are a founding member of the Global Accounting Alliance (GAA) with over 775,000 members worldwide, and are a member the Consultative Committee of Accountants (CCAB) which is the body for all the major professional accountancy bodies in the UK and Ireland.

Overview of structure and governance

- 2.7. In accordance with the Charter, ICAEW's council is responsible for determining ICAEW's overall objectives, strategy and budget and is comprised of elected, co-opted and ex officio members drawn from geographical constituencies and different parts of the profession. At the time of writing there are 82 members of council.
- 2.8. Council is supported by the ICAEW board. The board is responsible for overseeing all matters relating to the development and implementation of ICAEW strategy, policy, operational plans and resources. It reports to council with recommendations as required.
- 2.9. The board currently comprises:
 - the president, deputy-president and vice-president of council;
 - the chairs of four of the five ICAEW departmental boards;
 - the CEO and executive directors;
 - two members directly elected from council; and
 - a co-opted non-executive member from the EU.
- 2.10. A list of the current ICAEW office-holders and the executive management team is set out in Annex 3.
- 2.11. There are five departmental boards that report to the main board; these are: Learning and Professional Development, Members, Technical Strategy, Commercial and Professional Standards. These boards are responsible for overseeing departmental operational plans, monitoring performance and approving specific projects.

- 2.12. Copies of ICAEW's annual reviews and accounts for the last three years are contained in Annex 4. These set out our vision, values and current strategic aims. Also included in Annex 5 are our risk management strategies and staff development policies.

Becoming an ICAEW member

- 2.13. Half our members work in business, industry, the public and not-for-profit sectors and half in professional practice; 80% of UK FTSE100 companies have an ICAEW Chartered Accountant as a board member, and 56% of the UK FTSE250 boards have an ICAEW Chartered Accountant as chairman, CEO or CFO. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. We ensure these skills are constantly developed, recognised and valued.
- 2.14. To qualify as an ICAEW Chartered Accountant and become a member of ICAEW, students must complete the ACA. The ACA is an internationally recognised, leading business and finance qualification which incorporates a three-year period of supervised training within an ICAEW authorised training employer, alongside professional examinations and mandatory development in professional skills and ethics. This training is widely available throughout training offices in the UK and internationally.
- 2.15. Although over 80% of those entering training for the ACA are university graduates, ICAEW is also recognised for excellence in promoting access to the chartered accountancy profession. It actively promotes diversity and social mobility in the profession by offering direct entry into training for school leavers after A levels; via membership of the Association of Accounting Technicians, completion of ICAEW's Certificate in Finance, Accounting and Business (CFAB), a number of part-time university degree programmes and the new Higher Apprenticeship in Assurance/Audit.
- 2.16. In 2011, we attracted 5,951 new students and we expect our student intake to be around 6,000 in 2012.
- 2.17. During the period of authorised training, students must pass 15 ACA examinations. Credit for prior learning is possible for a few of the papers. The first stage of this training includes an examination on commercial and company law. The Advanced Stage of these examinations consists of two examinations on the business environment and business life cycle, and a four-hour advanced case study. The emphasis in the examinations is on the practical application of knowledge to situations.
- 2.18. During the three years' practical experience, students must achieve a minimum of 450 days' technical work experience in areas of accountancy such as audit and taxation. They also undergo skills development (known as IPD or Initial Professional Development) and structured training in ethics.
- 2.19. Further information on our current requirements for students training for the ACA is contained in Annex 6.

3. ICAEW AS REGULATOR AND MONITORING BODY

Our current regulatory responsibilities

- 3.1. For more than 130 years, ICAEW has had disciplinary arrangements for ensuring that members who behave inappropriately are called to account and, if necessary, excluded from the profession.

Statutory

- 3.2. Over the last 25 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency and investment business.
- We are the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 3,800 firms and 9,300 responsible individuals under the Companies Act 1989 and 2006.
 - We are the largest single insolvency regulator licensing some 700 insolvency practitioners as a Recognised Professional Body (RPB) under the Insolvency Act 1986 out of a total UK population of 1,700.
 - We are a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 (and previously a Recognised Professional Body under the Financial Services Act 1986) currently licensing approximately 2,500 firms to undertake exempt regulated activities under that Act.
 - We are a Supervisory Body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.
- 3.3. In January 2012, ICAEW became an accredited body under the FSA Retail Distribution Review (RDR) arrangements. Accredited body status is an opportunity for ICAEW to provide a wider range of services to members and also demonstrates our increased focus on protecting consumers.
- 3.4. In discharging these duties we are subject to oversight by the FRC's Conduct Committee, the Insolvency Service and the FSA. These bodies regularly monitor our arrangements and have not identified any significant areas of concern in the way we have discharged our regulatory responsibilities to date.

Broader regulatory activity

- 3.5. The Quality Assurance Department (QAD) of ICAEW Professional Standards is responsible for the delivery of ICAEW's PA scheme. This is ICAEW's framework of practice review that applies to all members holding a practising certificate (PC) in the European Economic Area. It is supplementary and complementary to the QAD's work in the regulated areas of audit, insolvency and investment business and, as such, is an area of monitoring that applies to all PC holders.
- 3.6. Members who hold a PC and who are engaged in public practice, or who work within the regulated areas, are also required to have professional indemnity insurance (PII). We monitor compliance with the PII regulations (Annex 7) to ensure that firms hold appropriate levels of cover to safeguard the public in cases of negligence. Both the PA scheme and ICAEW's requirements for PII are discussed below.

The committees

- 3.7. All ICAEW's functions as a regulatory and disciplinary body have been delegated to committees. Our office-holders are disqualified from membership of these committees in accordance with Principal Bye-law 44, and council members are also excluded from these committees. These rules enforce the principle of independence within ICAEW's governance structure separating regulatory and membership activities.
- 3.8. All the committees referred to below include lay members (ie, not chartered accountants). They are selected to bring a broader and public interest perspective to the

work of the committee. The presence of lay persons on these committees is also intended to instil public confidence that decisions and activities are conducted in an impartial manner.

The regulated areas

- 3.9. The Audit Registration, Insolvency Licensing and Investment Business Committees are responsible for discharging ICAEW's supervisory responsibilities in the regulated areas of audit, insolvency and investment business.
- 3.10. These committees are responsible for, among other things:
- granting or rejecting applications for registration and licences;
 - withdrawing or suspending registration or licences;
 - imposing conditions or restrictions on registration or licences;
 - imposing regulatory penalties for compliance failures and referring for investigation (and potentially disciplinary action) any serious issues;
 - granting or refusing dispensations from eligibility requirements;
 - reviewing returns and reports and investigating any failure to make such returns and reports;
 - making enquiries regarding eligibility and compliance; and
 - publishing orders and decisions.
- 3.11. These committees also consider reports arising out of monitoring reviews conducted by QAD and take regulatory action as required.

Review Committee

- 3.12. If members or firms wish to challenge the decisions of these committees, they have the right to apply to the Review Committee (RC). The Review Committee has the power to make any order which a regulatory committee could have made. The RC's regulations are set out in Annex 2.
- 3.13. The RC comprises up to 16 members, of whom at least one quarter must be lay, and normally operates in panels of three: one chartered accountant, one lay member, and one specialist in the area under review.
- 3.14. Panels of the RC are also assisted by an independent legal assessor who gives advice on procedural and other legal matters, although they do not take part in the decision-making process.

Appeal Committee

- 3.15. Following the decision of the Review Committee, members have a further right of appeal to the Appeal Committee (AC). The Appeal Committee consists of at least 14 members, at least one quarter of whom must be lay. It operates in panels of five members, comprising three chartered accountants, one lay member and a legally qualified chairman (who is a practising QC or retired judge of the High Court). There are currently 16 members of the AC.
- 3.16. On appeal, the panel of the AC has the power to affirm, rescind or vary any orders of the Review Committee, or to direct that the matter be heard afresh.

Code of Ethics

- 3.17. All ICAEW members¹ and member firms must comply with ICAEW's Code of Ethics, which is set out in Annex 8. This code has been derived largely from the International Ethics Standards Board of Accountants' (IESBA) Code of Ethics issued by the International Federation of Accountants in July 2009. It is intended to ensure that ICAEW members demonstrate the highest standards of professional conduct at all times, and that they take account of the public interest when they engage in professional accountancy work and business activities (whether remunerated or voluntary).
- 3.18. The code is divided into four parts: the first covering the general application of the principles to all members. Subsequent sections deal with specific situations which members might encounter in practice, in business or when undertaking insolvency work. The code also includes a number of case scenarios and suggests guidance on the course of action that might be appropriate (or in some cases required) in each case.
- 3.19. The Code of Ethics is underpinned by five fundamental principles which ICAEW members, member firms, students and affiliates must display at all times.
- **Integrity** - to be straightforward and honest in all professional and business relationships.
 - **Objectivity** - to not allow bias, conflict of interest or undue influence of others to override professional or business judgments.
 - **Professional competence and due care** - to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional services based on current developments in practice, legislation and techniques and to act diligently and in accordance with applicable technical and professional standards.
 - **Confidentiality** - to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, to not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the professional accountant or third parties.
 - **Professional behaviour** - to comply with relevant laws and regulations and avoid any action that discredits the profession.
- 3.20. As it is not possible to define the situations that might arise and pose a threat to the fundamental principles, the code sets out a conceptual framework to be applied by members in seeking to comply with their ethical obligations.
- 3.21. This framework requires members to consider, at all times, whether their actions or relationships could constitute a threat to the five principles. If a member identifies a threat, he/she must consider whether any safeguards are available either to eliminate that threat or reduce it to a level that is acceptable. These safeguards could take the form of further professional training, monitoring or the independent review of reports by a third party.
- 3.22. If, after evaluating the significance of the threat and the available safeguards, the member considers that the threat cannot be eliminated or reduced, the framework dictates that they should either decline the appointment or refuse to continue with the engagement.

Continuing professional development

- 3.23. All ICAEW members must comply with the Continuing Professional Development (CPD) regulations, set out in Annex 9. These regulations place an obligation on members to reflect on their learning and development needs, identify any gaps, source appropriate

¹ For the purposes of the code, a 'member' includes ICAEW affiliates, provisional members and employees of a member firm.

activities to fill those gaps and assess the effectiveness of their learning on a continuous basis.

- 3.24. ICAEW does not specify the form that CPD should take nor specify the number of hours or points that must be obtained. Instead members must undertake whatever development activity is required for them to remain competent in their roles.

This may include:

- attendance at a workshop, conference, seminar or webinar;
 - reviewing books, journals or faculty publications;
 - participation in an ICAEW special interest group;
 - reviewing technical updates and news relevant to their role; or
 - discussion and informal training with a senior colleague on an area of expertise.
- 3.25. Members must make an annual CPD declaration to this effect, which we audit on a sample basis. We also monitor compliance with the CPD regulations by requiring firms to return a CPD declaration each year for their staff. If a firm fails to make a CPD declaration, this is potentially a disciplinary issue and will be dealt with in accordance with our disciplinary procedures (detailed in paragraphs 3.48 to 3.60 below).

Practice Assurance

- 3.26. The PA scheme is a principles-based quality assurance framework, which provides firms with advice and practical support to develop and improve their practices. It is centred on four standards (listed below) that set out the quality assurance principles which firms and reviewers use to assess practices.

- **Laws, regulations and professional standards** - firms must comply with laws, regulations and standards that are relevant to the services they provide, including ICAEW's regulations, standards and guidance.
 - **Client acceptance and disengagement** - firms should agree to act for a client only if, in doing so, it does not contravene ICAEW's regulations, standards and guidance.
 - **Competence** - firms should ensure that all principals, staff and subcontractors are competent to carry out their work.
 - **Quality control** - firms should ensure that work is conducted in an environment where quality is monitored.
- 3.27. QAD provides guidance and support to members to help them implement procedures to maintain and improve the quality processes in their practices. This guidance sets out acceptable practice and best practice. Additional support is provided to firms when they first register and regular email alerts and web-postings are used to keep firms abreast of key issues. QAD produces a leaflet which is sent to firms before a visit informing them of the process and what will be considered. This is contained in Annex 10.

Annual returns

- 3.28. All firms that are subject to the PA scheme must complete an annual return. Additional tailored information is also required from firms working in the regulated areas of audit, insolvency and investment business.
- 3.29. Data from the annual return is used to monitor firms' compliance with the audit, DPB, insolvency and PII regulations (see below). QAD uses the information in the annual return to understand the risk profile of each firm based on factors such as the firm's size and client profile; its turnover, and the nature of the work being carried out. The questions on the annual return can be expanded if QAD identifies additional areas of concern or interest.
- 3.30. An example of the annual return is contained in Annex 11. Currently ICAEW is moving towards an online annual return.

Monitoring

- 3.31. QAD is responsible for carrying out reviews of firms working in the regulated areas of audit, insolvency and investment business, as well as to other firms that fall within the scope of the PA scheme. It currently carries out over 3,000 reviews of firms each year, in addition to conducting master classes for firms.
- 3.32. Depending on the firm's size, monitoring may take the form of a site visit, review by phone or desk-top review. The frequency of these reviews depends on various risk factors and the firm's size, but PA reviews are generally carried out at least once every eight years for smaller firms and every four years for larger firms. Smaller firms are invited to an educational masterclass at the mid-point between reviews. The very large firms are visited annually. QAD also carries out about 100 risk visits each year.
- 3.33. If a review highlights a serious issue in relation to PA or the regulated areas, the QAD team makes a report to the relevant committee. This committee in turn refers matters for possible disciplinary action if it is sufficiently serious or if the firm or the practising certificate holder fails to take the action recommended by the committee.
- 3.34. QAD reviewers have a high degree of skill and experience across a range of disciplines. QAD reviewers are all chartered accountants with many years' experience in reviewing audit, investment business and general practice. A number of reviewers hold specialist qualifications in tax and financial services. Combined, members of the team have an average length of service of 10 years.
- 3.35. ICAEW has a number of contracts to supply external monitoring services, which QAD also manages. These include contracts to provide monitoring services to the Chartered Institute of Public Finance and Accountancy (CIPFA) and the Institute of Actuaries, in addition to a number of monitoring contracts specifically related to anti-money laundering procedures for non-member firms.

Clients' money regulations

- 3.36. Members and firms holding client monies must comply with ICAEW's clients' money regulations, as set out in Annex 12. These regulations require firms to place any client monies in a separate, interest-bearing client account, unless the client agrees otherwise. Firms must also obtain agreement from their bankers that there is no right of set-off between a client money account and the firm's own account. If monies are to be deposited in a bank account outside the UK or Ireland, the firm must inform the client in writing of the country/territory and obtain the appropriate confirmations from the bank (if this is in the EU). The firm must inform the client that their money may not be protected as effectively as it would if held in a bank in the UK or Ireland, and obtain the client's agreement to these arrangements in writing. The regulations impose strict requirements on payments into and out of a clients' money account and also require firms to repay a client's money to the client promptly should there be no further reason for the firm to hold the funds on the client's behalf.
- 3.37. Firms are obliged to keep proper records of transactions involving clients' monies and to reconcile their client accounts at least every five weeks. Firms must keep these records for six years. Compliance with these regulations is monitored by QAD as part of the PA scheme.

Anti-money laundering legislation

- 3.38. Members must also demonstrate their compliance with primary legislation relating to money laundering and terrorist financing, and the Money Laundering Regulations 2007. ICAEW, in collaboration with other accountancy bodies, has produced guidance to help members and member firms interpret this legislation. The Anti-Money Laundering

Guidance for the Accountancy Sector² (Annex 13) has been approved by HM Treasury and is intended to provide authoritative guidance and practical advice to firms in adopting best practice when implementing and complying with anti-money laundering (AML) requirements.

- 3.39. All PA review visits cover members' procedures for complying with AML legislation. Non-member firms can also apply to QAD for AML supervision provided a principal of the entity is an ICAEW member.

Professional indemnity insurance

- 3.40. All ICAEW members who hold a practising certificate and engage in public practice must hold PII and comply with our PII regulations (Annex 7).
- 3.41. The PII regulations place an obligation on firms to take reasonable steps to meet claims arising from being in public practice and to arrange 'qualifying insurance'. This is cover from a participating insurer, which complies with our minimum approved policy wording. The minimum level of indemnity is 2.5 times the firm's gross fee income for the previous accounting year, subject to a minimum of £100k and a maximum of £1.5m. These limits are kept under review with insurers in collaboration with the Institute of Chartered Accountants of Scotland (ICAS) and Chartered Accountants Ireland (CAI).
- 3.42. In addition, firms must carry out an annual risk assessment in order to obtain cover that is appropriate for their needs. We suggest that firms take into account such factors as their size and the nature of their work in assessing the level of cover that is required. The requirement to carry out the risk assessment means that many firms have PII in excess of the amount set out above.
- 3.43. If firms are unable to obtain suitable cover from the market, firms are able to apply for entry to the Assigned Risks Pool (ARP) for a period of two years. At the time of writing, there are only three ICAEW firms in the ARP, which reflects the much lower claims experience of our firms compared with some other professions.
- 3.44. We monitor compliance with the PII regulations through our system of annual returns and QAD reviews. The Professional Indemnity Insurance Committee oversees compliance with the PII regulations, dealing with issues arising on a case-by-case basis and overseeing firms' entry into the ARP.

Complaints and discipline

- 3.45. ICAEW has processes in place for dealing with complaints about members, provisional members, member firms or affiliates who may have breached our bye-laws or regulations, or failed to comply with our Code of Ethics. We will consider complaints that have been raised about members by their clients, other accountants, other regulators, the general public or ICAEW staff.

Assessment and conciliation

- 3.46. ICAEW is committed to resolving complaints as swiftly as possible and in line with best practice. Therefore, when a complaint is received, it is routed first to an assessor who determines whether the matter is of disciplinary interest. If the complaint cannot be taken forward – eg, because the accountant who is the subject of the complaint is not an ICAEW member – this will be explained to the complainant. If further action is required but the complaint is of more minor nature, attempts may be made to resolve the complaint by way of conciliation – eg, by way of an apology, redress or remedial action. At the time of writing there are currently five assessors (all of whom hold professional qualifications) and two conciliators trained in mediation and conciliation.
- 3.47. If the complaint appears to be more serious or if there appears to be no possibility of a conciliated outcome, the complaint will be referred to a case manager for investigation.

² With the exception of Appendix A – Supplemental guidance for the Tax Practitioner – which has been submitted for Treasury approval separately.

Investigation Committee

- 3.48. If, after investigation, the case manager considers there may be a case to answer (or if the complainant so insists) the complaint will be referred to the Investigation Committee (IC). The IC consists of at least 14 members of whom at least one quarter must be lay (although in practice normally a third of the committee are non-accountants). There are currently 19 members of the IC. Council members are not allowed to serve on the committee.
- 3.49. In less serious cases, the IC may issue a caution if it considers that the complaint is made out and some formal mark of disapproval is appropriate. A caution, while not published, forms part of the disciplinary record of the member/firm and is disclosed to enquirers. Alternatively, the IC may determine that although there is a prima facie case to answer, no further action is required.
- 3.50. In more serious cases where a complaint is admitted, the IC may issue a consent order with the agreement of the member or firm. This may result in the member being reprimanded or severely reprimanded, and having to pay a fine and a sum by way of costs to ICAEW.
- 3.51. If a member or firm does not accept a consent order, the case will be referred by the IC to the Disciplinary Committee (DC).
- 3.52. If the case is so serious that the individual's continued membership is threatened, the case will always be referred to the DC.
- 3.53. In cases where the IC considers that the complaint is not made out and that there is therefore no case to answer, the complainant is entitled to have the matter referred to an independent reviewer of complaints who is a non-accountant. The reviewer of complaints may ask the IC to reconsider the matter if, in their opinion, one of the following conditions apply:
- fresh evidence has been received since the date of the finding that is of a material nature;
 - either ICAEW staff or the IC have failed to follow proper procedure and the IC's consideration of the complaint has been prejudiced as a result;
 - there is reason to suspect that a member of the IC involved in considering the complaint was not independent and the committee's consideration of the complaint was prejudiced as a result; or
 - the IC's finding was not one that could reasonably have been arrived at on considering the fact and matters before it.

Disciplinary Committee

- 3.54. The DC has at least 14 members, at least one quarter of whom must be lay members. For hearings they sit in tribunals of three. There are currently 19 members of the DC.
- 3.55. If a matter is referred to the DC, there will be a hearing in accordance with the Disciplinary Bye-laws (Annex 2). The case for the IC is presented by ICAEW's Resolution team or independent counsel. The member is entitled to be represented by a lawyer or another ICAEW member, or by any other person at the DC's discretion.
- 3.56. If the DC decides that the case is proved, it may order a disciplinary penalty in accordance with the bye-laws. These include reprimands, fines, the removal of a member's practising certificate and, ultimately, exclusion from membership.
- 3.57. Members can appeal against a decision or order of the DC to the Appeal Committee whose remit and powers are described in paragraphs 3.15 to 3.16 above.

Penalties

- 3.58. When deciding whether a penalty is required and, if so, what level of penalty may be appropriate, the regulatory and disciplinary committees refer to the *Guidance on Sentencing*, a copy of which is contained in Annex 14. The guidance, which is reviewed annually, provides a structured framework for committee members when they decide on sentencing. It is intended to ensure that decisions are reached through a fair and reasoned process, and that the approach to sentencing is consistent and proportionate across committees. The principles that underpin sentencing policy are that penalties should be used to:
- protect the public;
 - maintain the reputation of the profession;
 - correct and deter misconduct; and
 - uphold the proper standards of conduct in the profession.
- 3.59. The framework states that, in considering what level of penalty to impose, a tribunal should consider:
- the category and type of behaviour that corresponds to the complaint (eg, dishonesty, financial mismanagement, breach of bye-laws and/or regulations etc)
 - the seriousness of the complaint;
 - what penalties are available;
 - any aggravating or mitigating factors;
 - any factors that are personal to the defendant; and
 - whether an ancillary order ought to be made in relation to factors such as costs, fees or publicity.

Publicity

- 3.60. Hearings of the Disciplinary Committee and Appeal Committee are open to the public unless, exceptionally, a tribunal decides otherwise. When an adverse finding and order is made by the IC or the DC (including consent orders), a record of the decision will be publicised on ICAEW's website and in other professional publications. This means there will be publicity in all cases where a finding and order is made. There is a power available to the tribunal to direct the omission of the defendant's name, but this power is rarely exercised.

4. DESIGNATION AS AN APPROVED REGULATOR

Rationale

- 4.1. ICAEW is applying to become an approved regulator for probate activities under Part 2 of Schedule 4 of the Act. In making this application, we seek only to be able to accredit firms wishing to apply for a grant of probate or letters of administration (ie, non-contentious probate work).³ We do not wish to accredit firms to oppose an application for a grant of probate or letters of administration.
- 4.2. We are making this application in the knowledge that a number of ICAEW members are already engaged in some of the activities related to probate. Members routinely provide advice on issues such as trust planning and inheritance tax, and conduct estate administration either for private clients or for solicitors on a sub-contract basis.
- 4.3. However, as probate is a reserved legal activity⁴, it is illegal for persons to engage in probate unless duly authorised. So although chartered accountants may carry out many of the activities ancillary to the application for a grant, they are precluded from undertaking that aspect of probate work for a fee.
- 4.4. We consider that our application to become an approved regulator for probate activities is consistent with the Act's regulatory objectives of promoting competition and increasing access to justice. It will promote diversity in the legal services market by providing, for the first time, an opportunity for our members to enter the market and deliver probate services directly to consumers. It will enable our firms to provide a more integrated service to clients who seek the full range of probate services from one provider, facilitating more competitive pricing and creating greater efficiencies in service delivery.

Who we will accredit as authorised firms

- 4.5. Our proposed probate regulations contain eligibility requirements for firms wishing to become accredited for probate (whether authorised or licensed). In accordance with the Act, firms wishing to become authorised will be those in which all principals and owners are individually authorised to carry out probate work.⁵ They may be authorised by us or another approved regulator.
- 4.6. Our expectation is that the vast majority of firms wishing to become authorised will be either sole practitioners or small to medium-sized firms with a limited number of principals. We do not expect large firms, which may have complex company structures, to seek individual authorisation for each principal and owner.
- 4.7. This expectation is supported by evidence we obtained through market research.⁶ At the request of the LSB, we conducted a survey of all firms in 2011 excluding the very largest. Extrapolating these results indicated that approximately 250 firms might seek

³ By way of example, 'non-contentious or common form probate business' is defined in section 128 of the Senior Courts Act 1981 as 'the business of obtaining probate and administration where there is no contention as to the right thereto, including -

(a) the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, (b) all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and (c) the business of lodging caveats against the grant of probate or administration.'

⁴ Under section 12(1) of the Legal Services Act 2007 the other reserved legal activities are: the exercise of rights of audience; the conduct of litigation; reserved instrument activities (eg, conveyancing); notarial activities and the administration of oaths.

⁵ Although a firm may still be authorised if another body is a principal of, or has an interest in, a firm, but non-authorised persons are only able to exercise (or control the exercise of) less than 10% of the voting rights in that other body. Therefore, certain de-minimis holdings will be possible.

⁶ An online survey was conducted 7-16 November 2011 among Practice Assurance contact principals. The survey was sent to a random sample of 2,770 firms, approximately 10% of which responded. The results were then extrapolated to reflect the wider universe of firms. As a self-selecting sample, however, the results of this survey should be treated with caution.

accreditation from us if we became an approved regulator and licensing authority. Approximately 150 of these firms would be sole practitioners seeking authorised firm status. Of the other approximately 100 larger firms (of two or more principals) the majority indicated that they would wish to become licensed firms.

- 4.8. Almost two thirds of the sole practitioners and nearly one third of the larger firms were not currently engaged in any probate-related activity (eg, estate administration). For those that were engaged in some probate-related activity, the level of activity was relatively low. Approximately half of the firms were unable or unwilling to identify separately the income received from these services; and for those that could, fees for probate-related services were generally 1% or less of their total fee income.
- 4.9. Of those firms engaged in estate administration (ie, those that acted as executor or assisted an executor in the administration of the estate) the majority were only dealing with only one or two estates. The vast majority of these firms (89%) did not hold estate assets or monies.
- 4.10. The majority of firms that indicated that they would be likely to apply for accreditation indicated that they would also increase the range of probate-related services that they would offer (although interest in providing will-writing services remained relatively low in comparison with the other probate-related activities, especially among sole practitioners).
- 4.11. Given the current low level of fee income from these services, our view is that, for the vast majority of firms, such services will form only a small proportion of their overall business and that their core activity will remain the provision of accountancy services. On this basis, and given the regulation to which firms will be subject, we consider that these firms will not pose a significant risk to consumers in the market (which according to HMRC statistics consisted of approximately 270,000 estates in 2008/2009).
- 4.12. As estate administration is not a reserved legal activity, we will not be seeking to authorise firms/individuals for this work. However, we have included estate administration within the scope of our regulatory arrangements following discussions with the LSB and the Legal Services Consumer Panel where this is undertaken by accredited probate firms. Our monitoring will be carried out through ICAEW's PA scheme and will extend to these firms (whether authorised or licensed) where estate administration work forms a significant part of the firms' fee income. Our arrangements for PII, compensation and complaints-handling will also apply. Firms not accredited for probate but which carry out estate administration work will also be covered by the PA scheme on a significance of fee basis.

Accountancy-led practices

- 4.13. Although our regulations have been framed widely so as not to restrict the types of firm that will be able to apply for accreditation, we expect that, in the main, firms will be accountancy-led. This should ensure that, from the outset, we will have a relationship with the firms we regulate. Firms wishing to become authorised are likely to be small member firms that are already subject to our Code of Ethics and existing regulatory and disciplinary arrangements. They will be familiar with the systems we have in place for monitoring compliance, along with our processes for quality assurance.
- 4.14. Importantly, we will also have a profile of firms seeking accreditation from us detailing both their complaints history and intelligence gathered through previous annual returns. This will mean that we will have a sound knowledge of the firms we accredit, which will inform our assessment of risk in determining each application for accredited probate firm status.

The authorisation process

The application

- 4.15. Our draft probate regulations require applicants to provide us with any information we consider necessary to assess the firm/individual's suitability for probate work. Provided each applicant can demonstrate to us that they are 'fit and proper', have suitably qualified persons, and agree to adhere to our regulatory framework, we would expect to grant an application without restrictions or conditions.
- 4.16. We will require the following information, among other matters, on the application forms:

Firm structure and staff	<ul style="list-style-type: none"> • Firm name and number • The firm's practice type • Principal and other office addresses • Details of the principals, including those who wish to become authorised individuals • Details of the firm's designated contact partner • Details of the firm's management and ownership structure • Summary details of all staff, including non-authorised individuals and support staff • Arrangements for diversity monitoring and existing diversity data.
Authorised individuals	<ul style="list-style-type: none"> • Details of all individuals wishing to become 'authorised individuals' who can undertake, or control the undertaking of, probate activities (excluding sub-contractors or consultants) • Details of each individual's probate qualification • Details of each individual's experience in conducting probate work, including details of the firms in which they previously employed or a principal. • If the individual is authorised for probate by another regulator, details of that regulator and the applicant's membership number • Declarations by each individual that they will comply with the probate regulations at all times • Details of the types of activity that will be used by the individual to maintain competence and keep up to date with developments in probate law and practice.
Business services	<ul style="list-style-type: none"> • Details of any probate-related services the firm intends to deliver, in addition to probate work.
Financial	<ul style="list-style-type: none"> • Total fee income from all sources for the last financial year • Estimated fee income for probate work and probate-related services.
Statements	<ul style="list-style-type: none"> • A statement on how the firm's application will promote access to justice • A statement identifying, where appropriate, any risk to the regulatory objectives and professional principles and the steps the firm will take to mitigate those risks • A statement outlining the steps the firm will take to ensure that authorised individuals can conduct probate work independently and free from improper

	<p>influence by non-authorised persons</p> <ul style="list-style-type: none"> • Confirmation that the firm will ensure that it has appropriate arrangements in place for dealing with such issues as training, supervision, discipline and complaints-handling • Confirmation that sole practitioners have arrangements in place for the appointment of an alternate in the case of incapacity or death • Confirmation that the contact partner will notify ICAEW immediately of any matter that indicates the firm has ceased, or may in the future cease, to comply with the probate regulations.
PII	<p>Full details of the firm's PII cover.</p> <ul style="list-style-type: none"> • Confirmation that cover has been obtained from an ICAEW participating insurer • Copy of the PII policy schedule.
Fit and proper declarations	<p>Relating to the firm:</p> <ul style="list-style-type: none"> • declarations concerning the firm's financial integrity and reliability (covering a period of 10 years) • a declaration concerning any civil liabilities over the last five years • declarations concerning the firm's reputation and character. <p>For the individuals wishing to become authorised for probate work:</p> <ul style="list-style-type: none"> • declarations concerning the individual's financial integrity and reliability • a declaration concerning any civil liabilities • declarations concerning the individual's reputation and character.
Declarations	<ul style="list-style-type: none"> • A declaration confirming that the firm will comply with the probate regulations at all times • A declaration confirming that the firm will not hold itself out as an accredited probate firm until it has received confirmation in writing that the application has been successful • A declaration confirming that the firm will establish and maintain internal processes for handling complaints and will deal cooperatively with the Legal Ombudsman and comply with his office's directions as necessary • A declaration confirming that the firm will deal openly and cooperatively with ICAEW, and will inform us promptly of any issue concerning the firm as required by the regulations • A declaration acknowledging that we may make enquiries of, or about, the firm as necessary • A declaration acknowledging that we may publish or

4.17. To ensure that the process is as simple and transparent as possible, we will provide guidance on our website on how we will determine applications, along with our fee structure. Information will also be provided on the mechanisms applicants can use to apply for a review of our decision if they are dissatisfied with the outcome of their application.

4.18. Copies of our draft application forms for firms and individuals wishing to become accredited for probate work are contained in Annex 15.

Qualification requirements

4.19. All principals and employees wishing to undertake, or supervise the undertaking of, probate work will need to comply with our qualification requirements and be approved as 'authorised individuals'.

4.20. As set out in regulation 4.1a of our draft probate regulations, applicants will need to satisfy us that they have attended a course covering both law and practice in relation to wills, probate and estate administration. We will need to be satisfied that any course or training programme has covered at least the following subjects:

- a general introduction to the Legal Services Act 2007 and how it applies to probate work;
- a general introduction to the law of property, equity and trusts;
- the purpose of a grant and its effect;
- the types of grant;
- who can apply for a grant of probate or letters of administration;
- consideration of the validity of wills;
- intestacy provisions;
- obtaining information about the assets and liabilities of the estate;
- the finalisation of inheritance tax, corrective accounts and obtaining a clearance certificate from HMRC;
- the completion of papers for application for a grant;
- the completion of the oath and filing the papers; and
- the administration of the estate once probate or letters of administration have been granted.

4.21. Members of ICAEW and other accountancy professional bodies with which we have reciprocal arrangements will be entitled to apply for probate accreditation via this route. As reflected in regulation 1.6, these bodies are:

- Institute of Chartered Accountants of Scotland
- Chartered Accountants Ireland
- Institute of Chartered Accountants in Australia
- New Zealand Institute of Chartered Accountants
- South African Institute of Chartered Accountants
- Institute of Chartered Accountants of Zimbabwe
- Canadian Institute of Chartered Accountants.

4.22. We will also recognise probate qualifications issued or recognised by another approved regulator, and consider appropriate qualifications from a wider category of applicants who are able to demonstrate that they have the requisite knowledge and/or experience to deliver probate work with professionalism and competence (see draft regulations 4.1b and 4.1c).

4.23. In developing our qualification requirements, we carried out an assessment of the skills practitioners require to conduct non-contentious probate work. We concluded that the rigorous training and existing competencies of chartered accountants in the fields of auditing, accounting and taxation make them ideally suited for probate work (which

essentially involves collating information about a deceased person's estate; calculating and paying any inheritance tax, and submitting the appropriate form to the probate registry). In our view, the same is true for the related activities of tax and trust planning and estate administration.

- 4.24. On this basis we sought to set our qualification requirements at a level which we consider is appropriate to ensure that those persons undertaking and supervising the conduct of probate work are competent to do so, without restricting market entry by imposing unnecessary and burdensome qualification requirements.
- 4.25. On grounds of proportionality, we have elected not to adopt the qualification requirements of some of the other approved regulators, some of which involve detailed study of the laws governing wills, probate and estate administration. We consider that non-contentious probate work is relatively straight forward, and are mindful of the fact that it is routinely undertaken by lay persons without formal training. We do not see non-contentious probate work as posing a risk to the administration of justice or the rule of law, and therefore do not consider that it necessitates substantial prior training.
- 4.26. We see the above qualification requirements as building on the training and existing skills of chartered accountants and have therefore elected to limit the category of applicants that can apply for accreditation via a short course in wills, probate and estate administration. We have limited this to ICAEW members and members of other international institutes whose chartered accountancy qualifications we recognise. Individuals who are not chartered accountants and members of these professional bodies will be unable to act as authorised individuals, unless they are authorised to carry out probate work by another approved regulator or hold other appropriate qualifications and/or experience. We consider that this is a vital component in ensuring that the consumer and public interest is protected and that probate work is conducted by persons of sufficient competence.
- 4.27. Contained in Annex 16 is an example of a course that we would consider acceptable for the purpose of our qualification requirements. It is a three-and-a-half-day learning programme which concludes with objective testing to assess candidates' knowledge and understanding of the course content.
- 4.28. The focus of the course would be on providing candidates with a comprehensive overview of the law governing wills, probate and estate administration. More detailed information would be provided in the accompanying course material, and we understand that candidates would also be directed to other resources that could be used in practice to obtain further information and/or keep abreast of changes to law and practice in the area.

The contact partner

- 4.29. We will require each firm we accredit to have a contact partner. This should be an individual with sufficient seniority and influence within the firm to ensure that his/her instructions are acted upon. It is recommended that the contact partner be a principal and an authorised individual and, in the case of a sole practice, they will be the sole practitioner.
- 4.30. This contact partner will play a vital role in ensuring the firm's compliance with our regulatory framework. They will be responsible for ensuring that an annual compliance review is carried out, and that the firm submits an annual return confirming its compliance with the probate regulations and activities as an accredited probate firm.
- 4.31. The contact partner will also play an important role in ensuring that lines of communication are maintained with us as a regulator. They will be responsible for corresponding with us and providing information and/or documentation to us as required.

Probate affiliates

- 4.32. In all our regulated areas, if a firm includes principals who are not ICAEW members, we require them to become affiliates. This is so we are able to take regulatory or disciplinary

action against such persons if necessary (whether they are an individual or body corporate).

- 4.33. In the same manner, we are proposing that principals of firms wishing to become accredited for probate become ICAEW affiliates if they are not members of ICAEW or one of the bodies listed in chapter 8 of our draft regulations, ie:
- Institute of Chartered Accountants of Scotland (ICAS);
 - Chartered Accountants Ireland (CAI); or
 - another approved regulator.
- 4.34. If a principal is already an ICAEW affiliate, an accredited probate firm, a registered auditor or a DPB-licensed firm, they will not be required to become a probate affiliate under the probate regulations.
- 4.35. Although probate affiliate status will not confer ICAEW membership on the applicant, it will bind the person to the probate regulations, our Code of Ethics and our arrangements for conduct and discipline.
- 4.36. We will only grant probate affiliate status if we are satisfied that the applicant is a fit and proper person who has agreed to be bound by regulations and paid an annual registration fee.

Fees

- 4.37. We have developed a business plan for probate, which is contained in Annex 17 and is discussed further in Part 7 below. This business plan provides background on the methodology we have used to calculate our fees.
- 4.38. Although there is provision in our regulations for an application fee, it is not our current intention to charge one. We will, however, charge the relevant annual registration fee at the point of application, which will be refunded to the firm if the application is declined. Currently, it is proposed that the annual registration fee will start at £599 for a sole practitioner and will increase depending on the size of the firm (ie, the number of offices, principals and authorised individuals).
- 4.39. In cases where we need to carry out a site visit, or where significant additional work is needed to determine a firm or individual's application or to undertake further monitoring activities, we may charge an additional fee. We will also charge firms a separate compensation levy on an annual basis. It is proposed that the minimum charge for a sole practitioner will be £399, with higher charges for other firms based on their size and structure.
- 4.40. The method by which we have calculated our fees is aimed at being cost-reflective and is consistent with the approach currently applied in our other regulated areas. Our intention has been also to set fees at a level which will not act as a disincentive to firms (particularly smaller firms) wishing to enter the market.

Determining applications

- 4.41. We will aim to acknowledge receipt of all applications within two working days and to determine the majority of applications within four weeks. We will monitor our performance against this target and will make the results available on our website for transparency.
- 4.42. However, in accordance with the Act, we recognise that we will have six months to determine each application (beginning on the day that all information required on the application form is received). This timeframe may then be extended to nine months by issuing an extension notice to the applicant. If we need to do this in particularly complex cases, or in cases in which we require further information, we will issue a notice to the applicant detailing the reasons for the extension.
- 4.43. We will delegate straightforward applications to appropriately trained members of staff for decision. More complex applications will be referred to the Probate Committee for

determination, and the Probate Committee will also consider applications in cases where accreditation is to be granted subject to restrictions. The committee's powers are discussed in more detail in paragraphs 4.51 to 4.56 below.

4.44. In determining whether to grant an application, or to grant the application subject to conditions or restrictions, we will take into account the following factors (among others) in assessing risk.

- The nature of the work proposed to be undertaken by the applicant (including any probate-related activities).
- The scale of the firm's likely fee income for probate and probate-related services.
- Whether the firm anticipates that client and/or estate monies will be held in connection with probate work.
- The qualifications of the individuals intending to undertake and supervise probate work.
- Fit and proper considerations (both at a firm and individual level).
- The firm's arrangements for maintaining competence through CPD.
- Confirmation that the firm has appropriate arrangements in place for dealing with issues such as record-keeping, supervision and complaints-handling.
- Declarations by the firm that they will comply at all times with our regulations, and will inform us of any issues which may compromise its ability to comply.
- The adequacy of the firm's PII cover.

4.45. We will also consider generally the extent to which granting the application could compromise the Act's regulatory objectives, particularly those of consumer protection and the public interest. Although we will have regard to the applicant's access to justice statement, we envisage few cases, in a probate context, where these considerations would pose a threat to the regulatory objectives such that we would want to decline the application.

4.46. When we grant accreditation, we will aim to inform the firm as soon as practicable, and at the latest within seven days of the decision. If accreditation is granted (with or without conditions) it will come into effect immediately. It will be issued for an indefinite period, subject to the applicant's ongoing compliance with the probate regulations and payment of the annual registration fee.

4.47. If an application is refused or issued subject to conditions or restrictions, applicants will have the right to apply for a review of the decision as discussed in paragraphs 4.57 to 4.58 below.

Data verification

4.48. Although the onus will be on firms to provide us with a full account of their status, we will put in place processes to verify the accuracy of information we receive. Largely this will be based on information we already hold about the firm that has been gathered through previous annual returns. However, we will also run checks on each applicant against our disciplinary records, and check the records of any authorised person with their relevant approved regulator. We will also run checks against the FSA's Shared Intelligence Service (SIS) and the LSB's register of disqualified persons.

4.49. In addition, applicants applying for 'authorised individual' status under regulation 4.1(c) who are not ICAEW members, members of other qualifying international accountancy bodies or other approved regulators, will be subject to basic Criminal Record Bureau (CRB) checks. These will contain details of all current criminal convictions held on the Police National Computer, but will not include details of any spent convictions or cautions.

4.50. We may elect to carry out an initial review of a firm and, in those circumstances, we would reserve the right to charge a fee. Our aim in conducting the review would be to gain an understanding of the firm's ownership and management structure, and its business and income streams. This will inform our assessment of risk and whether any

conditions or restrictions on the firm's accreditation may be required. It will also inform our requirements for subsequent monitoring.

Probate Committee

- 4.51. The Probate Committee will be responsible for overseeing ICAEW's regulatory framework for probate. As set out in our draft probate regulations, the committee will comprise ten members, with a 50:50 split between lay and non-lay members. A lay person will be defined as someone who has never qualified or practised as a professional accountant, whether chartered or otherwise. Solicitors and persons with legal training will also be excluded. The balance of the committee will be made up of practitioners with expertise in probate, and the chair of the committee will be a lay person and will have a casting vote where necessary.
- 4.52. The composition of the committee is intended to strike a balance between those members who have a sound technical knowledge of probate and accountancy-related issues (such as inheritance tax) and a strong lay membership. We consider that this proportion of lay members will provide the public with the requisite assurance that the committee's decision-making processes are fair and transparent.
- 4.53. The Probate Committee will have a range of responsibilities in relation to probate, which will include:
- considering applications by firms or individuals for accreditation;
 - granting accreditation subject to conditions or restrictions;
 - imposing restrictions or conditions on an accredited probate firm;
 - suspending or withdrawing accreditation;
 - granting or reviewing dispensations from the regulations;
 - considering applications by firms to modify accreditation;
 - reviewing QAD reports and returns;
 - making appropriate enquiries to confirm that firms and individuals are complying with the probate regulations; and
 - issuing regulatory penalties with the consent of the firm.
- 4.54. As set out in chapter 9 of our proposed regulations, some of these powers may be delegated to appropriately trained members of staff. However, if an application for accreditation is to be rejected, or granted subject to restrictions, these powers will not be delegated and will be reserved to the Probate Committee only.
- 4.55. We will only impose conditions or restrictions in cases where we consider that additional safeguards are needed to protect the interests of consumers or the Act's regulatory objectives. These may include restrictions on the types of probate work a firm may undertake; a requirement on the firm to submit more frequent returns; or requirements for targeted CPD.
- 4.56. As a matter of policy, an application would only be refused if we considered that the risk to the regulatory objectives were so significant that it could not be mitigated or eliminated by the imposition of a condition or a restriction on accreditation.

Review of decisions

- 4.57. If a firm or individual is dissatisfied with a decision of the Probate Committee or ICAEW to reject their application, or to approve it subject to conditions or restrictions, they will have the right to apply for a review. The Review Committee will consider the matter afresh and consider any new material put forward by the applicant. It will then be able to make any decision that ICAEW could have made. The Review Committee's remit is described further in paragraphs 3.12 to 3.14 above.
- 4.58. Thereafter, the applicant will have the right to appeal to the General Regulatory Chamber of the First-tier Tribunal (GRC) if they remain dissatisfied with the Review Committee's decision. In these circumstances, the Review Committee's decision will be postponed until the GRC either confirms or varies the decision, or directs that the

Review Committee reconsider the matter. The GRC's jurisdiction and remit is described further in paragraphs 5.134 to 5.139 below.

Post-authorisation arrangements

- 4.59. The firms and individuals we accredit for probate will be bound to comply with our by-laws, regulations and guidance at all times. The key areas of compliance are outlined below.

Code of Ethics

- 4.60. As with ICAEW members and member firms, accredited probate firms will be bound by our Code of Ethics, which is set out in Annex 8 and discussed in paragraphs 3.17 to 3.22 above. Critically, this will place a duty on firms and individuals undertaking probate work to act in a way that is consistent with the five fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour.
- 4.61. By adhering to these principles and applying the underlying ethical framework to probate work, accredited probate firms should maintain and promote the professional principles contained in section 1 of the Act, which require the authorised person to:
- act with independence and integrity;
 - maintain proper standards of work;
 - act in the clients' best interests; and
 - maintain confidentiality of clients' affairs.
- 4.62. While the code's principle of objectivity precludes members from acting in the client's interests if to do so would be unlawful, in the probate context it will function to promote and protect the client's interests because it will ensure that probate work is carried out free from bias and undue influence.
- 4.63. Under the code, accredited probate firms will be required to take care in conducting probate work, and will have a duty to ensure that they act with integrity and keep clients' affairs confidential.

Conduct of probate work

- 4.64. Our Code of Ethics also places a duty on members to engage only in services they are competent to perform. Therefore, although we may grant accreditation without conditions or restrictions, the onus will be on firms to ensure that they only handle matters that fall within their sphere of competence. If we believe individuals or firms are acting outside their area of knowledge, we will put in place safeguards to ensure that the quality of probate work is maintained and the interests of clients and the public are protected.
- 4.65. Similarly, firms will be responsible for demonstrating that they have proper processes in place to ensure the appropriate supervision of employees who carry out probate work on behalf of authorised individuals. We will require firms to confirm on their application form that they have arrangements for supervision, and will monitor the effectiveness of these processes through monitoring reviews and our PA scheme.
- 4.66. If at any time a firm ceases to have a principal or employee who is an authorised individual, the regulations require the firm to stop undertaking probate work immediately until another principal or employee becomes authorised.
- 4.67. All accredited probate firms will be obliged to deal with us in an open and cooperative manner. This will include keeping us fully informed of the identity of those individuals undertaking probate work, to changes in the firm's management and ownership structure, and to any issues that arise that might prevent the firm from complying with its regulatory responsibilities.
- 4.68. Firms will also be required to set out on the application form their processes for preventing anyone who is neither an authorised individual nor a person working under

their supervision from having any improper influence over the conduct of probate work. This is reflected in our proposed probate regulations 2.4h, 2.7b and 3.5.

- 4.69. We consider that these obligations are consistent with better regulation principles insofar as they have been set at an appropriate level to ensure that the quality of probate services is maintained, while at the same time not limiting the ability of firms to innovate and deliver a range of services to their clients.

Continuing professional development

- 4.70. In accordance with regulation 3.4, firms that we accredit for probate will be required to ensure that all principals and employees undertaking authorised work (ie, probate and estate administration) are, and continue to be, competent to do so. This regulation seeks to ensure that all individuals undertaking or supervising probate work remain up to date with changes to law and practice, and receive ongoing training and development as appropriate.
- 4.71. We will monitor compliance with this regulation and our CPD regulations (Annex 9) through our system of annual and member profile returns and QAD reviews. Firms will be expected to confirm how they are complying with CPD requirements, and non-compliance will be dealt with through an escalating range of enforcement measures from informal reminders through to action in accordance with our Disciplinary Bye-laws (Annex 2).

Clients' money and other property

- 4.72. Regulations 3.8 and 3.9 make provision for firms receiving property in connection with authorised work. They provide that any firm receiving property in connection with probate or estate administration must ensure that all reasonable steps are taken to keep the property safe and that details of the property are recorded. It is also recommended that insurance cover is obtained as appropriate.
- 4.73. The regulations also provide that any property may only be released on the client's written instructions, and that any client or estate monies are held in accordance with ICAEW's clients' money regulations (although these must be kept separate from other clients' monies). As set out in Annex 12 and discussed in paragraphs 3.36 to 3.37 these regulations place an obligation on firms to (among other matters) place any client monies in a separate client account; to keep full records of monies paid into and out of all client bank accounts, and to carry out a reconciliation of all client bank accounts at least every five weeks.

Record-keeping

- 4.74. Regulation 3.10 places an obligation on firms to ensure that they maintain appropriate records of authorised work undertaken on behalf of clients. The guidance to the proposed regulation clarifies that these records may be electronic, but that a firm must be able to access these records easily, regardless of the mechanism used. There will be an expectation that the records will be kept for at least six years.

Regulatory conflict

- 4.75. The proposed regulations place a duty on firms to inform us promptly (within 10 business days) if a requirement of another regulator (including an approved regulator or other external regulator such as the FSA) might cause them to cease complying with ICAEW's probate regulations. We will take steps to mitigate the risk of regulatory conflict in these circumstances and are a party to a memorandum of understanding (MoU) with the other approved regulators and professional bodies. This is discussed further in Part 9 below.

Cessation of practice

- 4.76. The proposed regulations also place a duty on firms to have appropriate arrangements in place to protect clients' interests on cessation of practice. Guidance to the regulations requires that, in cases where the accredited probate firm is a sole practice, the firm

appoints an alternate firm to assume conduct of ongoing work in the event of the practitioner's incapacity or death.

Monitoring compliance

Annual review and returns

- 4.77. Our proposed regulations place a requirement on accredited probate firms to review, at least annually, how they are complying with the regulations. The contact partner will be responsible for this review, which is intended to encourage firms to assess critically the effectiveness of their processes for compliance.
- 4.78. The review will also enable firms to prepare more accurately any periodic return that may be required. As set out in our proposed regulations, we will require firms to submit a return at least once annually in order to monitor their compliance with our arrangements. In relation to probate-related activities, this return will require firms to provide us with up-to-date data to confirm:
- the identity of persons authorised to carry out probate work and their status;
 - the profile of probate and related work undertaken by activity;
 - the volume of probate transactions;
 - total turnover and turnover in relation to probate and estate administration;
 - financial information in relation to client and/or estate monies held;
 - details of the firm's appointed alternate (if relevant);
 - details of any complaints that have been received or investigations undertaken and their outcome;
 - that authorised individuals (both principals and employees) have complied with our CPD requirements; and
 - that any matters raised in the previous annual compliance review have now been addressed.
- 4.79. These and other questions are contained in draft probate annual return questions in Annex 11. These questions may change in time if we identify new emerging risks in the regulatory environment.

Reviews and Practice Assurance

- 4.80. QAD will also carry out monitoring reviews of firms on a periodic basis. The frequency of reviews will depend on risk, but QAD will review the majority of firms approved or licensed by us for probate within the first 24 months of their accreditation. We will not charge for this initial review.
- 4.81. Subsequent reviews will be tailored to take account of the QAD's assessment of risk. This would include consideration of (among other matters):
- information from the firm's annual return;
 - the firm's size;
 - the volume and complexity of probate work being undertaken;
 - whether clients' or estate monies are being held in relation to probate work;
 - the value of clients'/estate monies held;
 - the firm's complaints-history; and
 - the disciplinary record of the firm and any authorised individuals.
- 4.82. In addition, the firms we accredit for probate will be subject to our PA framework. As discussed in paragraphs 3.26 to 3.27 above, this scheme is designed to provide members with guidance and support in developing and maintaining quality processes in their practices.

Modifications and dispensations

Dispensations

- 4.83. Firms accredited for probate will have a duty to inform us in writing within 10 business days of a situation arising that may mean that they cannot, or expect not to be able to, comply with one or more of the regulations. We will expect firms to provide us with full details of the situation and to outline the steps they are taking to rectify the issue.
- 4.84. In these circumstances, firms will be able to apply in writing for a dispensation from the requirement to comply with the regulations. We will aim to acknowledge receipt of the application within two working days and to submit it to the Probate Committee for consideration as soon as practicable, and in any event within a further 10 working days, provided all necessary information has been obtained.
- 4.85. The Probate Committee may grant a dispensation of no more than 90 days, subject to being satisfied that it is reasonable to do so having regard to the public interest and the interests of any client.
- 4.86. If the Probate Committee rejects an application for a dispensation, it will inform the accredited probate firm of its reasons in writing within 10 business days. The firm will then be entitled to apply to the Review Committee for a review of the decision (as set out in paragraphs 3.12 to 3.14 above).

Modifying accreditation

- 4.87. Accredited probate firms will be entitled to apply at any time for an order modifying their accreditation in accordance with regulation 2.12. We would require firms to submit their request to us in writing, outlining in full the situation and the reason for their request. As with the process for dispensations, we will aim to acknowledge the application within two working days, and to submit it for consideration to the Probate Committee within 10 working days, provided all necessary information has been obtained.
- 4.88. Although we will not charge for this process, we will reserve the right to apply a fee if substantial staff time is needed to determine the application (for example, if a visit to the firm is required or if the application contains substantial supporting information). In these cases, the level of the fee will be determined by the Probate Committee.
- 4.89. As set out in regulation 2.13, the Probate Committee may grant the modification, or modify accreditation on such other terms as it considers appropriate. If the Probate Committee rejects the application, it will inform the accredited probate firm or individuals of its reasons in writing within 10 business days. The accredited probate firm will then be entitled to apply to the Review Committee for a review of the decision (as set out in paragraphs 3.12 to 3.14 above).

Complaints-handling arrangements

- 4.90. Our proposed probate regulations outline a clear framework for complaints-handling in accordance with the Act. Firms will be required to maintain an internal complaints procedure and advise clients in writing of their right to refer matters to the Legal Ombudsman if they have a complaint. If matters are referred to the Legal Ombudsman, firms will need to cooperate fully with his investigation and comply with any decision.
- 4.91. In keeping with an outcomes-focused approach to legal services regulation, the regulations do not prescribe the steps that firms should take in seeking to resolve complaints. They provide firms with the freedom to resolve matters as they see fit, but contain some minimum requirements to ensure that clients' rights and interests are protected and that they are able to raise their concerns and access redress as appropriate.
- 4.92. The regulations require, for example, that in the event of a complaint, the matter should be investigated and dealt with in a fair, prompt, constructive and honest manner by a principal of the firm (or, in the case of a licensed firm, by the HoLP). This is intended to

promote clients' confidence that their concerns will be taken seriously by the firm and investigated thoroughly.

- 4.93. The regulations also incorporate the requirements set out for complaints-handling by the LSB and Legal Ombudsman. Firms will be required to maintain a separate complaints file, and to remind clients of their right to refer matters to the Legal Ombudsman either at the conclusion of the complaints process, or after eight weeks if the matter is not resolved to the client's satisfaction within that time.
- 4.94. As guidance, we have also included a recommendation that firms set out in writing the scope of their intended work at the beginning of the engagement. This is on the basis that many complaints arise out of a misunderstanding of what services the firm has been retained to do, progress in delivering those services and the costs involved. We advise that firms should ensure that the client understands and agrees to the process, and that they should keep the client updated as the matter proceeds. We see these measures as vital in helping firms avoid complaints, as well as promoting clients' understanding of their rights and duties during the legal process.
- 4.95. We also emphasise the importance of learning in relation to complaints and recommend that, at the conclusion of the complaints process, firms reflect on whether procedures or systems could be introduced or modified to avoid similar complaints arising in the future.
- 4.96. In our view, these arrangements should ensure that complaints about accredited probate firms will be dealt with fairly, effectively and in a timely and client-focused manner. Firms will retain the flexibility to resolve matters initially, but there will be transparency in complaints-handling as clients will be informed of their right to complain to the Legal Ombudsman at each stage of the process.

ICAEW and the Legal Ombudsman

- 4.97. As the Legal Ombudsman's remit will be limited to dealing with complaints of poor service by accredited probate firms, we will continue to be responsible for investigating issues of possible misconduct. These will be dealt with through our investigation and disciplinary processes outlined in paragraphs 3.45 to 3.60 above.
- 4.98. As with the other approved regulators, we will be willing to work collaboratively with the Legal Ombudsman and to share information where possible to avoid inconvenience and delay arising out of duplicated processes and evidential requirements. To assist in this process we would be willing to enter into a MoU with the Legal Ombudsman as has been the case with other approved regulators.
- 4.99. As a general rule, we understand that consumers will be referred first by firms to the Legal Ombudsman, but that they will be signposted back to us if the complaint involves an issue or issues of possible misconduct. In these cases, we will consider whether the issue is one that could give rise to possible disciplinary action under our Disciplinary Bye-laws, and we will refer consumers to other bodies as necessary during the initial assessment process.

Compensation and indemnification arrangements

Professional indemnity insurance

- 4.100. Firms we accredit for probate will be required to comply with our PII regulations as set out in Annex 7 and discussed in paragraphs 3.40 to 3.44 above. These will require firms to carry out an annual risk assessment to determine the level of PII that is suitable for their needs, and carry a minimum level of indemnity of at least £500k per claim. This is likely to be done in conjunction with the firm's PII brokers.
- 4.101. In arriving at this figure, we considered the information produced by HMRC on the value of estates arising out of deaths in the period 2008 – 2009 and reported before June 2011. Over 90% of these estates had a gross capital value of less than £500k, and the average gross value of all estates was £236k. It was on this basis that we concluded that a requirement for £500k PII per claim would be sufficient to protect the overwhelming

majority of consumers in cases of negligence, or fraud where there is one or more innocent principal.

- 4.102. We acknowledge that the PII requirements of other approved regulators may be greater than those which we propose. The Solicitors Regulation Authority, for example, requires solicitors to carry a minimum level of indemnity of £2m or £3m depending on the firm's structure. However, we understand that, historically, these limits were based on the compensation that might be due in complex personal injury cases, and that they were not driven by a need to protect probate clients as such.
- 4.103. In developing our regulatory arrangements, we have been conscious of the need to ensure that our proposals do not act as a deterrent to market entry. Accordingly, in considering our proposals for indemnification, we took note of the responses to our survey of firms in 2011. One of the key themes arising from this survey was the extent to which a requirement for increased PII could prevent smaller firms from applying for accreditation. This was particularly the case where firms did not expect probate and related work to generate a large income stream.
- 4.104. For these reasons, we have elected to require firms conducting authorised work (ie, probate and related estate administration) to hold at least £500k PII per claim (see probate regulation 2.10). We consider that the requirement for PII of this level balances the need for strong consumer protection on the one hand, with the Act's objective of promoting greater competition in the market on the other. Additionally, we would point out that these are minimum requirements only, and that the majority of medium-sized and large firms will carry PII at levels far in excess of these limits. In cases where the value of the estate is likely to exceed the level of insurance, firms will be required to notify their clients in writing at the beginning of the engagement that their PII is capped and their level of cover.

Compensation arrangements

- 4.105. We consider that there should be little risk to the consumer from firms engaging in probate work. We have analysed the steps and activities that need to be undertaken in preparing the papers for a grant of probate or letters of administration, and note that this is a largely an accounting and administrative exercise that should not require firms to hold client or estate monies or other assets.
- 4.106. In our view, risk may arise where firms are engaged in estate administration and hold estate monies following the grant of probate. Although PII should provide adequate protection for clients in cases of fraud where there is one or more innocent principal, there may be a need to provide redress for consumers in cases where PII is invalidated because the fraud has been carried out by a sole practitioner or two or more principals acting in collusion.
- 4.107. Although we consider it necessary to put these arrangements in place to comply with our regulatory responsibilities under section 28 of the Act,⁷ it should be noted that the historic experience with accounting firms demonstrates a particularly low risk environment.
- We are aware from data obtained from annual returns that few ICAEW accounting firms hold client monies and that, where held, the sums are low. A report produced in 2011 on firms holding clients' money indicated that, out of a total population of 12,672 firms, only 3,241 held any clients' money⁸. Of these firms, only 153 held more than £1,000, and the largest amount held by any one firm was £128,948 (in the case of a sole practitioner, however, this was just £2,505).

⁷ Section 28 of the Act places a duty on approved regulators in discharging their regulatory functions to act in a way that is, so far as is reasonably practicable, compatible with the regulatory objectives under section 1 of the Act; this includes the regulatory objective of consumer protection.

⁸ Of all firms holding clients' monies, 2,487 were firms of two or more principals; 754 were sole practitioners.

- Although firms already engage in estate administration and services ancillary to probate, we are aware of just 13 cases involving serious breaches of our clients' money regulations and/or a misappropriation of funds by members during the period January 2001 – December 2010. Since the public consultation in June, we have identified that just one of these cases related to professional trusteeship activities in connection with a Will Trust.
 - We have been informed by one PII broker that places a significant number of small ICAEW firms that it has been notified of just seven claims in relation to fraud/dishonesty involving ICAEW accounting firms or members since 2000 – only one of which has resulted in insurers paying damages.
- 4.108. This experience demonstrates that both the risk of defalcation and the amounts at risk are low among ICAEW accounting firms.
- 4.109. Nevertheless, in order to comply with the Act's requirements for compensation arrangements where individuals and firms engage in reserved legal activities, we propose to operate a compensation scheme which will be funded initially through Professional Standards' budget and underwritten by a master insurance policy. The ICAEW Probate Compensation Scheme will be a discretionary fund of last resort which will compensate clients in cases where a firm's own PII is invalidated.
- 4.110. As set out in chapter 3 of the Probate Compensation Scheme regulations (Annex 18) grants will be made wholly at the discretion of the Probate Committee where an applicant⁹ is able to satisfy the committee that they have suffered loss as a consequence of:
- fraud or other dishonesty on the part of the accredited probate firm, or any of its principals or employees, in carrying out authorised work (ie, probate and/or estate administration); or
 - a firm's failure to account for monies received in connection with authorised work.
- 4.111. Chapter 5 provides that grants will not be made in respect of losses which, among other matters:
- arose at a time when the firm was not accredited;¹⁰
 - arose solely by reason of professional negligence;
 - did not result from the firm's activities in relation to authorised work; or
 - result from the firm's trading debts or are the personal debts of the firm or any principals, employee or shareholders.
- 4.112. Grants from the scheme will be capped in any one year at a level comparable to our minimum requirements for PII, ie, £500k per estate.
- 4.113. From year one of operations, the compensation levy will be used to fund the compensation scheme and annual premium. A percentage of the compensation levy will also be used to build a compensation fund over time, with minimum contributions of £100k per year aimed at accumulating a fund of £1m over 10 years. Our intention in the medium to long-term is that a fund will enable us to increase the level of self-insured excess, thereby reducing the annual premiums and in turn the compensation levy that is charged to practitioners.
- 4.114. We have also included in our regulations a requirement that firms inform clients in writing at the beginning of the engagement of the existence of compensation arrangements and the timescales for making applications. We also recommend in guidance that firms

⁹ Applicants that are body corporates or registered charities will only be eligible for a grant if their annual turnover for the last accounting year was less than £1 million.

¹⁰ Unless the Probate Committee is reasonably satisfied that, at the time the relevant act or default took place, the applicant was not aware that the firm's accreditation had ceased or been suspended, or that the principal or employee conducting the probate work had been disqualified under the Act.

inform clients of the ways in which they can access further information about the scheme, in particular the circumstances in which a grant may be made. We consider that this will increase consumers' understanding of their rights during the legal process, as well as ensuring that they have a better understanding of the situations in which they may or may not be covered by these arrangements.

Enforcement and discipline

Powers of ICAEW and the Probate Committee

- 4.115. ICAEW and the Probate Committee will have the power to take regulatory action against a firm if they consider that the firm is not complying with the probate regulations, or that regulatory action is required to protect the interests of clients or the public interest.
- 4.116. Under the probate regulations, ICAEW has the power to:
- impose conditions or restrictions on the way in which an accredited probate firm conducts probate work;
 - suspend accreditation;
 - withdraw accreditation; and
 - impose regulatory penalties with the firm's consent.
- 4.117. As is set out in regulation 10.1, we may elect to impose a condition or restriction on the firm's accreditation if we consider that:
- the firm has not or may not have complied with the probate regulations in the past and the conditions or restrictions are justified;
 - there is reason to believe that the firm may cease to comply with these regulations in the future and the conditions or restrictions are justified;
 - being accredited or continuing probate work without conditions or restrictions could adversely affect a client or any other person;
 - the condition or restriction is appropriate to ensure that probate work is undertaken, supervised and managed effectively;
 - the firm no longer meets the eligibility requirements for accreditation and the conditions or restrictions are justified;
 - the firm is not, or may not be, complying with the PII regulations and the conditions or restrictions are justified;
 - the firm is over 30 days late in filing any required returns or reports and the conditions or restrictions are justified; or
 - the firm has failed to pay any required fees, fines or costs within time and the conditions or restrictions are justified.
- 4.118. These conditions may require authorised individuals to undergo further training or receive enhanced supervision, or require firms to introduce more rigorous processes to ensure their compliance with the regulations. Similarly, a firm may be barred from carrying out certain types of probate work, or from accepting instructions from specific categories of client. The regulations make it clear that, if a condition or restriction is imposed by ICAEW, a firm will need to undertake to comply with its terms and that failure to comply may result in disciplinary action being taken against the firm.
- 4.119. We will also have the power under regulation 10.7 to impose restrictions or a condition on an urgent basis if we consider there is a need to do so. In these circumstances, the order would come into effect immediately, although the firm would have the right to make oral and written representations to the committee within 10 business days, and to apply to the Review Committee for a review of the underlying order in accordance with the procedure set out in chapter 11.
- 4.120. In more serious cases, we will have the power to suspend accreditation or withdraw accreditation completely. Accreditation may be suspended or withdrawn on a number of the grounds set out in paragraph 4.117 above, or if the firm has failed to comply with any restrictions or conditions, or undertakings it has given to ICAEW.

- 4.121. In all cases the firm will have the right to apply to the Review Committee for a review of the decision and thereafter to the GRC. Any order imposing restrictions or conditions would not come into effect for at least 10 business days and, during this time, the affected party would have the right to apply for a review of the decision. Similarly, orders suspending or withdrawing accreditation would not come into effect for at least 28 days, providing the firm with an opportunity to seek a review.

Regulatory penalties

- 4.122. In cases where we are satisfied that there has been a breach of the regulations, but where the breach is not so serious as to warrant action in accordance with the Disciplinary Bye-laws, we may propose a regulatory penalty to the firm. If the firm does not agree that there was a breach, the matter is referred to the Investigation Committee.
- 4.123. There is no right of review or appeal to a regulatory penalty.

Powers of the Investigation and Disciplinary Committees

- 4.124. Although the Probate Committee will have the power to propose regulatory penalties to firms with their consent, it will not have the power to apply ICAEW's wider disciplinary arrangements. So if the Probate Committee considers that a matter could give rise to possible disciplinary action and should be investigated, it will be required to refer matters to the Investigation Committee. If there is a liability to disciplinary action, the matter will be dealt with by the Investigation Committee or referred on to the Disciplinary Committee for consideration.
- 4.125. The remit and powers of the Investigation and Disciplinary Committees are outlined in paragraphs 3.48 to 3.60 above. Depending on the seriousness of the breach, the Disciplinary Committee will have the power to impose the following sanctions, among others, if it considers that a matter that has been referred by the Investigation Committee is proved:
- to reprimand or severely reprimand the accredited probate firm or individual;
 - to impose fines;
 - to withdraw accreditation; or
 - to exclude membership.
- 4.126. If a firm or individual is dissatisfied with a decision or order of the Disciplinary Committee they will have the right to appeal to the GRC. Accordingly, parties will have two opportunities to appear in person to present their case: once before the Disciplinary Committee and once on appeal.

Targeted and proportionate enforcement action

- 4.127. In cases where we consider that firms may be in breach of our regulatory arrangements, we will act using targeted and proportionate enforcement action. In less serious cases we will seek to achieve an informal resolution where possible. Our experience in the regulated areas of audit, insolvency and investment business has shown that a wide range of minor compliance issues can be resolved informally with firms through discussion. In our view, this approach fosters a culture of compliance among firms, at the same time as reducing the costs of regulation and enabling limited resources to be targeted at areas of greatest risk.
- 4.128. However, in more serious cases where action is needed to protect the consumer and/or the public interest, we will apply one of the above enforcement powers or sanctions to ensure that the quality of probate work is maintained, and that firms conduct probate work in accordance with the professional principles. The factors we will take into account in determining whether it may necessary to restrict, suspend or withdraw accreditation, or refer a matter for possible further disciplinary action will include (among other matters):
- the seriousness of the risk to the regulatory objectives (in particular those of consumer protection and the public interest);

- the number of clients and other persons affected by the issue/behaviour;
- whether the act or omission was deliberate or ongoing;
- whether the firm or the individual concerned has acknowledged the issue;
- the steps that the firm or individual is taking (or has taken) to remedy the situation; and
- the firm's/individual's regulatory and/or disciplinary history.

Intervention powers

- 4.129. Despite the low incidence of fraud historically among our members, we recognise that that there may a risk to the consumer in cases where firms engage in probate and estate administration and hold client and/or estate monies. Therefore, in order for us to protect the consumer and the wider public interest, we consider that it would be prudent to hold intervention powers under the Act for all accredited probate firms. We see this as acting in accordance with the regulatory objectives and best regulatory practice, which is a requirement for approved regulators under section 28 of the Act.
- 4.130. As is discussed in Part 5, if we are successful in our application to become a licensing authority, we will acquire additional intervention powers in relation to licensed firms (known as alternative business structures or ABS) under Schedule 14 of the Act. We propose to discuss with the LSB and the Ministry of Justice (MoJ) the process by which we might acquire these powers in respect of authorised firms.
- 4.131. In our view, the ability to intervene in cases of fraud or financial mismanagement will be particularly important in relation to authorised firms, the vast majority of which will be sole practices or very small firms where PII could be invalidated in the event of fraud. We see the risk to the consumer being increased in these circumstances and believe it would be prudent for us to have the ability to intervene to protect the regulatory objectives if necessary, in the same way that we will be able to intervene into licensed firms.
- 4.132. We do not, however, envisage using these powers lightly. It is likely that we would only take such a step in cases where there was evidence or a serious suspicion or likelihood of fraud or financial mismanagement, or where other measures had been applied but failed (such as the imposition of conditions or restrictions on the firm's accreditation).
- 4.133. In cases where we do intervene, this would be done in conjunction with an order restricting the firm's probate activities on an urgent basis under regulation 10.7 of our proposed regulations. Regulatory and/or disciplinary sanctions would also be taken against the firm's principals and authorised individuals, and accreditation would be withdrawn.
- 4.134. It is a requirement of regulation 3.12 that firms conducting probate and/or estate administration have in place arrangements to protect their clients' interests on cessation of practice. In guidance to this regulation we require that sole practitioners, in particular, nominate alternates to take over their work in the event of incapacity or death. Therefore, if we were aware that an alternate had been appointed previously by a firm, we would arrange for that firm to take over and complete any ongoing probate work. If no alternate has been previously appointed, we would appoint a firm as our agent to intervene into the firm to take control of the client monies and files, to protect the interests of existing and past clients.

5. DESIGNATION AS A LICENSING AUTHORITY

- 5.1. ICAEW's application to become a licensing authority for probate activities is made in accordance with Part 1 of Schedule 10 of the Act. This section is intended to address the LSB's requirement for an explanation of how our proposed regulations comply with the requirements of section 83(5) and Schedules 11 and 13 of the Act, and the LSB's guidance on licensing rules. We also demonstrate how our proposed regulations and broader regulatory arrangements will support the outcomes set out in the LSB's guidance.

Who we will accredit as licensed firms

- 5.2. As mentioned in Part 4, we expect that the firms we will accredit will be mainly those that are accountancy-led, although our regulations have been framed widely to embrace other types of entity that we will accredit on their merits. As with our arrangements for authorised firms, this is to ensure that, from the outset, we have an understanding of the types of firm we will be licensing: their structure, processes and business streams.
- 5.3. We anticipate that the greatest interest in alternative business structures (ABS) will come from our mid-tier to larger firms, as we do not expect every principal or owner in a larger accountancy firm to become individually authorised for probate.
- 5.4. This assumption was borne out in the research we carried out in 2011, which indicated that almost two thirds of firms with two or more principals would apply to become licensed if we were to become a probate regulator.¹¹
- 5.5. Few firms responding to the survey indicated a clear intention to employ solicitors or other legally-qualified staff to carry out probate work. Around half the larger firms with two or more principals that responded said that they were unsure, with over a third indicating that solicitors would not be employed. This possibly implies that firms will look to current members of staff to become accredited for probate, rather than taking on additional legal professionals to deliver these services. This is in keeping with our informal discussions with firms, which indicate that they currently undertake some aspects of probate-related work on instruction from a solicitor (particularly in relation to the preparation of inheritance tax accounts for HMRC).

Our proposed regulations/regulatory arrangements

Appropriate qualification requirements

Section 83(5)(a) and section 21(2)

Licensing rules of a licensing authority must contain appropriate qualification regulations in respect of licensable bodies to which the licensing authority proposes to issue licences.

- 5.6. In paragraphs 4.19 to 4.28 above we outlined our qualification and training requirements for individuals wishing to become authorised for probate work. These are set out in our proposed regulation 4.1. In accordance with the LSB's guidance on licensing rules, these requirements will apply equally to firms applying for accreditation under the ABS regime. We will not impose qualification requirements on those working in licensed firms that are any different to those that apply to individuals working in authorised firms.
- 5.7. We agree with the LSB's view that generally the qualifications and experience of those working in licensed firms are for the firm to decide, based on the requirements of their businesses and the expectations of staff. We have therefore set our qualification/training requirements at a level which we believe is appropriate given our members' current skill set and training. This should ensure that probate is delivered by persons of sufficient skill

¹¹ Although another third of respondents indicated that they were unsure whether they would apply for accreditation as an approved firm or a licensed firm. This may indicate that they would need more time to consider what the two options would entail.

and competence, while at the same time not placing unreasonable or unjustified qualification requirements on applicants wishing to enter the market.

- 5.8. In accordance with the Act, our proposed regulations require licensed firms to have a Head of Legal Practice (HoLP) and Head of Finance and Administration (HoFA). The HoLP will need to be an authorised individual and we will need to approve their designation. We will also need to approve the appointment of the HoFA who we would expect to hold an appropriate accounting or financial qualification. Given the nature of the firms that we are likely to accredit, this individual is likely to be a chartered accountant.
- 5.9. If a firm were to propose as a HoFA an individual who does not hold these qualifications, we would need to be satisfied that the individual's background and training was appropriate given the size and profile of the applicant firm and its likely business streams and turnover.
- 5.10. In both cases, the guidance to our regulations states that we would expect these persons to be of sufficient seniority to ensure that their instructions are acted upon by the firm's other principals and employees. In cases where one or more of the firm's principals is an authorised individual, we would expect one of those individuals to be the HoLP. Similarly, we would prefer the HoFA to be a principal of the firm where possible.
- 5.11. Although we will need to approve a firm's appointment of a HoLP and HoFA, we would expect to decline these appointments only in exceptional cases. An example might be where the firm was intending to appoint a relatively junior member of staff as a HoLP who does not have access to the firm's managerial board. Likewise, we would not approve a HoFA's appointment if there are questions around their fit and proper status (particularly relating to issues of financial mismanagement).
- 5.12. In accordance with the LSB's guidance, the information we receive about these individuals will be used to inform our overall risk assessment of an applicant firm. If we consider that there may be some risk to the HoLP or HoFA's ability to discharge their regulatory responsibilities, we would apply enhanced mechanisms for monitoring (as discussed in paragraphs 4.80 to 4.82 above). This may necessitate more frequent reviews of the firm, including a review before accreditation is granted.

Access to justice

Section 83(5)(b)

Licensing rules of a licensing authority must contain provision as to how the licensing authority, when considering the regulatory objectives (in compliance with its duties under section 3(2) or 28(2)) in connection with the application for a licence, should take account of the objective of improving access to justice.

- 5.13. All firms wishing to become accredited for probate work will be required to set out on their application form how their application will promote access to justice. We will need to be satisfied that this objective will be promoted before we grant a firm's application – although we can envisage few situations in which a firm's statement on this point alone would lead to the application being refused. We agree with the LSB that it will be difficult for applicants to predict in isolation how their application will have an impact on this principle, and therefore we do not consider that responses to this question will be a determining factor on their own.
- 5.14. We understand from the LSB that the purpose of requiring this data is to contribute to a sector-wide evidence base that will enable the LSB and other approved regulators to understand better and evaluate the impact of ABS on access to justice. Accordingly, we will be willing to assist the LSB in its compilation of an annual statement on the impact of ABS, and will discuss with the LSB what evidence it needs for this purpose.
- 5.15. In order to better promote clients' awareness and understanding of legal processes, we have included within our regulations guidance to firms that they should ensure the client

understands and consents to the scope of the work that is to be conducted, and the likely cost, at the beginning of the engagement. We consider that the best way to obtain and record the client's agreement is in an engagement letter. We also suggest that firms should be prepared to explain to clients aspects of their work as it progresses.

- 5.16. In our view, these initiatives should promote public legal education and access to justice and should contribute to the achievement of the following outcomes set out in LSB guidance:

Outcome: ABS provide examples of innovative and flexible ways of providing a greater range of services and enhanced value for money for consumers.

Outcome: ABS provide examples of improving access to justice that can be used by other approved regulators, licensing authorities and the LSB as examples of good practice in improving access to justice in general.

Outcome: consumer trust in the provision of legal services improves.

Outcome: consumer awareness and understanding of their right to, and how to get, legal advice improves.

Regulating conduct

Section 83(5)(c)

Licensing rules of a licensing authority must contain appropriate arrangements (including conduct rules, discipline rules and practice rules) under which the licensing authority will be able to regulate the conduct of bodies licensed by it, and their managers and employees.

- 5.17. In Part 4, we set out the arrangements we will have in place for regulating the conduct of all firms we accredit for probate and their principals and employees. Chapter 3 of our proposed regulations sets out the important duties firms will need to comply with when conducting probate work and related estate administration. This includes the requirement that individuals only work within their sphere of competence and take responsibility for their ongoing professional training and development. It also places a duty on firms to ensure that clients understand fully the nature, scope and terms of the work that is being carried out and that proper records are maintained.
- 5.18. In addition to these regulations, firms will be required to demonstrate their compliance with the following:
- our Code of Ethics;
 - our clients' money regulations;
 - our PII regulations; and
 - anti-money laundering legislation.
- 5.19. We consider that, when taken together, these arrangements will drive firms to conduct probate work and related activities with professionalism and skill, which will protect the interests of probate clients.
- 5.20. As outlined in paragraphs 4.60 to 4.63, firms are obliged at all times to conduct work in accordance with ICAEW's principles-based Code of Ethics and the professional principles set out in regulation 3.1. Among other things, this will ensure that firms conduct probate and related non-reserved activities with integrity and objectivity. They will need to ensure that their work is conducted free from undue influence, bias and conflicts of interests, and that client confidentiality is maintained at all times. The professional principles also place a duty on firms to act in the clients' best interests and ensure that proper standards of work are maintained.
- 5.21. When they apply, firms will also be required to set out on their application form their processes for preventing anyone from having any influence over the conduct of probate

work who is not either an authorised individual (or a person working under the supervision of that person) if this influence is likely to affect the integrity and independence of probate work. This is reflected in our proposed probate regulations 2.4h, 2.7b and 3.5.

- 5.22. We consider that, when taken together, these duties and arrangements will ensure that the following outcomes set out in LSB guidance will be promoted and achieved:

Outcome: both “lawyer” and “non-lawyer” employees, office holders and owners behave in ways that ensure that:

- justice and the rule of law are upheld;
- they act with integrity and respect for the professional principles;
- they act with independence and in the best interests of their clients, ensuring that confidentiality and client money are protected;
- they provide good standards of service to all their clients; and
- they are trusted members of the public and do not behave in a way that undermines trust in the provision of legal services.

- 5.23. As discussed above, we will monitor compliance with these requirements through annual returns, QAD reviews and the PA scheme which applies to all members holding a practising certificate, including those not involved in the regulated areas of audit, insolvency and investment business. We consider that the certainty of a review is a major driver in ensuring compliance with our arrangements. We will continue to adopt this approach when dealing with accredited probate firms.
- 5.24. If we consider that firms may be in breach of our regulatory arrangements, we will take targeted and proportionate enforcement action. In less serious cases, we will seek to achieve an informal resolution where possible. We envisage that our relationships with each firm’s HoLP (or the contact partner in an authorised firm) will play a vital role in fostering a culture of compliance. Through our system of QAD reviews and the PA scheme, we will seek to help firms where possible in building effective and efficient processes to ensure compliance with our regulatory arrangements.
- 5.25. In more serious cases, we will apply one of our enforcement tools to ensure that consumers are protected and that the public interest is not compromised. The Probate Committee may take regulatory action by placing conditions on a firm’s accreditation either to limit the activity that can be carried out, or to ensure that steps are taken by the firm to improve their compliance with our regulatory arrangements.
- 5.26. In more serious cases, we may suspend a firm’s accreditation, or apply conditions on their accreditation by way of an urgent order to prevent the continuation of probate work. This is likely to be used as an enforcement tool in cases where, for example, we have concerns about an individual or firm’s competence to conduct probate work, or if there are allegations or suspicion of fraud.
- 5.27. If we consider that there has been a deliberate, ongoing and/or serious breach of the probate regulations and/or our wider regulatory arrangements, we will take steps to withdraw a firm or individual’s accreditation, or disqualify them from being a principal or employee of a licensed firm or holding the role of HoLP or HoFA.
- 5.28. In relation to owners, we will also take action if we consider that the actions or interests of any non-authorised persons are putting at risk the regulatory objectives and the ability of authorised individuals/firms to comply with our regulatory arrangements. We will have the ability to impose conditions on a person’s holding of a material interest, or to object to that holding, if we consider that action is required to safeguard against the risk of the person exerting improper influence over the conduct of probate work. In the most serious of cases, we will apply to the High Court for an order securing compliance with a condition on a holding, or for divestiture requiring the sale of shares.

- 5.29. Our powers of intervention under Schedule 14 of the Act will only be used in cases where we consider that there is a significant and immediate threat to consumer protection and the regulatory objectives. In these cases, we would seek to arrange for an alternate to complete any outstanding probate work and for the transfer of client files.
- 5.30. We have sought, where possible, to apply our arrangements equally to authorised and licensed firms, unless prevented from doing so by the Act. This is to provide a level playing field across all accredited probate firms.
- 5.31. Our arrangements have been developed with a view to promoting and achieving the following outcomes outlined in LSB guidance:

Outcome: regulation is focused on consumer protection. Licensing authorities' enforcement powers are targeted on areas of high risk and consumer detriment, act as an effective deterrent and are able to be used proportionately in response to a wide variety of compliance and enforcement issues involving both individuals and entities to reduce the risk to consumers.

Outcome: consumers are confident that their advisers are regulated appropriately.

Outcome: licensing authorities' approach to regulation provides a level playing field in which competitive pressures rather than regulation shapes the provision of legal services.

Indemnification arrangements

Section 83(5)(d)

Licensing rules of a licensing authority must contain appropriate indemnification arrangements.

- 5.32. In paragraphs 4.100 to 4.104 above, we have set out the level of PII that firms will be required to carry if they wish to become accredited for probate. These requirements will apply equally to authorised and licensed firms.
- 5.33. For the reasons outlined in those paragraphs, we consider that our indemnification requirements have been set at a level that is appropriate for this type of work. We would emphasise that the PII and probate regulations require firms to hold PII of £500k per claim as a minimum level of indemnity only. The guidance to the PII regulations makes it clear that firms should still carry out a risk assessment, at least annually, to determine the level of indemnity that is appropriate for them given factors such as their turnover and volume of work, their client profile and the types of service they are conducting. Our regulatory requirements are therefore designed to be sufficiently flexible to enable accredited probate firms to arrange insurance that meets their needs and the changing market conditions, while still protecting the consumer.
- 5.34. We do not believe that our arrangements will pose structural barriers to normal commercial activities such as issuing shares, mergers and restructures. For the sake of consistency, we do not consider that it is appropriate for firms to have alternative arrangements in place of PII. However, there is flexibility within our PII arrangements to deal with firms on a case-by-case basis which seek a waiver from the requirements of the PII regulations and have suitable alternative cover in place.

Compensation arrangements

Section 83(5)(e)

Licensing rules of a licensing authority must contain compensation arrangements.

- 5.35. In paragraphs 4.105 to 4.114 we outlined our proposed compensation arrangements for accredited probate firms. Again, in line with LSB guidance, these arrangements will apply equally to both authorised and licensed probate firms.
- 5.36. Our compensation and indemnification arrangements are designed to promote the following outcomes set out in the LSB's guidance:

Outcome: regulatory arrangements provide appropriate levels of redress and protection for consumers against negligence and fraud for the services being provided, comparable to those enjoyed by consumers of non-ABS firms, whilst not unduly restricting commercial activity.

Outcome: consumers are more informed about the risks and potential compensation for fraud and misconduct when obtaining legal advice from any legal service provider.

Regulatory conflict

Section 83(5)(f)

Licensing rules of a licensing authority must contain the provision required by sections 52 and 54 (resolution of regulatory conflict) (including those provisions as applied by section 103).

- 5.37. As explained in paragraph 4.75 above, our proposed regulation 2.25 requires firms to inform us promptly if they consider that a requirement of another regulator (including another approved regulator) is giving rise to a regulatory conflict.
- 5.38. In Part 9 we outline how we are addressing the issue of possible regulatory conflict in relation to accredited probate firms. We are a signatory to the Alternative Business Structures Framework Memorandum of Understanding (set out in Annex 20) and have been an active member since 2010 of the inter-regulator ABS Working Group which established this framework.
- 5.39. We consider that these arrangements should enable us to reduce the risk of regulatory conflict arising, and mitigate its effects on the licensed body and the consumer in cases where it does. By working collaboratively and openly with other regulators, and by sharing information in cases of conflict, we consider that the delays and costs that stem from duplicated processes should be minimised and that common standards should be upheld.
- 5.40. This should promote the achievement of the following outcome set out in the LSB's guidance on licensing rules:

Outcome: a single framework Memorandum of Understanding is implemented by all relevant bodies and provides a mechanism to resolve overlaps in ways which:

- provide the best form of consumer protection and redress;
- minimise confusion for market participants; and
- reduce/remove conflict in the future.

Complaints-handling arrangements

Section 83(5)(g)

Licensing rules of a licensing authority must contain the provision required by sections 112 and 145 (requirements imposed in relation to the handling of complaints).

- 5.41. In paragraphs 4.90 to 4.95 we outlined our requirements in terms of complaints-handling for firms carrying out probate work. These arrangements will apply equally to firms licensed under the ABS regime.
- 5.42. As discussed above, we will not seek to be prescriptive about the way in which firms deal with complaints, provided they can demonstrate, if requested, that they have mechanisms in place to deal with complaints in a fair, prompt, constructive and honest manner.
- 5.43. We recognise that clients can suffer inconvenience if responsibilities for complaints-handling are not clear. So our draft regulations require that firms inform their clients at the beginning of the engagement of the individual to contact if they have a complaint. This will be the HoLP in a licensed firm. They will also need to highlight the availability of the Legal Ombudsman, both at the outset of the engagement and during the internal complaints process, and provide clients with the information necessary to refer matters to the Legal Ombudsman if required. If we receive complaints for which we lack jurisdiction, we will refer clients to other bodies promptly during our initial assessment process.
- 5.44. We consider that these arrangements promote and support the following outcomes set out in LSB guidance:

Outcome: consumers of legal services provided by ABS are afforded the same protections as consumers from non-ABS providers for first line complaints handling and access to the Legal Ombudsman.

Outcome: referral of complaints to other bodies is done in a way that minimises inconvenience for consumers.

Section 83(5)(h)

Licensing rules of a licensing authority must contain any other provision required to be contained in licensing rules by the Act.

- 5.45. Our licensing rules have been drafted in accordance with the requirements of the Act.

Applications for accreditation

Sch. 11, paragraph 1(1)

Licensing rules must make provision about the form and manner in which applications for licences are to be made, and the fee (if any) which is to accompany an application.

- 5.46. As outlined in paragraphs 4.15 to 4.18 above, our proposed regulations contain provision for firms wishing to apply to become accredited for probate work. To make the application process as straightforward as possible, we will publish guidance on our website to help applicants (both entities and individuals) complete our application forms, which are set out in Annex 15.
- 5.47. Although the information we will require from firms wishing to apply to become authorised or licensed will be substantially the same, we will require additional information from firms wishing to be licensed. For example, we will require details of the qualifications and experience of individuals wishing to be appointed as the HoLP and/or

the HoFA. These individuals will also have to submit fit and proper declarations and undergo standard Criminal Records Bureau (CRB)¹² and other background checks.

- 5.48. In accordance with the Act, we will also require firms to submit to us full details of any non-authorised principals or shareholders. Those persons holding a material interest in the body of 10% or more will have to submit fit and proper declarations and undergo background checks in the same way as applicants for HoLP and HoFA status. Further details of the information that will be required from non-authorised owners are set out in paragraphs 5.17 – 5.127 below.

Diversity

- 5.49. Firms applying for accreditation (both authorised and licensed) will be required to conduct an initial monitoring exercise to assess the diversity profile of their organisation. In line with LSB guidance, we will provide firms with a model questionnaire, which will give individuals working in the firm the opportunity to describe themselves in terms of the following characteristics: age, gender, disability, ethnic group, religion or belief, sexual orientation, socio-economic background and caring responsibilities.
- 5.50. In discussion with the other approved regulators and the LSB, we will issue guidance to firms on the arrangements for publishing summary data about their workforce and reporting it to us.
- 5.51. At this stage, we anticipate conducting this exercise on a three-yearly basis, but we will keep the timing of collection under review in consultation with the LSB and other approved regulators. We consider that it would be disproportionate and administratively burdensome to ask firms to conduct this exercise every year.
- 5.52. Our approach in requiring firms to collate this data is to contribute to a sector-wide evidence base that will enable the LSB and the approved regulators to evaluate the extent to which the regulatory objective of encouraging a strong, independent, effective and diverse legal services market is being achieved. Our intention is that it will also allow us to assess how far the following objectives set out in LSB guidance are being achieved:

Outcome: ABS allow the provision of legal services to develop in ways that help and encourage diversity.

Outcome: better information on diversity allows consumers a clearer insight into the providers they choose, provides individuals the information needed to make an informed decision about their careers and allows...firms to differentiate themselves in a liberalising market.

Determining applications for accreditation

Sch. 11, paragraph 2

Licensing rules must make provision for those items set out in Schedule 11, paragraph 2.

- 5.53. In paragraphs 4.41 to 4.47 we outlined the manner in which we will determine applications. We will aim to acknowledge receipt of all applications within two working days and to determine the majority of applications within four weeks of receipt. We will monitor our performance against this target and will make public the results in accordance with LSB guidance.
- 5.54. The guidance to regulation 2.5 sets out the Act's requirements in terms of timescales for determining applications. If it is not practicable to determine an application within six months, we will issue an extension notice to the applicant setting out the reasons for the extension (which may not exceed nine months).

¹² A standard CRB check contains information on both spent and unspent convictions, cautions and charges.

Review of determinations

Sch. 11, paragraph 3

Licensing rules must make provision for review by the licensing authority of:

- a decision to refuse an application for a licence; and
- if a licence is granted, the terms of the licence.

- 5.55. As previously explained, if an application for accreditation is refused, or granted subject to conditions or restrictions, applicants will have a right to apply for a review of the decision in accordance with the procedures set out in chapter 11 of the draft regulations. This will apply to applications by firms, and to applications for authorised individual, HoLP or HoFA and probate affiliate status. If we object to a non-authorised owner holding a material interest in a licensed firm, or if we impose conditions on that holding, they will also have a right to apply for a review of this decision.
- 5.56. In accordance with LSB guidance, the Review Committee will be comprised solely of individuals who have not been involved in the original decision. The process for review is straightforward and transparent, and is set out in our proposed regulations.

Period of accreditation and renewal

Sch. 11, paragraph 4(1)

The licensing rules may make provision:

- limiting the period for which any licence (subject to the provision of Part 1 of Schedule 11 and of the licensing rules) is to remain in force;
- about the renewal of licences, including provision about the form and manner in which an application for renewal is to be made, and the fee (if any) which is to accompany an application.

- 5.57. As recommended by the LSB, our accreditation of licensed firms will not be time-limited, and so there will be no need for an annual renewal process. We will, however, charge an annual registration fee as required by the Act, and non-payment of this fee may result in a firm losing its accreditation (see our proposed regulations 2.14 to 2.18).
- 5.58. As with all accredited probate firms, licensed firms will be required to submit an annual return. This will enable us to monitor the performance of the entity on an ongoing basis, and respond to any risks to the regulatory objectives that we might see emerging.

Licensing by another licensing authority

Sch. 11, paragraph 4(3)

Licensing rules must provide that a licence issued to a licensed body by the licensing authority ceases to have effect if the licensed body is issued with a licence by another licensing authority.

- 5.59. Our draft regulation 2.22b sets out that a firm will cease to be licensed by ICAEW as an accredited probate firm if it becomes licensed by another licensing authority.

Continuity of accreditation

Sch. 11, paragraph 5

Licensing rules may make provision about the effect on a licence issued to a partnership or other unincorporated body (“the existing body”) of any change in the membership of the existing body. The provision which may be made includes provision for the existing body’s licence to be transferred where the existing body ceases to exist and another body succeeds to the whole or substantially the whole of its business.

- 5.60. Our draft regulation 2.7k places an obligation on accredited probate firms to inform us as soon as practicable (and in any event within 10 business days) of any event affecting the firm’s eligibility to be accredited.
- 5.61. The regulations do not provide for a temporary transfer of accreditation as suggested above. We have elected instead to include guidance in the opening paragraphs of chapter 6 to highlight to firms the importance of notifying us in advance of events that are likely to affect their eligibility for accreditation.
- 5.62. If a firm moves from being authorised to licensable, or if the ownership of a licensed firm changes such that we will be required to approve one or more non-authorised persons holding a material interest, we would expect firms to give us advance notice under the regulations.

Modifying accreditation

Sch. 11, paragraph 6(1)

Licensing rules must make provision about the form and manner in which applications are to be made for modification of the terms of a licence under section 86, and the fee (if any) which is to accompany the application.

- 5.63. Our process for modifying accreditation is set out in paragraphs 4.87 to 4.89 above. Although we will not generally charge a fee for this process, we will reserve the right to apply a charge if an application is particularly complex or contains substantial supporting documentation. This fee would be at the discretion of the Probate Committee.

Sch. 11, paragraph 6(2)

Licensing rules may make provision as to the circumstances in which the licensing authority may modify the terms of a licence under section 86 without an application being made.

- 5.64. As set out in chapter 10 of our proposed regulations, ICAEW will have the power to impose a condition or restriction on a licensed firm’s accreditation for a period if required. This will allow us to modify a firm’s accreditation without an application being made.
- 5.65. Regulation 10.1 (which also refers to parts of regulation 10.3) sets out the circumstances in which we may exercise this power.
- 5.66. We will also have the power to restrict or impose conditions a licensed firm’s accreditation by way of an urgent order under regulation 10.7 if necessary.

Sch. 11, paragraph 6(3)

Licensing rules must make provision for review by the licensing authority of:

- a decision to refuse an application for modification of the terms of a licence;
- if the licensing authority makes licensing rules under sub-paragraph 6(2), a decision under those rules to modify the terms of the licence.

- 5.67. Under regulation 11.2, licensed firms will have the right to apply to the Review Committee for a review of the decision if they are dissatisfied with the outcome of their application for a modification. They will need to exercise this right within 10 business days of being notified of the Probate Committee's decision.
- 5.68. As is set out in regulations 10.7 and 10.8, we will also have the power to impose conditions or restrict a firm's accreditation on an urgent basis and without an application being made. Where this occurs, the firm will have the right to make oral or written representations within 10 business days. In addition, it will have the right to apply to the Review Committee for a review of the decision under regulation 11.2.

Modifications under section 106

- 5.69. In accordance with LSB guidance, our probate regulations do not provide currently for applications made under section 106 of the Act (applications by special bodies including low risk bodies as defined in section 108). Once the LSB has issued guidance on the appropriate approach to these bodies following the conclusion of the transitional arrangements for ABS, we will consider whether our regulations should be amended.

Management

Sch. 11, paragraph 9(1)

Licensing rules must require a licensed body to comply with the requirements set out in Schedule 11, paragraph 9 at all times. The requirements are:

- at least one of the licensed body's managers must be a person (other than a licensed body) who is an authorised person in relation to a licensed activity;
- no manager of the licensed body may be a person who is disqualified from acting as a manager of a licensed body.

- 5.70. These requirements are addressed by our proposed regulations 2.3 and 2.8

Sch. 11, paragraph 10(1)

Licensing rules may make provision as to:

- the managers of licensed bodies; and
- the arrangements for the management by them of the licensed body and its activities.

- 5.71. Our proposed regulations place no additional requirements on principals of licensed firms that do not apply to authorised firms. This is intended to give firms the greatest flexibility possible in determining their own management profile depending on their structure and business needs. We believe that a consistent approach is also in accordance with the principles of better regulation.
- 5.72. In cases where we consider that an application gives rise to a possible risk to the regulatory objectives, we consider that it would be more appropriate and proportionate to address this risk by way of a condition or restriction on the firm's accreditation, rather than applying a blanket requirement to all firms.

Sch. 11, paragraph 10(2)

Licensing rules must not require all managers of a licensed body to be authorised persons in relation to a reserved activity.

- 5.73. This is not a requirement of our proposed probate regulations.

Head of Legal Practice (HoLP)

Sch. 11, paragraph 11(1)

Licensing rules must include the requirements set out in Schedule 11, paragraph 11 in respect of the appointment of the Head of Legal Practice.

- 5.74. Regulations 1.6 and 2.7 provide that, at all times, a licensed firm must have a HoLP who is an authorised individual and who is not disqualified from holding that position. The individual must have consented to the appointment and we must have approved their appointment (regulations 4.2 and 4.4). If the HoLP no longer consents to hold that position, their status as a HoLP will cease, as set out in regulation 4.9, and the firm will have to appoint a new individual.

Sch. 11, paragraphs 12(1) and 12(2)

Licensing rules must make provision:

- about the procedures and criteria that will be applied by the licensing authority when determining under Schedule 11, paragraph 11(4) whether an individual is a fit and proper person;
- for a review by the licensing authority of a determination under Schedule 11, paragraph 11(4) that an individual is not a fit and proper person;
- about the procedures and criteria that will be applied by the licensing authority under Schedule 11, paragraph 11(6) whether to withdraw its approval;
- for a review by the licensing authority of a determination under Schedule 11, paragraph 11(6) to withdraw its approval;
- about the procedure which is to apply where a licensed body ceases to comply with the requirement imposed by virtue of Schedule 11, paragraph 11(2).

Rules made may in particular provide that the requirement imposed by virtue of Schedule 11, paragraph 11(2) is suspended until such time as may be specified by the licensing authority if the licensed body complies with such other requirements as may be specified in the rules.

- 5.75. We will only approve the individual's designation as a HoLP if we are satisfied that they are a fit and proper person who can carry out their regulatory responsibilities under the Act. If we consider that they have breached this duty, we may withdraw their status as a HoLP and disqualify them in accordance with regulation 5.1.
- 5.76. The declarations we will require from prospective candidates for HoLP designation are contained in the application form set out in Annex 15. These are the same declarations as those we will require from prospective owners of licensed firms. As stated in the application form, a disclosure to one or more of the questions will not result in the Probate Committee automatically declining the application, but it will prompt the committee to make further enquiries into the applicant's background before deciding the application. On the other hand, if an applicant provides false or misleading information, this will be taken seriously by the committee and, if deliberate, is likely to result in the application being declined.
- 5.77. In accordance with LSB guidance, we will not require the HoLP of a licensed firm to undergo fit and proper checks on an annual basis. We agree that this would result in a substantial regulatory burden that may not be proportionate or justified. Rather, we have included within our proposed regulations a requirement on firms to inform us as soon as practicable (and at the latest within 10 business days) of any changes to the HoLP at their firm. It is clear from the regulations that this person would need first to have been approved by us in that capacity (see regulation 2.7j).

- 5.78. We will seek to verify the information we receive about an applicant's status against our own disciplinary records and/or the records of other applicable approved regulators. We will also carry out additional checks using the FSA's Shared Intelligence System (SIS), the LSB's register of disqualified persons, and will conduct standard CRB checks on applicants for HoLP status.
- 5.79. Where we are satisfied that the applicant is a fit and proper person, we would expect to approve their appointment as a HoLP without delay. We agree that the qualifications and experience of the HoLP should be broadly a matter for the firm to decide, depending on its management structure and the requirements of its business and staff. However, as we indicate in the guidance to regulation 1.6, we would expect any applicant to be of sufficient seniority within the firm to ensure that their instructions are acted upon. We would also want to be satisfied that this individual would have the freedom to report on matters to us without restrictions, even if this conflicts with the views of the firm's principals and senior management team.
- 5.80. In the rare case that approval by us of a HoLP was declined or, if granted, withdrawn at a later date, the individual would have the right to apply to the Review Committee for a review of the decision in accordance with the processes set out in chapter 11.
- 5.81. If a licensed firm finds itself temporarily without a HoLP – either because that person has left the firm, no longer wishes to hold that role, or because we have withdrawn their status – the firm will be able to apply for a dispensation from the regulations. As set out in regulations 2.19 – 2.21, the firm would be required to inform us of in writing within 10 business days of the steps they are taking to replace the HoLP. The Probate Committee will then have the power to grant a dispensation of no more than 90 days, provided it is satisfied that it is reasonable to do so having regard to the public interest or the interests of any client. Any decision by the Probate Committee to decline an application for a dispensation would result in the firm being able to apply for a review of the decision in the usual way.

Head of Finance and Administration (HoFA)

Sch. 11, paragraph 13(1)

Licensing rules must include the requirements set out in Schedule 11, paragraph 13.

- 5.82. Our proposed regulations 1.6 and 2.7 provide that a licensed firm must have at all times a HoFA who is not disqualified from holding that position. The individual must have consented to the appointment and we must have approved their appointment (regulations 4.3 and 4.4). If the HoFA no longer consents to hold that position, their status as a HoFA will cease, as set out in regulation 4.9 and the firm will have to appoint a new individual.

Sch. 11, paragraphs 14(1) and 14(2)

Licensing rules must make provision:

- about the procedures and criteria that will be applied by the licensing authority when determining under Schedule 11, paragraph 13(4) whether an individual is a fit and proper person;
- for a review by the licensing authority of a determination under Schedule 11, paragraph 13(4) that an individual is not a fit and proper person;
- about the procedures and criteria that will be applied by the licensing authority under Schedule 11, paragraph 13(6) whether to withdraw its approval;
- for a review by the licensing authority of a determination under Schedule 11, paragraph 13(6) to withdraw its approval
- about the procedure which is to apply where a licensed body ceases to comply with the requirement imposed by virtue of Schedule 11, paragraph

13(2).

Rules made may in particular provide that the requirement imposed by virtue of Schedule 11, paragraph 13(2) is suspended until such time as may be specified by the licensing authority if the licensed body complies with such other requirements as may be specified in the rules.

- 5.83. The equivalent procedures set out in paragraphs 5.75 – 5.81 will apply in relation to applications for designation of an individual as a HoFA. However, as is reflected in the guidance to regulation 1.6, the HoFA will not need to be an authorised individual, although we would expect them to hold an appropriate accountancy and/or financial qualification and be, where possible, a principal of the firm.
- 5.84. Our requirements concerning the appointment of both a HoLP and HoFA in a licensed firm are intended to comply with the Act's requirements and the following outcomes set out in LSB guidance:

Outcome: high quality Heads of Legal Practice (HoLPs) and Heads of Finance and Administration (HoFAs) who come from a wide range of backgrounds and diversity reflecting the commercial decisions and commercial operations of the ABS as well as statutory requirements.

Outcome: strong governance arrangements to:

- provide HoLPs and HoFAs with access to CEO, Board, non-executives, and the licensing authority whenever necessary;
- ensure compliance with the Legal Services Act 2007 and licence requirements;
- ensure appropriate operating procedures; and
- provide a mechanism for ABS staff to raise concerns, which are acted upon appropriately.

Outcome: ABS compliance with licence requirements is high, with minimum enforcement required by licensing authorities.

Practice requirements

Sch. 11, paragraph 15(1)

Licensing rules must require a licensed body at all times to have a practising address in England and Wales. [This] does not apply to a licensed body:

- which is a company or limited liability partnership; and
- the registered office of which is situated in England and Wales (or in Wales).

- 5.85. Our proposed regulations 2.4e and 2.7i require all accredited probate firms to have at least one office in England and Wales from which they undertake probate work (unless they are a company or LLP whose registered office is in England or Wales).

Licensed activities

Sch. 11, paragraph 16

Licensing rules must provide that a licensed body may carry on a licensed activity only through a person who is entitled to carry on the activity.

- 5.86. This is addressed through our proposed regulation 3.3, which provides that only authorised individuals may undertake, or control the undertaking of, probate work.

Compliance with regulatory arrangements

Sch. 11, paragraph 17(1)

Licensing rules must include the requirements set out in Schedule 11, paragraph 17 – ie that:

- the licensed body, its managers and employees comply with the duties imposed by section 176 (duties of regulated persons)
- the licensed body and any manager or employee who is authorised for probate complies with the professional principles set out in section 1(3) of the Act; and
- the licensed body must at all times have suitable arrangements in place to ensure that non-authorised persons subject to the duty imposed by section 90 comply with that duty.

- 5.87. Our proposed regulation 3.1 places a clear obligation on accredited probate firms to comply with the professional principles set out in the Act. As the professional principles are consistent with the five fundamental principles underpinning the Code of Ethics of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour, these principles apply equally to licensed and authorised firms.
- 5.88. Regulations 2.4, 2.7 and 3.5 place a duty on both firms and the individuals within them to ensure that they comply with the duties set out in sections 90 and 176 of the Act; namely, to ensure that the firm and its principals and employees comply with our regulatory arrangements as an approved regulator, and that non-authorised persons do nothing to interfere with that duty. Firms are required to confirm in their application form that they have informed all principals, employees or shareholders of the duties contained in sections 90 and 176 of the Act. They will also need to outline the steps they will take to ensure that authorised individuals can conduct probate work independently and free from influence that might compromise their ability to comply with the probate regulations and the professional principles.
- 5.89. In addition, the regulations stipulate that the role of the HoLP is to ensure, among other matters, that:
- the accredited probate firm complies with the requirements of the regulations;
 - authorised persons in the firm continue to comply with their regulatory obligations; and
 - non-authorised persons (whether they be non-authorised principals, employees or owners) do not do anything which causes or substantially contributes to a breach of the regulations by the firm or any authorised persons.
- 5.90. We do not consider it necessary to set out in our rules the processes the licensed firm should put in place to ensure compliance with the above principles and their regulatory duties. We agree with the LSB that this should be a commercial decision for the ABS to decide. Accordingly, providing we are satisfied that the firm has at all times a HoLP in post who is ensuring compliance with the professional principles, and has the power and ability to notify us when these principles and duties are being compromised, we would deem this satisfactory in the absence of adverse evidence.
- 5.91. These issues will also be covered as part of a QAD review of a firm.

Disqualified employees

Sch. 11, paragraphs 18(1) and (2)

Licensing rules must include the requirement that a licensed body may not employ a person who under Part 3 of Schedule 11 is disqualified from being an employee of a licensed body.

- 5.92. Our proposed regulation 2.8 provides that an accredited probate firm may not have a principal or employee who is disqualified from being a principal or employee of a licensed firm under section 99 of the Act. This applies to both authorised and licensed firms. Guidance to the regulation will alert firms that the LSB will maintain a list of persons who have been disqualified from working in licensed bodies.
- 5.93. Our disqualification procedure is set out in paragraphs 5.104 to 5.107 below. If we disqualify an individual from working in a licensed firm, we will inform the LSB of the disqualification as soon as practicable.

Indemnification and compensation arrangements

Sch. 11, paragraph 19

For the purpose of giving effect to indemnification arrangements and compensation arrangements, licensing rules may:

- authorise or require the licensing authority to establish and maintain a fund or funds;
- authorise or require the licensing authority to take out and maintain insurance with authorised insurers;
- require licensed bodies or licensed bodies of any specific description to take out and maintain insurance with authorised insurers.

- 5.94. Our arrangements for indemnification and compensation of consumers in cases of negligence, fraud and bankruptcy are outlined in paragraphs 4.100 to 4.114 above in relation to authorised firms. These arrangements will apply equally to licensed firms.

Accounts

Sch. 11, paragraph 20(1)

The licensing rules must make provision:

- as to the treatment of money (including money held on trust) which is received, held or dealt with by the licensed body, its managers and employees for clients or other persons; and
- the keeping of accounts in respect of such money.

- 5.95. The requirements on firms that deal with client and estate monies are outlined in paragraphs 4.72 to 4.73 above for authorised firms. These requirements are the same for licensed firms. In a licensed firm, however, the HoFA will be responsible for ensuring that the firm complies with these obligations and that any breach is reported to ICAEW as soon as reasonably practicable.
- 5.96. The importance for authorised firms of record-keeping and the need to reconcile accounts on a regular basis is set out in the clients' money regulations discussed in paragraphs 3.36 to 3.37. It applies equally to those that are licensed.

Fees

Schedule 11, paragraph 21

The licensing rules must require licensed bodies to pay periodical fees to the licensing authority. The rules may provide for the payment of different fees by different descriptions of licensed body.

- 5.97. All accredited probate firms, including licensed firms, will be required to pay an annual registration fee and compensation levy. In Part 7 we explain our methodology in calculating these fees, which are intended to be broadly cost-reflective and targeted depending on the firm's size and structure.
- 5.98. As set out in regulations 2.14 – 2.16 and discussed in paragraphs 4.37 to 4.40 above, we will also reserve the right to charge an initial application fee and other ad hoc fees if we need to carry out a visit or undertake significant additional work to determine a firm's application. However, it is not currently our intention to levy an application fee and additional fees will only be charged in exceptional circumstances.

Financial penalties

Sch. 11, paragraph 22

The licensing rules must make provision as to:

- the acts and omissions in respect of which the licensing authority may impose a penalty under section 95;
- the criteria and procedure to be applied by the licensing authority in determining whether to impose a penalty under that section, and the amount of any penalty.

- 5.99. If there has been a breach of the probate regulations, the Probate and disciplinary committees will follow the *Guidance on sentencing*, which is described in paragraphs 3.58 to 3.59 above and set out in Annex 14. In due course, this guidance will be amended to take account of our activities in this new regulated area.
- 5.100. The guidance will apply to all penalties imposed on licensed firms (up to the maximum set by order of the Lord Chancellor) and to authorised firms.¹³ It will also apply to penalties imposed on individuals, and will form the basis for the Probate Committee's calculation of regulatory penalties.
- 5.101. As explained above, the *Guidance on sentencing* provides a structured framework for determining both whether a penalty is required, and, if so, the level of penalty. In accordance with the LSB's guidance, the *Guidance on sentencing* does not provide indicative penalties as this would limit the ability of the committees to set penalties at levels that are appropriate to the circumstances of each case, and may have the unintended consequence of distorting behaviour.
- 5.102. Rather, the framework sets out a suggested starting point for each type of complaint or breach of the regulations or bye-laws. This figure is intended as a guide to committees on where they might start when considering all the factors relevant to a complaint. Committees are then directed to take into account any aggravating or mitigating factors before determining whether it is appropriate either to reduce or increase the level of penalty. Examples of what might constitute an aggravating or mitigating factor for each type of complaint are set out in the framework.
- 5.103. The guidance states clearly that the purpose of a penalty should be to protect the public, correct and deter misconduct, and maintain proper standards of professional conduct

¹³ The Legal Services Act 2007 (Licensing Authorities) (Maximum Penalties) Rules 2011 (SI 1659/2011) has set the maximum financial penalty at £250m for an entity and £50m for an individual.

and the reputation of the profession. In our view, the application of the guidance in probate cases will ensure that sentencing policy across committees will be transparent, consistent and proportionate, taking into account the surrounding circumstances of each case.

Disqualifications

Sch. 11, paragraph 23(1)

Licensing rules must make provision as to the criteria to be applied by the licensing authority in determining whether a person should be disqualified under section 99.

- 5.104. Our proposed regulation 5.1 will give us a broad power to disqualify a person from holding the following positions in a licensed firm:
- HoLP;
 - HoFA;
 - principal; or
 - employee.
- 5.105. In accordance with the Act, we may take the step to disqualify someone if we believe that, either intentionally or through neglect, they have:
- breached the duties imposed on them by the Act; or
 - caused or substantially contributed to a significant breach of the licensed firm's accreditation; and

it is undesirable for them to continue holding that position.

- 5.106. We are likely to use these powers only rarely, in cases where we consider that the breach was either deliberate or so serious that the issue could not be addressed by either a condition on the firm's accreditation, or some kind of lesser penalty. In accordance with our *Guidance on sentencing* any committee wishing to impose this penalty would need to have first considered the detailed circumstances surrounding the complaint, the seriousness of the behaviour, and whether any mitigating or aggravating factors exist.
- 5.107. Using the principles underlying sentencing policy, in deciding to disqualify an individual, a committee would need to be satisfied that the circumstances of the case were sufficiently serious to warrant the imposition of this penalty.

Sch. 11, paragraph 23(2)

Licensing rules must make provision:

- for a review by the licensing authority of a determination by the licensing authority that a person should be disqualified;
- as to the criteria and procedure to be applied by the licensing authority in determining whether a person's disqualification should cease to be in force; and
- requiring the licensing authority to notify the Board of any determination by the licensing authority that a person should be disqualified, of the result of any review of that determination, and of any decision by the licensing authority that a person's disqualification should cease to be in force.

- 5.108. Chapter 11 of our proposed regulations provides that, if a person is disqualified from holding one of the positions set out in paragraph 5.104 above, they will be entitled to apply for a review of that decision. They will also have the right to apply at a later date to be reinstated in that position through the usual application process.

- 5.109. As set out in our regulation 5.5 we will notify the LSB promptly if a person is disqualified under regulation 5.1, and will also notify the LSB if there is any change to that decision. Regulation 5.4 makes it clear that we may end a disqualification order if, on application from the person concerned, we consider that it is no longer necessary for the disqualification to remain in force.

Suspension or revocation of accreditation under section 101

Sch. 11, paragraph 24(1)

Licensing rules must make provision for the items set out in Schedule 11, paragraph 24.

- 5.110. Our proposed regulations 10.3 – 10.4 set out the circumstances in which ICAEW may withdraw or suspend a firm's accreditation. In relation to licensed firms, this includes cases where the firm or its principals, employees or shareholders fail to comply with the probate regulations. Specifically, it includes cases where the firm:
- no longer meets the eligibility criteria for licensed firms set out in regulation 2.3 (Sch. 11, paragraph 24(3));
 - conducts probate work through a person who is not authorised, contrary to regulations 2.7h and 3.3 (Sch. 11, paragraph 24(4));
 - fails to comply with the requirements of chapter 6 in relation to non-authorised owners of licensed firms (Sch. 11, paragraph 24(5));
 - fails to ensure that non-authorised persons do not improperly influence the conduct of probate work contrary to regulations 2.7b and 3.5 (Sch. 11, paragraph 24(6));
 - fails to ensure that it, and its principals and employees, comply with the requirements of section 176 in accordance with regulation 2.7a (Sch. 11, paragraph 24(7));
 - has a principal or an employee who has been disqualified under the Act contrary to regulation 2.8 (Sch. 11, paragraph 24(8)); or
 - fails to comply with the requirement to have, at all times, a HoLP and HoFA (regulations 2.7f and 2.7g) who has consented to the appointment (regulations 4.2 and 4.3) and whose designation ICAEW has approved under regulation 4.4 (Sch. 11, paragraph 24(9)).
- 5.111. In cases where we consider it necessary either to revoke or suspend a firm's accreditation, we will serve notice on the firm of our intention in writing. This decision will not come into effect for 28 days and, during that time, the firm may apply to the Review Committee for a review of the decision. As discussed in paragraphs 5.134 to 5.139 below, there is then a further right of appeal to the GRC.

Sch. 11, paragraph 25

Licensing rules may make provision about other circumstances in which the licensing authority may exercise its powers under section 101 to suspend or revoke a licence.

- 5.112. In addition to the circumstances outlined in paragraph 5.110 above, our proposed regulations 10.3 – 10.4 also empower us to suspend or revoke a firm's accreditation in a number of other circumstances. For example, the firm's accreditation may be revoked or suspended if we consider that the firm is no longer complying with the PII regulations; if it is failing to comply with any restrictions or conditions; or if its continued accreditation or involvement in probate work might adversely affect the interests of a client or other person.
- 5.113. As set out in regulation 2.22a, a firm may apply to us at any time to cancel its status as an accredited probate firm, whether authorised or licensed.

Sch. 11, paragraph 26(1)

Licensing rules must make provision about the criteria and procedure the licensing authority will apply in deciding whether to suspend or revoke a licence, or to end the suspension of a licence under section 101.

- 5.114. Chapter 10 of our proposed regulations sets out the criteria and procedure we will apply in deciding whether to suspend or revoke accreditation, or end or vary a suspension pursuant to regulation 10.6.

Sch. 11, paragraph 26(2)

Licensing rules must make provision for a review by the licensing authority of a decision by the licensing authority to suspend or revoke a licence.

- 5.115. As required by the Act, we will give any affected firm 28 days' notice of our intention to suspend or revoke accreditation under regulation 10.11. During this time, the firm will have the right to apply to the Review Committee for a review of the decision under regulation 11.2 (and thereafter a right to appeal to the GRC).
- 5.116. An application for a review of the decision would need to be in writing and set out the firm's circumstances and reasons for objecting to the decision.

Ownership of licensed bodies

Sch. 13, paragraph 6

- (1) For the purposes of this Schedule, the approval requirements are met in relation to a person's holding of a restricted interest if:
- a) the person's holding of that interest does not compromise the regulatory objectives (the "regulatory objectives test");
 - b) the person's holding of that interest does not compromise compliance with the duties imposed by section 176 by the licensed body or [any employee or manager of the licensed body who is an authorised person in relation to an activity which is a reserved legal activity] (the "regulated person's duties test"); and
 - c) the person is otherwise a fit and proper person to hold that interest (the "fitness to own test").
- ...
- (3) In determining whether it is satisfied of the matters mentioned in sub paragraph (1)(a) to (c), the licensing authority must in particular have regard to:
- a) the person's probity and financial position;
 - b) whether the person is disqualified as mentioned in section 100(1) or included in the list kept by the Board under paragraph 51;
 - c) the person's associates; and
 - d) any other matter which may be specified in licensing rules.
- (4) Licensing rules must make provision about the procedures that will be applied by the licensing authority when determining whether it is satisfied of the matters mentioned in sub-paragraph (1)(a) to (c).

- 5.117. We will require firms wishing to become licensed for probate to identify all persons with an interest in the firm (whether they are individuals or entities) and state their respective voting rights or shares. As required by the Act, those persons holding a material interest will then be subject to the 'fitness to own' test before the application can be approved.
- 5.118. We have considered whether there are grounds for setting the threshold for material interests at a percentage lower than the 10% limit prescribed as a minimum by the Act. This would require us to extend the 'fitness to own' test to persons holding a small or *de*

minimis interest in each firm. We consider, however, that the regulatory framework set out in the Act is already sufficiently robust to safeguard against the risk of non-authorised owners improperly influencing the conduct of probate work. In our view, to extend additional checks over external ownership, shareholdings or voting rights would be disproportionate. Arguably, it may result in unnecessary and administratively burdensome over-regulation, which could have the unintended consequence of deterring firms from becoming authorised for probate work. The minimum interest has accordingly been set at 10%.

- 5.119. The Act already contains a further safeguard to protect against the risk of a person holding indirect influence in a firm through the holdings of one or more ‘associates’. In identifying those with a material interest, the firm will need to identify whether any owner (or prospective owner) has associates as defined in regulation 6.3. Where such a relationship exists, the respective holdings will be considered together in determining whether the owner holds a material interest requiring pre-approval. So there is already a mechanism for addressing the risk that owners may seek to reduce their holdings in order to avoid the pre-approval checks that are required for larger interests.
- 5.120. If a firm identifies a principal or shareholder with a material interest in a firm, it will be required to complete a separate application form for that person. During the application process we will require information to enable us to determine whether the person’s holding poses a risk to the regulatory objectives (the so-called ‘regulatory objectives’ test) or whether there is a risk that they may compromise the ability of the firm’s principals or employees to conduct probate work in accordance with the probate regulations and the professional principles set out in the Act (the ‘regulated persons’ duties’ test).
- 5.121. We will also gather information to enable us to assess the person’s probity and financial history (the ‘fitness to own’ test). The declarations we will require from these principals and shareholders are contained in the application form set out in Annex 15. These are the same declarations that we will require from candidates for HoLP and HoFA status and they extend to firms in which that individual was previously a principal, director or shareholder. They also include questions on whether the applicant has been previously disqualified from acting as a HoLP, HoFA, principal or employee of a licensed firm, or whether a licensing authority has ever objected to, or imposed conditions on, the holding of a material (or other) restricted interest in a licensed firm.
- 5.122. As with applicants for HoLP and HoFA status, we will rely on our own disciplinary records and/or the records of other approved regulators (as applicable) to check the accuracy of the information we receive. We will also conduct the following, additional checks:
- standard CRB checks on potential non-authorised owners;
 - checks against the FSA’s Shared Intelligence System (SIS);
 - checks against the LSB’s register of disqualified persons; and
 - checks against the LSB’s register of non-authorised persons whose holding of a restricted interest in a licensed body has been objected to or made the subject of conditions by another licensing authority.
- 5.123. As is stated in the application form, a disclosure to one or more of the questions will not result automatically in the Probate Committee declining the application, but it will prompt the committee to make further enquiries into the person’s background before deciding the application. However, if an applicant provides false or misleading information, this is likely to be taken seriously by the committee and, if deliberate, could result in the application being declined.
- 5.124. It is likely that the committee would also consider declining an application if it were apparent that the person and/or their associates had previously been associated with a failed firm, or a firm whose application to another licensing authority had been declined.

- 5.125. In more minor cases, however, we consider that it may be possible to discount adverse information, if that information is unlikely to have a bearing on the person's role or interest in the licensed firm and their ability to influence the conduct of probate work. For example, it may be considered less relevant if an individual has a 10 year old finding of misconduct, but will not be involved in the delivery of probate work. In other cases, the imposition of a condition on a holding may be sufficient to ensure that adequate safeguards are in place to protect probate clients and the regulatory objectives.
- 5.126. In accordance with regulation 2.4h, firms applying to be licensed must confirm that they have informed all principals, employees and shareholders who are non-authorised persons of the duties imposed on them by sections 176 and 90 of the Act. Guidance to regulation 3.5 reminds firms of the need to inform new principals, employees and shareholders of these duties.
- 5.127. We consider that that this approach to the authorisation of ownership of licensed firms will achieve the following outcomes set out in LSB guidance:

Outcome: licensing authorities identify and manage risks to the outcomes posed by owners and their associates.

Outcome: consumer confidence in ABS that are owned by non-lawyers is at least as high as other law firms.

Sch.13, paragraph 38

Licensing rules may impose limits on shares / voting rights held etc.

- 5.128. Our probate regulations do not provide for additional restrictions on the interests held by non-authorised persons in licensed firms. We agree with the LSB that any limits on shares or voting rights should be a commercial matter for the ABS to decide. We agree that the 'fitness to own' test, when taken in conjunction with our enforcement powers, should provide appropriate safeguards against improper influence and conflicts.

Sch. 13, paragraph 21

The continuing obligation on firms to notify the licensing authority if a non-authorised person ("the investor") proposes to take a step which would result in them acquiring a restricted interest in a body and/or acquires an interest in the body without taking such a step.

- 5.129. The continuing obligation on firms to notify us of any changes to their ownership structure in terms of persons who hold a material interest is set out in regulations 6.10 to 6.12.

Foreign ownership

- 5.130. We agree with the LSB's guidance that it would not be appropriate to ban certain categories of foreign ownership of ABS. Arguably, this would be contrary to the Act's objective of increasing competition and diversity in the market.
- 5.131. However, we acknowledge that, in some circumstances foreign ownership may increase a firm's risk profile and adherence to the regulatory objectives. It may be difficult to verify the background of an ultimate beneficial owner, or they might benefit from legal immunity.
- 5.132. We intend to deal with these risks on a case-by-case basis. If we identify a risk to the regulatory objectives, we may elect to impose a condition or restriction on the firm's accreditation, or approve a holding subject to conditions, as a means of ensuring greater consumer protection.

- 5.133. Should we incur additional costs in investigating the background of foreign owners, we would reserve the right to charge an increased annual registration fee or an ad hoc fee for significant additional work under regulations 2.14 and 2.15.

Appellate body

- 5.134. We are proposing that all appeals in relation to accredited probate firms (including licensed firms) be directed to the GRC. This is consistent with the approach favoured by the LSB which considers that a single mechanism for all appeals in relation to ABS will:
- support consistency in decision-making in relation to ABS (both in relation to entities and individuals working within those entities);
 - enable a body of expertise to be developed in relation to ABS regulatory appeals; and
 - lead to economies of scale in relation to administrative and appellate functions.¹⁴
- 5.135. In order for the GRC to hear appeals in relation to ICAEW licensed probate firms, we understand that an order under section 80 of the Act will be required and that the GRC will need to consent to the designation. Accordingly, we aim to work closely with the GRC in the coming months to better understand the tribunal process. However, we understand that the GRC is currently the relevant appellate body for decisions of the Council of Licensed Conveyancers in relation to licensed bodies and that its existing rules of procedure apply. Parties generally bear their own costs in the tribunal, although the GRC does have limited powers to award costs in cases where parties have acted unreasonably.
- 5.136. In order to refer matters to the GRC, parties will need first to have sought a review of the decision by the Review Committee. If parties have failed to exhaust the internal complaints process, it is likely that the GRC will only hear the appeal if the Review Committee has failed to conduct the review in a timely manner.
- 5.137. A firm or individual who is unhappy with a decision of the Review Committee or the Disciplinary Committee will be able to submit a notice of appeal to the GRC. The GRC will be able to:
- affirm the decision wholly or in part;
 - set aside the decision wholly or in part;
 - substitute for all or part of the decision with a new decision of a kind ICAEW could have made;
 - remit the matter to ICAEW (either generally, or for determination in accordance with a finding made or direction given by the tribunal); or
 - dismiss the appeal.
- 5.138. If a respondent is unhappy with the determination of the GRC, they will have the right to appeal to the Tribunal Service's Upper Chamber on a point of law.
- 5.139. We consider that designation of the GRC as the relevant appellate body for accredited probate firms will achieve the following outcomes set out in the LSB's guidance:

Outcome: one appellate body with sufficient resources and expertise to deal with complex issues whose processes and costs are transparent, efficient, fair and public.

Outcome: the appellate body is able to draw from experience across a wide range of regulatory issues and is able to come to consistent decisions about similar issues.

¹⁴ Legal Services Board *Alternative business structures: appeal arrangements*
[http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/20110509_absappeals_decision_doc.pdf]

Capital adequacy

- 5.140. In accordance with LSB guidance, we have not included within our authorisation processes a capital adequacy test for ABS. However we will require some financial information from the firm as part of the annual return.

Unreserved legal activities

Section 85(7)

Conditions on a licence issued by a licensing authority may include conditions as to the non-reserved activities which the licensed body may or may not carry on.

- 5.141. Although we may have the power as a licensing authority to impose conditions on the non-reserved activities a firm may carry out, it is not our intention do this if authorisation for these services is not required under the Act (either as a licensing authority or an approved regulator). That being so, there are no specific issues that we anticipate needing to take into account.
- 5.142. We agree with the LSB's guidance that the approach taken by licensing authorities in deciding whether to regulate reserved and/or non-reserved legal activities should reflect the current levels of consumer protection in the market. On this basis, we consider that to impose conditions on the non-reserved services that an authorised/licensed firm can carry out would result in an uneven playing field between regulated and unregulated firms, and would defeat the following outcome set out in LSB guidance:

Outcome: different forms of commercial arrangements for ABS emerge and effective regulation provides the same levels of consumer protection for reserved and unreserved legal activities as in the rest of the market.

- 5.143. Although we will not be limiting the conduct of non-reserved legal activities generally, estate administration will fall within the scope of our regulatory arrangements for accredited probate firms. Our monitoring of estate administration will be carried out through ICAEW's PA scheme and will extend to those accredited probate firms where estate administration work forms a significant part of their fee income. Our arrangements for PII, compensation and complaints-handling will also apply.

Licensing authority competence to accredit different forms of ABS

- 5.144. As explained in paragraph 5.2 above, although we expect to accredit mainly firms whose principal business is accountancy, we will not place restrictions on the nature or extent of external ownership other than those set out in the Act. Applications will, however, be considered on a case-by-case basis, and we will impose conditions and/or restrictions on accreditation where necessary to protect the public interest.
- 5.145. ICAEW has never sought to restrict its members from working within entities regulated by other bodies. In the same way we will not restrict our members from working in an entity licensed by another licensing authority.

Register of licensed firms

- 5.146. As required by the Act, we will maintain a register of all firms we license for probate and this information will be available on our website. In accordance with LSB rules, it will contain the following information:
- The name of the licensed firm, along with any trading names and previous names;
 - The firm's registered address (if relevant);
 - The firm's practising address;
 - The firm's company registration number (if relevant);
 - The name of the HoLP and his or her authorising body;
 - The name of the HoFA;
 - Confirmation that the firm is licensed to undertake probate work;

- The date the firm became licensed for probate;
 - The status of the firm's accreditation (ie, whether the licence has been suspended or withdrawn and the date that this took place); and
 - Details of any sanctions or enforcement activities that has been taken against the licensed firm (or its principals, shareholders or employees) although this will not include any administrative fines.
- 5.147. The information contained on this register may change from time to time if there is a change to the LSB's rules. Equivalent information will also be held and made available in respect of firms ICAEW authorises as an approved regulator.

6. THE REGULATORY OBJECTIVES AND BETTER REGULATION PRINCIPLES

Section 82(1)

Each licensing authority must prepare and issue a statement of policy as to how, in exercising its functions under Part 5 (concerning the regulation of ABS), it will comply with the requirements of section 28.

Section 28

In discharging its regulatory functions the approved regulator must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives and which the approved regulator considers most appropriate for the purpose of meeting those objectives:

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse, and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties; and
- Promoting and maintaining adherence to the professional principles, ie:
 - authorised persons should act with independence and integrity;
 - authorised persons should maintain proper standards of work;
 - authorised persons should act in the best interests of their clients;
 - the affairs of clients should be kept confidential.

The approved regulator must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principle appearing to it to represent the best regulatory practice.

- 6.1. The following section is intended as a statement of policy on how we will exercise our regulatory functions as an approved regulator and licensing authority in accordance with the requirements of section 28 of the Act.
- 6.2. The statement is also aimed at demonstrating how our proposed regulatory arrangements will support the regulatory objectives and professional principles set out in section 1 of the Act.

The regulatory objectives

Promoting the public interest and protecting and promoting the interests of consumers

- 6.3. As a professional membership body and regulator with a duty to operate in the public interest, we have taken care to ensure that our regulatory arrangements for probate will promote the public interest and protect and promote the interests of consumers.
- 6.4. By becoming an approved regulator and licensing authority, we will be in a position to accredit accountancy-led firms to deliver probate services directly to consumers. We consider that this will almost certainly increase competition in the market for probate services, which should benefit consumers by encouraging the formation of new and innovative business services and more competitive prices.
- 6.5. In developing our regulatory arrangements we have also taken care to ensure that the appropriate safeguards will be in place to ensure that probate is only delivered by

- persons of sufficient skill and competence. Accordingly, we have restricted the category of individuals who can apply to be authorised individuals through attendance on a course, to our members and the members of other international chartered accountancy bodies with which we hold reciprocal arrangements. As we consider that the activities involved in conducting non-contentious probate work involve a high degree of accountancy content, we have concluded that a short course in wills, probate and estate administration should build on our members' current skills and competencies and equip them with the necessary knowledge to provide a competent and professional service.
- 6.6. In addition, individuals who are authorised by other approved regulators may be recognised as authorised individuals under our regulations, and we will consider applications from other individuals with appropriate probate qualifications and experience on their merits.
 - 6.7. We have also designed our authorisation processes to ensure that only persons who are fit and proper will be able to conduct probate work. Again, we see this as being consistent with the regulatory objectives of consumer protection and the promotion of the public interest. We will require applicants for accreditation (both entities and individuals) to disclose any issues that might call into question their integrity and ability to conduct probate work in a fair and honest manner, and we will run checks on the data we receive from both internal and external sources.
 - 6.8. Applicants will be required to confirm that they have processes in place for dealing with matters such as clients' money, staff training and review procedures, record-keeping and complaints-handling. They will also need to confirm that they have appropriate levels of PII. We will monitor compliance with these arrangements through annual returns, and our system of targeted monitoring and Practice Assurance reviews, the frequency of which will be determined by our assessment of risk for each firm.
 - 6.9. In cases where our supervision of firms highlights an actual or possible breach of our regulatory arrangements, we will act to protect the public interest and the interests of consumers. This may be through a range of measures, from obtaining an informal undertaking from the firm or individual to put things right to the imposition of formal regulatory and disciplinary sanctions such as the imposition of conditions or restrictions, the suspension or withdrawal of accreditation, disqualification or a fine (the level of which will be guided by our *Guidance on sentencing*).
 - 6.10. We have also taken care to ensure that appropriate levels of redress will be in place to protect consumers if things do go wrong. Firms will be required to maintain an internal complaints system that is prompt, transparent and straightforward. They will be obliged to highlight the availability of their complaints procedure to new and existing clients, and to signpost the availability of the Legal Ombudsman both at the beginning of the engagement and during the complaints process.
 - 6.11. In the case of negligence, bankruptcy or fraud, clients will have access to redress due to the requirement on firms to hold a minimum of £500k in PII per claim. In cases where PII is invalidated – for example in cases where a fraud is conducted by a sole practitioner – clients will also have recourse to redress through ICAEW's Probate Compensation Scheme (discussed in paragraphs 4.105 to 4.114 above).
 - 6.12. At the beginning of the engagement, firms will be under an obligation to highlight to clients the availability of compensation arrangements, a measure which we see will not only promote consumer protection, but also improve consumers' understanding of their rights in relation to redress in the provision of legal services.
 - 6.13. We are confident that the arrangements we are proposing will protect both consumers and the public interest. We will develop a consumer engagement strategy, which will provide information and advice to consumers about probate and our regulatory framework. We will also collect information on consumers' expectations and experiences around the provision of probate services, which will inform our regulatory arrangements going forward.

Improving access to justice

- 6.14. Although 'access to justice' is not a defined term in the Act, it has been suggested that, in the context of legal services provision, it might be improved in a variety of ways such as increased availability of services geographically, improved technology, new and innovative business models and lower prices.
- 6.15. As our designation as an approved regulator and licensing authority should lead to increased competition and a more liberalised market for probate services, we consider that our application is consistent with the regulatory objective of improving access to justice.
- 6.16. As required by the Act, we will take note of the objective of promoting access to justice when we consider applications for accreditation. All firms applying to become either authorised or licensed for probate will have to provide us with a statement on how their accreditation will promote access to justice. We would be prepared to collate and analyse this data to assist the LSB in creating a sector-wide evidence base that assesses the impact of various factors on access to justice.
- 6.17. As a matter of policy, however, we consider that it would be extremely rare for us to decline an application solely on the basis of a firm's response to this section. We agree with the LSB that it will be difficult, if not impossible, for firms to assess in isolation how their application will affect this regulatory objective. Accordingly, although we will consider the concept of access to justice in determining each application, we do not envisage that this criterion alone will be necessarily determinative.

Promoting competition in the provision of services

- 6.18. We consider that our designation as an approved regulator and licensing authority will increase and promote competition in the provision of legal services. It will enable us to accredit accountancy firms to conduct probate work, which until now has been an activity reserved solely to lawyers. We consider that this should drive various benefits for consumers in terms of an increased availability of services nationally, lower prices and efficiencies in service delivery.
- 6.19. To promote a level playing field between firms we accredit for probate, we have sought to develop a single regulatory regime that will be consistent and apply to both authorised and licensed firms. No additional requirements have been placed on ABS, unless required by the Act.
- 6.20. Where the Act has set out requirements that apply solely to ABS, we have sought where possible to limit restrictions so as not to impede competition. Accordingly, we have elected only to apply the fitness to own test to non-authorised owners holding a material interest of 10% or more in a licensed firm as required by the Act. We decided against imposing additional checks on holders of lesser interests, or to include, for example, a capital adequacy test or additional share limits. We consider that additional checks would be likely to result in a disproportionate regulatory burden on firms, which is unjustified and may create a disincentive to market entry. We consider that the default value of 10% is sufficient to protect consumers without hindering diversity in the provision of probate services.
- 6.21. Similarly, although we may have the ability as an approved regulator and licensing authority to impose restrictions or conditions on the non-reserved activities an accredited firm may carry out (such as will-writing and estate administration), we do not intend to do this unless we have reason to believe that the firm's activities in these areas are posing a threat to its compliance with the probate regulations or the regulatory objectives. We do not consider it reasonable to place additional restrictions on accredited probate firms if these activities can be carried out in an unregulated capacity. This would appear to us to be anti-competitive and not in keeping with the Act's objectives.

Encouraging an independent, strong, diverse, and effective legal profession

- 6.22. We consider that the accreditation of accountancy firms for probate work will contribute to a more competitive, strong and diverse market. Firms we accredit for probate will be asked to monitor and report on the diversity profile of their firms on a periodic basis. This initiative, which is in accordance with LSB guidance, is intended to drive change in the profile of providers in the legal services market. It should also provide consumers with the ability to make informed choices about where to obtain legal services.
- 6.23. We also consider that our regulatory arrangements will encourage a strong, effective and independent market by enabling firms to determine how best to ensure compliance with our regulations within their own commercial context. Our CPD requirements, for example, give firms the freedom to identify their own training and development needs. We are not prescriptive in the activities accredited firms must carry out on an annual basis, but we will monitor compliance with the principle that professional training and development should be kept under review on a continuing basis.
- 6.24. Similarly, our requirements for complaints-handling are not prescriptive. We will require only that firms demonstrate to us that they are complying with certain minimum requirements (such as ensuring appropriate signposting to the Legal Ombudsman and cooperation and compliance with that body's decisions). Otherwise, firms will have the freedom to determine for themselves how best to deal with consumer complaints.

Increasing public understanding of the citizen's legal rights and duties

- 6.25. We have included within our proposed regulations guidance on the importance of good communication with clients about the anticipated scope of the engagement. We have suggested that, in order to increase client satisfaction and to reduce the likelihood of complaints, firms should set out in writing at the beginning of the engagement what they can expect to happen and the steps involved. They will also need to alert clients to their right to refer matters to the Legal Ombudsman, and be prepared to explain to clients aspects of their work (and the costs involved) as it progresses. We believe that this will improve consumers' understanding of the legal processes governing probate and promote public legal education generally.

Promoting and maintaining adherence to the professional principles and supporting the rule of law

- 6.26. Firms we accredit for probate will be under an obligation to comply with the professional principles and the rule of law. The professional principles are set out in our proposed probate regulations, and are consistent with the five fundamental principles underpinning our Code of Ethics: integrity, objectivity, confidentiality, professional competence and due care, and professional behaviour (discussed in paragraphs 3.17 to 3.22 above).
- 6.27. If we consider that there is a threat (either real or emerging) to compliance with the professional principles and the rule of law, we will act. This may be by the imposition of a condition or restriction on accreditation, or, in serious cases, through the suspension or withdrawal of accreditation, or disqualification. In the most serious cases, if there are concerns that the financial or other interests of clients may be being compromised, we may intervene in the practice.

Better regulation principles

Transparency

- 6.28. We will be transparent in the way in which we exercise our regulatory functions. If we intend either to decline an application for accreditation, or approve the application subject to conditions or restrictions, we will explain clearly to the applicant the reasons for our decision and they will have an opportunity to seek a review of the decision. Similarly, if we are considering taking regulatory action, the affected individual or firm will be informed of this and invited to make representations. Once the decision has been taken, we will provide our reasons and advise them of their right to apply for a review and the timescales for this.

- 6.29. We will also be transparent in the way in which we approach enforcement. We will be transparent in our sentencing (our *Guidance on sentencing* is in the public domain) and there will be a presumption that penalties will be made public, unless there is an overriding public interest reason why redaction or non-publication is necessary in the particular circumstances of the case.

Accountability

- 6.30. We will be accountable for the way in which we exercise our regulatory functions. If we have set targets for the determination of applications, for example, we will publish these targets on our website and monitor our performance against them.
- 6.31. We will also work cooperatively with the LSB as oversight regulator. We appreciate that we will be accountable to the LSB for the decisions we take and the way in which we discharge our regulatory functions. We will therefore undertake to provide accurate information in line with the LSB's requirements on a prompt basis.

Proportionality

- 6.32. In developing our proposed qualification requirements, we have sought to adopt a proportionate approach that is aimed at fostering competition, while ensuring that those persons undertaking and supervising probate work are competent to do so. Having assessed the skills required for probate and related activities such as estate administration, we are satisfied that the training and skills required to become a chartered accountant form a solid foundation for further studies in this area. We have therefore set our qualification requirements at a level which we believe is appropriate to build on applicants' existing skill sets and competencies.
- 6.33. In our approach to monitoring and enforcement, we have also sought to be proportionate. As explained in Parts 3 and 4, the frequency and focus of our reviews will depend on our assessment of risk. In cases where we see a threat to the regulatory objectives emerging (particularly that of consumer protection) we will increase monitoring and supervision and focus our resources in that area.
- 6.34. As in the other regulated areas of audit, insolvency and investment business, we will apply our enforcement mechanisms in a proportionate manner. Where possible, we will seek always to resolve issues initially with individuals and firms in an informal manner. We consider that this fosters a culture of compliance which helps to reduce regulatory costs and delays for both parties.
- 6.35. If, however, we consider that there has been, or may be, a breach of our regulatory arrangements, we will act. This may result, in less serious cases, in the imposition of a condition on a firm's accreditation, or in an appropriate sanction such as a reprimand, fine or regulatory penalty. It would only be in the most serious cases that we would suspend or withdraw accreditation to carry on probate work, or disqualify an individual from holding a position in a licensed firm. We would only apply these sanctions in cases where we considered that the breach of the regulations was so serious, or the risk to the regulatory objectives so severe, that a lesser penalty would not be appropriate.

Consistency

- 6.36. In developing our regulatory arrangements for probate, we have sought to be consistent. Our arrangements use comparable procedures to those that we use in the areas of audit, insolvency and investment business regulation.
- 6.37. Except in cases where the Act has prescribed requirements that apply only to ABS (for example, the fitness to own test) we have applied our requirements equally to both licensed and authorised firms. Where possible, we have sought to minimise the risk of a competitive disadvantage arising where additional regulatory requirements are placed on a certain type of firm.
- 6.38. We will also seek to be consistent in the way in which we discharge our regulatory functions as an approved regulator and licensing authority. Decisions in relation to our

authorisation processes and our monitoring of firms will be taken by a small number of trained staff or the Probate Committee. The Probate Committee will also be responsible for determining applications for dispensations or to modify accreditation, and for taking regulatory action if there has been a breach of the probate regulations. We consider that vesting these powers in a single body will ensure consistency in decision-making across cases.

- 6.39. Similarly, we will also be consistent in our use of regulatory and disciplinary powers. Through the application of our *Guidance on sentencing*, we consider that penalties will be applied in a consistent and proportionate manner. Committees will consider the guidance in determining what, if any, penalty to apply and the level of penalty, having taken into account the particular circumstances of the case and any mitigating or aggravating factors.
- 6.40. In our approach to appeals, we have sought also to be consistent. We are proposing that appeals on decisions of the Review and Disciplinary Committees should be referred to the GRC for consideration. We do not consider that there should be a distinction between appeals of authorised and licensed firms, and consider that the GRC will have the competence to determine appeals in a cost-effective and timely manner.
- 6.41. On a broader level, we will continue to foster a consistent approach to the regulation of probate and ABS. As a member of the ABS working party, we will continue to cooperate and coordinate our regulatory activities with other approved regulators and professional bodies. This should facilitate consistent and joined-up regulation across the sector, and enable us agree common standards to regulation and specific issues.

Targeted

- 6.42. We will adopt a targeted and proportionate approach to monitoring and enforcement. In determining the level of supervision that will be required to monitor accredited probate firms, we will take into account a range of factors in assessing risk. These are likely to include factors such as the size of the firm; the level of turnover; the frequency with which probate work is being conducted; and the experience and seniority of the authorised individuals, and the firm's HoLP and HoFA.
- 6.43. We consider that a targeted approach to monitoring and enforcement will ensure that resources are directed appropriately in areas of greatest risk. We will also seek to focus reviews on specific areas of concern if we see an emerging risk to compliance with our regulatory arrangements or the regulatory objectives.

Conclusion

- 6.44. In developing this application, we have taken care to ensure that our proposed regulatory arrangements for probate and ABS will be consistent with, and promote, the Act's regulatory objectives and better regulation principles. If our application is successful and we are designated as an approved regulator and licensing authority for probate, we will be committed to ensuring that we discharge our regulatory functions, so far as reasonably practicable, in accordance with the regulatory objectives and best regulatory practice.

7. PROBATE BUSINESS PLAN

Executive summary

- 7.1. We have set out in Annex 17 our business plan for implementing the probate accreditation scheme. Assuming our application for designation as an approved regulator and licensing authority is successful, senior staff at ICAEW, under the sponsorship of the ICAEW chief executive and the executive director, Professional Standards, will be responsible for implementing this plan.
- 7.2. The business plan demonstrates that, as in the other regulated areas of audit, insolvency and investment business, our approach is to ensure that we have the appropriate levels of resource and funding in place to be able to discharge our regulatory duties in relation to probate competently. As an experienced regulator, we pride ourselves on our governance and organisational structure, and consider that we are well positioned to add probate to the existing suite of activities we already regulate.
- 7.3. Contained within the business plan is a timeline for the activities we will need to undertake before we will be in a position to begin accrediting firms and individuals to conduct probate work. The timeline represents our initial thinking although we recognise that the duration of each activity, and point at which it will commence, may change.
- 7.4. The principles and methodology underpinning the provisional fee scale are detailed below.

Resource and capability

- 7.5. We will implement the probate accreditation scheme by making use initially of existing structures and personnel within ICAEW's Professional Standards. At the time of writing, some 125 staff are employed across the regulatory support, quality assurance, regulatory policy and professional conduct departments of Professional Standards. All these departments have well established and efficient operational and IT processes for carrying out regulatory activities, and staff have a wealth of experience across the regulatory and disciplinary areas.
- 7.6. As we do not expect the volume of firms applying for probate accreditation to be high in the short term, we plan to maximise synergies with the other regulated areas by applying our existing operational processes to probate. Accordingly, any applications required under the probate regulations which are straightforward will be dealt with by appropriately trained staff in the regulatory support and regulatory policy areas under delegated powers. More complex applications will be referred to the Probate Committee for decision.
- 7.7. The QAD will be responsible for monitoring firms' compliance with our proposed regulatory arrangements for probate. The QAD will be tasked with carrying out risk reviews based on intelligence gathered from annual returns and other sources, and will conduct reviews of firms. These reviews will be carried out in conjunction with QAD's PA scheme to maximise efficiencies where possible. Targeted, risk-based reviews will also be conducted where necessary, and we envisage that the majority of firms will receive a review during their first 24 months of accreditation.
- 7.8. If our monitoring of firms highlights an issue of possible or actual non-compliance with our regulatory arrangements for probate, the matter will be referred to Professional Standards' professional conduct department for investigation. Staff in this department deal with around 2,000 first-instance complaints and enquiries each year, and have a long experience in assessing and, where necessary, recommending disciplinary action against members for breaches of the regulations and Disciplinary Bye-laws.

Training and development

- 7.9. Although our internal training programmes have yet to be finalised, we envisage that all staff engaged in monitoring compliance with our regulatory arrangements will attend a programme similar to that required of applicants for authorised individual status.
- 7.10. Principally this will apply to QAD staff who will be responsible for carrying out monitoring reviews mentioned above. As explained in paragraphs 3.31 to 3.35, QAD reviewers are all chartered accountants with a combined average length of service of 10 years. They are already skilled in monitoring compliance with ICAEW's clients' money regulations and anti-money laundering requirements, and so we are confident that this additional training in probate and estate administration will equip them to discharge their supervisory responsibilities competently in this area.

Probate Committee

- 7.11. We will establish a committee, to be known as the Probate Committee, to oversee our regulatory responsibilities relating to probate. As has been outlined in the application, this committee will be tasked with dealing with a range of matters including determining complex or non-standard applications for accreditation; determining applications for modifications and/or dispensations; reviewing returns and QAD reports; taking regulatory action against individuals/firms in the case of non-compliance and determining applications for grants made in accordance with the Probate Compensation Scheme. It will have full delegated powers to determine policy and regulatory matters and for rule-making and fee-setting with the approval of the LSB.
- 7.12. It is proposed that this committee will comprise ten members, with a 50:50 split between lay members and probate practitioners. A lay person will be defined as someone who has never qualified or practised as a professional accountant, and solicitors and persons with legal training will also be excluded. Our intention is to recruit these persons from existing lists of candidates held by ICAEW's strategy and governance department.¹⁵ However, we have built funds into the operational budget to recruit committee members externally (by way, for example, of advertisements in national newspapers) if it proves difficult to recruit the appropriate complement of members internally.
- 7.13. At this point we anticipate that the Probate Committee will convene for a minimum of three to four meetings per year, but the frequency of committee meetings will be kept under review depending on the volume of applicants for accreditation.

Funding

Fee scales and methodology

- 7.14. The commercial basis for the fee structure is that, on an ongoing basis, the underlying cost of providing the regulatory services is fully funded from the registration fee and compensation levy. The initial year of development involves estimated costs in the region of £130k which Professional Standards will finance from its budget, but recover in future charges phased over time.
- 7.15. The costs of the regulatory body will include the costs of the directly associated personnel, but will also draw on the infrastructure services of ICAEW on a basis consistent with that applied for the other three regulated areas of audit, insolvency and investment business. Costs will also take account of synergies with the PA scheme, which may facilitate reviews of accredited probate firms concurrently with practice operation.
- 7.16. The fee structure has been determined taking into account the following factors.
- The aim of making the cost to a sole practitioner entering this market for the first time as undemanding as possible and enabling such entry to be achieved, though it

¹⁵ In accordance with the Principal Bye-laws and the draft terms of reference for the Probate Committee, ICAEW office-holders and council members will be unable to serve on the committee.

be at the expense of the more established and larger practices. The Act's regulatory objectives include improved competition and access to justice, and we consider that high registration fees could pose an entry barrier to smaller firms, which would be counter-productive to those objectives.

- A recognition that firm size, and the number of individuals conducting authorised work (ie, probate and/or estate administration) will have an impact on the scale of our regulatory operations and the costs involved.
 - Acknowledgement that, unlike the other regulated areas within ICAEW, the area being regulated (probate) will generally comprise a small part of the overall service offering of the accounting firm or practitioner. Therefore, the fees will be measured against only certain elements of income rather than the whole income of the firm or practitioner. This would be the commercial approach adopted by the firm in deciding whether to apply, and one we have mirrored in determining the fee structure.
- 7.17. On this basis, we have calculated a fee base to be set at £599 for a sole practitioner. This annual registration fee will be increased in scale for firms of 2+ principals taking into account the size of the practice (ie, the number of principals, offices and authorised individuals).
- 7.18. In developing the fee scale, we have considered whether fees should be linked to levels of probate-specific turnover. This option was dismissed on grounds that it would require continuous monitoring by our regulatory support staff throughout the registration year, which would be likely to increase operational costs. It would also not be an appropriate basis for the first year's fee. In our view, the fee methodology outlined above has the benefit of being relatively straightforward and transparent for applicants to understand, at the same time as being cost-effective to apply.

Contributions to ICAEW compensation arrangements

- 7.19. In addition to an annual registration fee, we will charge a compensation levy. This levy will be charged in a manner consistent with the annual registration fees and will start at £399 for a sole practitioner and increase for other firms depending on the size of the practice and the number of authorised individuals and principals.
- 7.20. We propose to meet the initial seed funding of the scheme of £100k through Professional Standards' budget. From year one of operations, the compensation levy will be used to fund the annual premium. A percentage of the compensation levy will also be used to build a compensation fund over time, with minimum contributions of £100k per year, aimed at accumulating a fund of £1m over 10 years.
- 7.21. The Probate Compensation Scheme will be a discretionary fund of last resort. Grants from the scheme will depend, among other matters, on applicants taking steps to exhaust other remedies and mitigate their loss. Grants will be at the total discretion of the Probate Committee and will be capped at £500k per estate with a total aggregate of £5 million per year.

Forecasts and sensitivity analyses

- 7.22. Information we gathered during the 2011 survey was used as a base for estimating the likely volume of applicants during the first years of operation.
- 7.23. After conducting a range of sensitivity analyses which included volumes, mix, charging structures and impacts on delivery and other costs, we have based our initial financial plan on the assumption that around 250 firms will apply for accreditation during the first year (whether to become authorised or licensed firms). Data from the survey indicated that of these 250 firms, around 150 (or roughly two thirds) would be sole practitioners and it is assumed that there will be five large firms at the top end of the scale.
- 7.24. Applying these volumes to the fee scale indicated that, alongside the cost analysis, ICAEW could target break-even from the first year.

- 7.25. We recognise that these volumes are estimates only, and that we will need to have appropriate contingency arrangements in place to enable us to respond effectively to a change in demand for accreditation. Equally, we acknowledge that a change in the regulatory environment or in the complexity of firms seeking accreditation from us could lead to an increase in our operating costs.
- 7.26. Nevertheless, we consider that we will be able to cope with these contingencies given the number of trained and experienced staff in ICAEW Professional Standards. The synergistic nature of many of our activities facilitates a flexible rather than fixed-cost base so that, where necessary, we will be able to backfill roles as required to respond to a sudden increase in demand for accreditation or deploy resources where not required. In the longer term, our business plan and fee scale are sufficiently flexible to enable us to respond to a changing operational environment and take on additional, trained and skilled staff if necessary.

Draft timetable

Date	Activity/milestone
December 2012	Formal submission of application to the LSB.
December 2012 – mid-2013	Development of internal processes and systems for registration; establishment of the Probate Committee; training of staff; further development of forms, website and IT development; guidance and marketing literature (as detailed in the annexed plan).
December 2012 – spring 2013	LSB's determination of the application following formal consultation with the Office of Fair Trading (OFT), the Legal Services Consumer Panel and the Lord Chief Justice.
Mid-2013	Lord Chancellor's consideration of the application.
Mid-2013	Passage of statutory orders through Parliament.
Autumn 2013	ICAEW begins accepting applications from firms for accreditation.
Autumn 2013	Designation of ICAEW as an approved regulator and licensing authority for probate.
Autumn 2013	The first firms are accredited for probate as authorised and licensed firms.

8. INTERNAL GOVERNANCE

Background

- 8.1. The Act provides for the principle of regulatory independence. As set out in the LSB's internal governance rules 2009 (IGRs) this is the principle that:
- ‘structures or persons with representative functions must not exert, or be permitted to exert, undue influence or control over the performance of regulatory functions, or any person(s) discharging those functions.’
- 8.2. The LSB has indicated that, as an accountancy regulator, we are likely to be considered an approved regulator for the purposes of the IGRs. As such, we are bound to comply with rules 6 and 7, and not the detailed schedule to the rules that applies in relation to front-line legal regulators. Nor will we be required to complete the annual dual self-certification exercise confirming our compliance with the principle of regulatory independence.

Rule 6 of the LSB's internal governance rules 2009

Each Approved Regulator must:

- have in place arrangements that observe and respect the principle of regulatory independence; and
- at all times act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle.

Rule 7

Without limiting the generality or scope of Rule 6, the arrangements in place under that Rule must in particular ensure that:

- persons involved in the exercise of an Approved Regulator's regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with any person(s) including but not limited to the Board, the Consumer Panel, the OLC and other Approved Regulators;
- the exercise of regulatory functions is not prejudiced by any representative functions or interests;
- the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions;
- the Approved Regulator takes such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions; and
- the Approved Regulator makes provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.

- 8.3. When the LSB consulted on these rules in 2009 it recognised a need to allow a degree of flexibility where the scheme of the IGRs might conflict with, or make less practicable, a new approved regulator's adherence to the requirements of other oversight regulators. The LSB was mindful also that, at least initially, new approved regulators are likely to be responsible for only a narrow range of reserved legal services, and that their regulated population is likely to be small.

- 8.4. As a regulatory body, our principal regulatory activities are subject to oversight by the FSA, the FRC, the Irish Auditing and Accounting Supervisory Authority (IAASA) and the Insolvency Service. Up until now, these regulators have not taken substantive issue with our governance arrangements, and therefore we have not considered it appropriate or necessary to reorganise our arrangements along the lines of some of the other legal professional bodies, which have created separate legal entities for the discharge of their regulatory functions. We have been of the view that any amendments could interfere with, and make less practicable, our existing relationships with these other oversight bodies, and have considered that it would be disproportionate to restructure our governance arrangements significantly for probate, given the small population that we are likely to regulate, and the cost-savings and synergies that are possible through shared services with ICAEW's representative arm (such as IT, human resources and procurement).
- 8.5. However, in 2013 ICAEW will be conducting a wide-ranging review of its regulatory governance processes and structures. This review will focus on the relationship between PSB and other ICAEW departments, and encompass such issues as the proportion of lay members on regulatory committees and boards; the regulatory financing model; rule-making powers and arrangements for shared services. Should changes be recommended as a result of the review, it is likely that these will take effect in 2014/2015. A key driver of the review will be the principle of regulatory independence in the Legal Services Act and ICAEW's responsibilities as a prospective legal services regulator.
- 8.6. In the meantime, we consider that the approach that we are proposing in relation to the Probate Committee – both to its membership and its function – will be in keeping with the spirit of the principle of regulatory independence and the LSB's internal governance rules. While the Probate Committee will sit within ICAEW's existing governance structures, it will have full autonomy and independence in dealing with matters in relation to probate practitioners, and will have the freedom to report matters as necessary to the LSB. Its role and membership will be kept under review and is likely to evolve in consultation with the LSB as ICAEW's experience in legal services regulation expands.

Current arrangements

- 8.7. As explained in paragraphs 2.7 to 2.12 above, ICAEW's council is responsible for determining ICAEW's overall objectives, strategy and budget. It is supported by ICAEW's main board, and five departmental boards – Learning and Professional Development, Technical Strategy, Members, Commercial and Professional Standards – each of which oversees departmental operational plans, monitors performance and approves specific projects.
- 8.8. The Professional Standards Board (PSB) is responsible for ICAEW professional standards and the activities of the Professional Standards Department (PSD). Its responsibilities include:
- developing proposals relating to Professional Standards' strategy and policy;
 - determining the PSD's overall budget and resources;
 - setting the level of regulatory fees based on the self-financing principle;
 - making and amending regulations in the professional conduct and regulated areas of audit, insolvency and investment business;¹⁶
 - amending the PA standards and guidance;
 - dealing with matters relating to the monitoring of compliance with the clients' money regulations;

¹⁶ Excluding those regulations made by the Investigation, Disciplinary and Appeal Committees under powers delegated to them in the Schedule to the Disciplinary Bye-laws), and provided that PSB may not approve any such regulations or amendments without the endorsement of the Board where these represent new, or changes to, policy or are matters which are likely to be sensitive to members.

- developing and monitoring performance criteria and performance measures for PSD activities;
 - reviewing the structure and membership of Professional Standards' committees (in consultation with ICAEW's Nominating Committee); and
 - ensuring that the activities of the quasi-judicial committees and staff are visibly distinguishable and separate from other ICAEW activities.
- 8.9. The PSB is also charged with overseeing the work of ICAEW's quasi-judicial committees which include the:
- Audit Registration Committee;
 - Insolvency Licensing Committee;
 - Investment Business Committee;
 - Review Committee;
 - Investigation Committee;
 - Disciplinary Committee; and
 - Appeal Committee.
- 8.10. This is subject to the above committees not being answerable to the PSB for their decisions in individual cases or in relation to, for example, their policy on sentencing guidance. No member of council or anyone who sits on a committee of ICAEW's representative arm may sit on any of the quasi-judicial committees.
- 8.11. The PSB currently comprises 16 members, including two lay members, three staff members and the executive director, Professional Standards. It is chaired by a council member who also sits on ICAEW's main board, along with the executive director.
- 8.12. Although PSD shares some services with other departments in the organisation (eg, human resources) it operates with a significant degree of independence. Measures are in place to ensure that the discharge of activities is conducted free from influence from ICAEW's representational arm. Access to its IT systems, for example, is protected and, within the department, regulatory information is shared on a need-to-know basis.
- 8.13. PSD is also responsible for setting its own budget in accordance with a self-financing principle. ICAEW membership subscriptions or practising certificate fees are not used to subsidise its regulatory function in relation to audit, insolvency, investment business and PA (although legal and professional conduct activities are funded in part through these fees). Similarly, regulatory fees are not used to subsidise membership activities.

Proposed arrangements

Probate Committee

- 8.14. If our application is successful, the regulation of probate activities will fall within the remit of ICAEW PSD. A newly created quasi-judicial body, the Probate Committee, will have full responsibility for dealing with regulatory matters concerning probate practitioners and will have no representative functions. This will include rule making, policy/strategy setting, budget setting and day-to-day casework concerning accredited probate firms. Although under the proposed terms of reference (Annex 19) the Probate Committee will be obliged to consult with the PSB and other stakeholders on matters of policy or if amendments to the probate regulations are proposed, it will have full independence and ultimate responsibility for ensuring that matters concerning probate are conducted in accordance with the Act's requirements and the regulatory objectives.
- 8.15. If at any time the Probate Committee ceases to discharge its functions appropriately, we understand that, as the approved regulator, ICAEW would be required to notify the LSB, or could replace members of the committee following consultation with the LSB.

Access to the LSB

- 8.16. The Probate Committee will have the right to enter into communication freely with the LSB and other stakeholders. Although for the purposes of transparency, information may be shared with ICAEW's representative arm (to facilitate, for example, the development of courses of probate best practice) it is recognised that, in accordance with rule 7 of the IGRs, ICAEW's council, main board, representative departments and PSB will be unable to influence the content of representations made to these bodies. The Probate Committee will have the freedom to notify the LSB if it considers that its independence is being compromised in any way.

Committee membership

- 8.17. Following feedback from the public consultation, it is now proposed that the Probate Committee will be made up of ten members, with a 50:50 split between lay and non-lay members and a casting vote for the lay chair where required. A 'lay member' will be defined as someone who has never qualified or practised as a professional accountant, and persons with legal training will also be excluded. The balance of the committee will be made up of 'practitioners in the regulated areas', providing scope for the committee to expand its role in the future if ICAEW applies to regulate other reserved legal activities. In the meantime, non-lay members on the committee will be probate practitioners who are likely to be authorised individuals and/or solicitors.
- 8.18. Arguably the strengths of this approach are that:
- the proportion of lay members on the committee should promote public confidence that decisions of the committee will be free from bias and professional interests. All accountants and persons with legal training will be excluded from serving as lay member on the committee regardless of their background or professional membership body.
 - the proposal of a lay chair was supported by the Consumer Panel in its response to consultation. The Panel considers that the chair will set the strategic direction for the committee and that it is important that consumer-focused regulation is "*led from the top*".
 - the balance of the committee will be formed of practitioners who have knowledge and experience of probate and estate administration. This should ensure an appropriate level of technical expertise on the committee to enable it to discharge its functions effectively and with competence.

- 8.19. We consider that this approach to the committee's membership should ensure that an appropriate balance is struck between involving lay persons in the regulatory process and practitioners who have technical knowledge and expertise of probate and estate administration. The 50:50 split of lay and non-lay members is an approach that has been endorsed by the NHS in evaluating the governance arrangements of the General Medical Council and the Dental Council.

- 8.20. It is proposed that a 'sunset clause' will apply to enable the committee's membership and functions to be reviewed within 3 years. This should provide sufficient flexibility to enable the arrangements to be modified should the need arise in the future.

Conclusion

- 8.21. ICAEW fully supports the principle of regulatory independence and seeks, through its existing governance structures, to apply this principle to the three regulatory areas for which it is currently responsible. It is recognised, however, that in order to comply fully with the spirit of rules 6 and 7 of the IGRs, some adjustments will need to be made to enable us to become a legal services regulator. It is proposed, therefore, that the Probate Committee should have full, independent powers to determine matters in relation to probate practitioners free from any influence from ICAEW's representative

arm and other committees and boards within PSD. Its role and constitution will remain under review, in consultation with the LSB, as ICAEW's experience as a legal services regulator grows and its arrangements evolve following the wider governance review.

9. REGULATORY CONFLICT

Other approved regulators

- 9.1. Section 52 of the Act places a duty on approved regulators to make provision as is reasonably necessary to prevent regulatory conflicts. We recognise that if ICAEW becomes an approved regulator and licensing authority, there is scope for conflict to arise in cases where:
- individuals authorised by other approved regulators work within ICAEW accredited probate firms; or
 - ICAEW members work within entities regulated by other approved regulators.
- 9.2. Since 2010 we have been involved in an inter-regulator working group that has been considering the issues around regulatory conflict in multi-disciplinary practices and ABS. This has led to the creation of a Multi-Disciplinary Practices Framework MoU, a copy of which is contained in Annex 20. We are a signatory to this MoU, which provides a framework for cooperation, coordination and the exchange of information between regulators and professional bodies. Although a non-binding document, it sets out a statement of intent comprising principles to which all signatories agree to adhere, as far as they practically and lawfully can. These include the principles that regulators and professional bodies should:
- work together to establish arrangements to prevent and resolve regulatory conflicts;
 - work together to agree common standards of regulation;
 - share information where it is lawful and in the public interest to do so;
 - cooperate and coordinate investigation to ensure that regulatory costs and duplication are minimised as far as possible; and
 - ensure client money and the financial interests of consumers are protected.
- 9.3. If an individual working within an ICAEW accredited probate firm is, or may be, in breach of our regulatory arrangements, we will liaise, and coordinate our investigations, with the relevant approved regulator. Although it is generally anticipated under the MoU that the entity regulator will lead investigations in these circumstances, we will approach the relevant approved regulator to discuss the process and determine who should lead the investigation. We will seek, where possible, to resolve any regulatory conflicts, and will share with other regulators the outcome of our investigations. Where possible, we will admit information obtained from other regulators within our own disciplinary processes.

External regulatory conflicts

- 9.4. Section 54 of the Act places a duty on approved regulators to make provision, as is reasonably practicable and in all the circumstances appropriate to:
- prevent external regulatory conflicts;
 - provide for the resolution of any external regulatory conflicts that arise; and
 - prevent unnecessary duplication of regulatory provisions made by an external regulatory body.
- 9.5. We envisage that conflict could also arise with the requirements of other regulators that are not approved regulators under the Act. Given the nature of our members' work, we consider that the most likely source of conflict would be with the regulatory requirements of the FRC, the FSA and the Insolvency Service.
- 9.6. To address this issue, we have included within our proposed probate regulations a requirement on firms to inform us promptly – within 10 business days – if they consider that any other regulatory requirement to which they are subject (including the requirements of another approved regulator) might cause them to compromise their compliance with the regulations. If a situation of this kind arises, we will adopt a collaborative approach to liaising with the other approved regulators and resolving any issues on a case-by-case basis.

- 9.7. The FSA is a signatory to the Multi-Disciplinary Practices MoU and is a member of the working party mentioned in paragraphs 9.2 to 9.3 above. We anticipate, therefore, that if these working groups continue we will be working with the FSA and other professional bodies to analyse further the issues around the scope and risks of regulatory conflict under the Act. This may result in the creation of further subject-specific MoUs or the development of informal resolution mechanisms for conflict situations in the future.

Conclusion

- 9.8. Although we recognise that the nature of multi-disciplinary practices could give rise to conflict between the regulatory arrangements and requirements of various regulators and professional bodies, we are committed to working proactively with other bodies to reduce the risk of conflict arising, and to mitigate the effects of conflict if it does. We recognise that it is in the public interest for regulators to work cooperatively and collaboratively together, to ensure that a consistent and fair approach is applied to regulation across the legal services sector. We will continue to participate in the inter-regulator working group, and will work with the LSB and other approved regulators to address issues of possible regulatory conflict as they arise.

10. CHARTER AND STATUTORY POWERS

- 10.1. In preparing this application, ICAEW has had regard to whether any additional powers will be required for the effective discharge of its functions as an approved regulator and licensing authority. For the most part, ICAEW considers that its existing powers under the Royal and Supplemental Charters of 1880 and 1948 will be sufficient. However, to be sure that we will have the appropriate powers to regulate both this new area of legal activity and mixed practices of members and non-members, we have sought to amend clause 1 of the Supplemental Charter of 1948, which sets out the ICAEW's principal objects.
- 10.2. These proposed amendments to the charter are contained in Annex 21. The Resolution containing these proposed amendments was agreed by members in a Special Meeting on 12 June 2012 and is currently awaiting HM Privy Council allowance. ICAEW understands that these draft amendments will be considered by the Privy Council once the application has been submitted formally to the LSB and a recommendation for designation as an approved regulator and licensing authority looks likely.

Additional statutory powers

- 10.3. ICAEW has sought Counsel's advice on whether any additional statutory instruments will be needed to support this application. It is understood that statutory instruments may be required to facilitate ICAEW's proposed arrangements for appeals and enforcement (ie, intervention powers).

Appeals

- 10.4. It is proposed that appeals in relation to all accredited probate firms will be heard by the GRC. This will apply to decisions ICAEW makes as an approved regulator and licensing authority across both regulatory and disciplinary matters. The GRC will need to consent to its designation, and ICAEW has been informed that the Tribunal Procedure Committee has now agreed to add this new appeal right to their work programme. The consent of the Senior President of Tribunals will now be sought to the proposal.
- 10.5. In addition, ICAEW has received advice that statutory orders pursuant to section 69 and section 80 of the Act will be required to enable the GRC to hear appeals in relation to firms it authorises as an approved regulator and those it licenses as a licensing authority
- 10.6. The draft Probate regulations (Annex 1) have been drafted on the assumption that appeals in relation to all accredited probate firms will be referred to the GRC. As this proposal, along with others in relation to enforcement and governance, departs from ICAEW's usual arrangements under the Disciplinary Byelaws, ICAEW intends to amend the byelaws in 2013 to make it clear that regulations may change, supplement or disapply parts of the bye-laws in certain circumstances. This amendment is considered prudent as clause 16 of the Supplemental Charter states that regulations must not be in any way inconsistent with the Supplemental Charter or the bye-laws.
- 10.7. Subject to approval through ICAEW's usual governance processes, this proposal will be put to members for approval at ICAEW's next Special Meeting in June 2013. The proposed amendments to the Disciplinary Byelaws will then require HM Privy Council allowance.

Intervention powers

- 10.8. ICAEW will acquire intervention powers automatically under the Schedule 14 of the Act for firms it licenses for probate in its capacity as a licensing authority. As set out in paragraphs 4.129 – 4.134, however, ICAEW considers that there would be merit in it also holding similar powers to those detailed in Schedule 14 for firms it authorises for probate as an approved regulator. Although ICAEW has limited powers of intervention under the Disciplinary Byelaws currently, it is considered that these additional powers would enable ICAEW to discharge its supervisory function more consistently across all accredited probate firms. Additional enforcement powers are also sought for consumer

protection reasons as it is recognised that the majority of authorised firms will be either sole practitioners or very small firms where PII will be invalidated in the case of fraud by a sole practitioner or in cases of collusion.

- 10.9. Subject to the LSB and MoJ's agreement to this proposal, ICAEW understands that it may be possible to acquire additional intervention powers as an approved regulator by way of a supplementary order on designation under section 69 of the Act.

11. CONSULTATION

- 11.1. ICAEW consulted on its draft application to become an approved regulator and licensing authority for probate between 29 June and 7 September 2012. A full copy of the draft application and regulations was available on the website and publicised through various channels including member email alerts, ICAEW's website and trade publications.
- 11.2. An email was sent to key stakeholders on 29 June informing them of the consultation. This included the 'mandatory consultees' (the Consumer Panel, the OFT and the Lord Chief Justice); the Ministry of Justice; the Legal Ombudsman; ICAEW's oversight regulators, and other approved regulators and professional bodies. A full list of the bodies that were contacted is set out in Annex 22.
- 11.3. In total 8 responses were received, six during the consultation period and two thereafter. Six were brief responses from members which did not raise significant issues. The seventh response was from the Consumer Panel, and a summary of their comments and ICAEW's response is also contained in Annex 22. The Law Society also responded stating that they would reserve their comments until after the application has been finalised and submitted formally to the LSB.
- 11.4. During the consultation period ICAEW staff met with the Chief Ombudsman and representatives of the Consumer Panel. The Chief Ombudsman provided comments on the draft regulations, which have since been incorporated into the revised application. Representatives of the Lord Chief Justice's office did not consider it appropriate to meet prior to the formal submission of the application to the LSB. Officials from the OFT also considered a meeting unnecessary as no possible competition issues in relation to the application had been identified at that stage.

12. STATEMENT

We confirm that the information contained in this application is accurate and complete to the best of our knowledge and belief:

Vernon Soare 17.12.12

Vernon Soare
Executive Director, Professional Standards

Richard W. Harwood.

Richard Harwood
Chairman, Professional Standards Board

13. CONTACT DETAILS

Claire Phillips
Regulatory Policy Manager
T: +44 (0)1908 546 279
E: claire.phillips@icaew.com

ICAEW
Professional Standards
Metropolitan House
321 Avebury Boulevard
Milton Keynes
MK9 2FZ

The Institute of Chartered Accountants in England & Wales (ICAEW) was incorporated under Royal Charter. The ICAEW Royal Charter number is RC000246

14. GLOSSARY OF DEFINED ABBREVIATIONS

ABS	Alternative business structures
AML	Anti-money laundering
AC	Appeal Committee
ARP	Assigned risks pool
ACA	Associate Chartered Accountant
CFAB	Certificate in Finance, Accounting and Business
CAI	Chartered Accountants Ireland
CIPFA	Chartered Institute of Public Finance and Accountancy
CEO	Chief executive officer
CFO	Chief financial officer
CCAB	Consultative Committee of Accountancy Bodies
CPD	Continuing professional development
CRB	Criminal Records Bureau
DPB	Designated professional body
DC	Disciplinary Committee
FRC	Financial Reporting Council
FSA	Financial Services Authority
GAA	Global Accounting Alliance
GRC	General Regulatory Chamber
HoFA	Head of Finance and Administration
HoLP	Head of Legal Practice
HMRC	Her Majesty's Revenue and Customs

IAASA	Irish Auditing and Accounting Supervisory Authority
IHT	Inheritance tax
IPD	Initial professional development
ICAEW	Institute of Chartered Accountants in England and Wales
ICAS	Institute of Chartered Accountants of Scotland
IGR	Internal governance rules
IESBA	International Ethics Standards Board for Accountants
IC	Investigation Committee
LSB	Legal Services Board
LLP	Limited liability partnership
MoJ	Ministry of Justice
OFT	Office of Fair Trading
PA	Practice Assurance
PC	Practising certificate
PII	Professional indemnity insurance
PSB	Professional Standards Board
PSD	Professional Standards Department
QAD	Quality Assurance Department
QC	Queen's Counsel
RPB	Recognised professional body
RQB	Recognised qualifying body
RSB	Recognised supervisory body
RDR	Retail distribution review

RC Review Committee

SIS Shared Intelligence Service

15. ANNEXES

1. ICAEW's draft probate regulations
2. ICAEW's Royal Charter
ICAEW's Supplemental Charter
ICAEW's Principal Bye-laws
ICAEW's Disciplinary Bye-laws
ICAEW's Review Committee regulations
3. ICAEW office-holders and executive management team
ICAEW structure chart and reporting lines
4. ICAEW annual reviews and accounts (2009 – 2011)
5. ICAEW risk management strategies
ICAEW staff development policies
6. ACA entry routes
ACA student regulations
7. Professional Indemnity Insurance regulations
8. ICAEW Code of Ethics
9. Continuing Professional Development regulations
10. Practice Assurance visits leaflet
11. Annual return – 2011
Draft probate annual return questions
12. ICAEW's clients' money regulations
13. The Anti-Money Laundering Guidance for the Accountancy Sector
14. Guidance on Sentencing
15. Proposed probate application forms
16. Course outline: wills, probate and estate administration
17. Business plan for probate
18. Probate Compensation Scheme regulations
19. Proposed terms of reference for the Probate Committee
20. Framework Memorandum of Understanding: Licensed Bodies as Multi-Disciplinary Practices Constituted as Alternative Business Structures
21. Proposed amendments to ICAEW's Supplemental Charter for probate and ABS
22. Consultation – stakeholder list
Consultation – responses
Consultation – ICAEW's response to the Consumer Panel's comments
23. Compliance with the Legal Services Board's criteria for determining approved regulator and licensing authority applications