



Legal Services Board – Decision Notice issued under Part 2 of Schedule 4 and Part 1 of Schedule 10 to the Legal Services Act 2007

1. The Legal Services Board (**LSB**) has decided to grant an application to make a recommendation to the Lord Chancellor that an order be made designating the Institute of Chartered Accountants in England and Wales (**ICAEW**) as an approved regulator for probate activities. The LSB has also decided to grant an application to make a recommendation to the Lord Chancellor that an order be made designating the ICAEW as a licensing authority for the same reserved legal activity.
2. In making the recommendations, the LSB also recommends that the related regulatory arrangements are, at the same time treated as having been approved by the LSB. This includes the ICAEW's Probate Regulations which contain the Licensing Rules (see **Annex 3**).
3. This Notice sets out the basis for the LSB decision.

Authority for the decision

4. The authority under which the LSB has made this decision is set out in **Annex 1**.

Background

5. The ICAEW has made two separate applications to the LSB under the Legal Services Act 2007 (**the Act**). The first is an application under Part 2 of Schedule 4 to the Act for a recommendation from the LSB to the Lord Chancellor for designation as an approved regulator. The second is an application under Part 1 of Schedule 10 to the Act for a recommendation from the LSB to the Lord Chancellor for designation as a licensing authority. Both applications are for the reserved legal activity of probate activities.
6. The designation as a licensing authority can only proceed if the Lord Chancellor first agrees to designate the ICAEW as an approved regulator¹.

¹ Paragraph 1(3)(b) of Schedule 10 to the Act

7. The ICAEW's applications relate to probate activities. This is a reserved legal activity, defined in paragraph 6 of Schedule 2 to the Act as the preparation of any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales. The Act further defines 'probate papers' as papers on which to found or oppose a grant of probate or, a grant of letters of administration.²
8. The ICAEW's proposed regulatory arrangements will restrict the authorisation of probate practitioners to 'non-contentious probate', i.e. the grant of probate or letters of administration only. The authorisation will not extend to opposing a grant of probate or letters of administration.
9. In preparation for making this application the ICAEW has developed, where possible, a single regulatory framework that will apply, for the most part, equally to authorised firms (in which all principals and owners of that firm are individually authorised) and licensed firms (Alternative Business Structures in which not all principals and owners of that firms are authorised) wishing to undertake probate activities. In the limited circumstances where additional requirements apply only in respect of licensed firms (for example, fitness to own tests, ownership, appointment of a Head of Legal Practice (**HOLP**) and Head of Finance and Administration (**HOFA**) etc) this is to comply with requirements of the Act.
10. The ICAEW is a new entrant to the legal services market and is not an existing approved regulator for any reserved legal activities. It is a chartered body founded by Royal Charter in 1880 and received a Supplemental Charter in 1948.

Assessment of the applications

11. The LSB undertook an assessment of the application for designation as an approved regulator against the criteria for designation specified in Schedule 4 to the Act and, of the application for designation as a licensing authority against the criteria for designation specified in Schedule 10 to the Act. The applications were also assessed against the Rules for Applications for Approved Regulator and Qualifying Regulator designation (1 April 2011) and Rules for applications to be designated as a licensing authority (13 June 2011) (**LSB's Designation Rules**)

² Schedule 2 to the Act – The reserved legal activities: Probate activities
Paragraph 6 (1) "Probate activities" means the preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales. (2) In this paragraph "probate papers" means papers on which to found or oppose – (a) a grant of probate, or (b) a grant of letters of administration.

made by the LSB under each Schedule.³ The assessment was presented to a meeting of the Board of the LSB (**the Board**) on 27 November 2013 and is summarised at **Annex 2**.

The Board discussion

12. The Board discussed the ICAEW's arrangements to secure compliance with the LSB's Internal Governance Rules (**IGRs**).⁴ This is an important consideration as the criteria on independence for both the approved regulator and licensing authority applications is that the applicant must have appropriate internal governance arrangements at point of designation; regulatory functions not be prejudiced by its representative functions; as far as reasonably practical, regulatory decisions be taken independently of representative ones.⁵
13. The ICAEW has created the Probate Committee (**PC**), a new quasi-judicial body with responsibility for overseeing the ICAEW's regulatory framework for probate which will have fully delegated responsibility from the ICAEW for dealing with all matters concerning probate practitioners.
14. The LSB have concluded that the ICAEW is not an applicable approved regulator (**AAR**) and therefore do not have to comply fully with the LSB's Internal Governance Rules (**IGRs**). Further details on this are examined in **Annex 2**. Consequently, the full IGRs schedule (which includes the requirement for a lay majority on the governing body of the regulatory function) does not apply to the ICAEW.
15. The Board is satisfied that the arrangements for the PC will allow it to exercise the regulatory functions in a way that is not prejudiced by the ICAEW representative functions. In making the decision to approve the designation applications, when considering the ICAEW's proposals for regulatory independence, it was important to determine what a proportionate approach would be. Taking into account the scale of probate activities (compared to other ICAEW regulatory activity), we consider that having placed responsibility for governance with the PC is appropriate. The terms of reference, membership and powers of the PC are capable of delivering regulatory functions independent from representative functions.

³ The rules made by the LSB are published on the LSB's website at this link:

http://www.legalservicesboard.org.uk/what_we_do/regulation/index.htm

⁴ For further information, please refer to the LSB's IGRs which are published on the LSB's website at this link:

http://www.legalservicesboard.org.uk/Projects/pdf/internal_governance_rules%202009_final_km.pdf

⁵ As set out in paragraphs 13(2)(a) and 13(3)(a)-(b) of Schedule 4 to the Act for approved regulator and reserved legal activity applications.

16. The Board discussed the ICAEW's proposals for an appeals body to be in place to hear and determine appeals against decisions of that applicant. This point forms part of the criteria under the Act which must be met by the ICAEW for designation as a licensing authority.
17. The ICAEW set out in its original application that it had elected to use the General Regulatory Council of the First Tier Tribunal (**GRC**) as the single appellate body for all regulatory decisions relating to probate (for further detail please refer to **Annex 2**). To achieve this, section 69⁶ and section 80⁷ orders are needed so that the ICAEW can make the relevant rules to allow the GRC to consider the ICAEW decisions and for the GRC to be established as the appellate body for all probate decisions. However, due to the length of time needed to complete the necessary Ministry of Justice (**MoJ**) reviews and the parliamentary processes for these orders to take place, the ICAEW has proposed an interim measure which will allow designation to take place at an earlier date. This interim measure establishes the existing ICAEW Appeals Committee as the single appellate body for all probate decisions until such time as the relevant orders are in place. The ICAEW's Appeals Committee is independent of the ICAEW as the representative body.
18. The Board accepts this approach as an interim measure; our assessment is that there will be a limited number of cases for the ICAEW Appeal Committee to consider in the interim period. The Board is also satisfied that an appeals body will be in place (both in the interim and for the long term) to hear and determine appeals against licensing authority decisions.
19. The Board also raised an issue in relation to managing any potential conflict between duties of disclosure on one hand and client confidentiality on the other. The ICAEW's application indicates that the Code of Ethics requires that members demonstrate the highest standards of professional conduct and to take into consideration the public interest. It sets out five fundamental principles which guide members' behaviour which include the requirement to ensure professional competence and due care and, confidentiality.⁸ We are satisfied that the Code of Ethics addresses this issue appropriately.

⁶ Section 69 of Part 4 to the Act Modification of the functions of approved regulators etc.

⁷ Section 80 of Part 4 to the Act Functions of appellate bodies.

⁸ The supporting documentation to the applications includes the full ICAEW Code of Ethics at Annex 8 (see link to LSB website:

http://www.legalservicesboard.org.uk/Projects/pdf/20121214_icaew's_probate_application_anx_5-8.pdf

Decisions

20. The LSB Rules (Rules for applications for Approved Regulator and Qualifying Regulator designation) giving effect to paragraphs 13(2) and 13(3) of Schedule 4 set out the matters on which the LSB must be satisfied when granting an application for designation as an approved regulator.
21. The LSB has considered the application and is satisfied that the criteria for granting an approved regulator designation application have been met.
22. The LSB Rules (Rules for applications to be designated as a LA) giving effect to paragraphs 11(2) and 11(3) of Schedule 10 detail the matters on which the LSB must be satisfied when granting an application for designation as a licensing authority.
23. Therefore the LSB decided to:
 - recommend to the Lord Chancellor under paragraph 16(2) of Schedule 4 that the ICAEW be designated as an approved regulator for probate activities;
 - recommend to the Lord Chancellor under paragraph 14(2) of Schedule 10 that the ICAEW be designated as a licensing authority for probate activities; and
 - include in the recommendation to the Lord Chancellor, the recommendation that the ICAEW's Probate Regulations be approved for use by the ICAEW in its status as an approved regulator and licensing authority when the Lord Chancellor exercises his authority under paragraph 18(1) of Schedule 4 and paragraph 16(1) of Schedule 10.
24. This document constitutes the decision notice which is being provided to the applicant under paragraph 14(3) of Schedule 4 and paragraph 12(3) of Schedule 10 to the Act. It is being published under paragraph 14(5) of Schedule 4 and paragraph 12(5) of Schedule 10 to the Act.

Chronology

- The ICAEW made its application to the LSB on 14 December 2012;
- The LSB confirmed receipt of an application from the ICAEW on 14 December 2012;
- The decision period started on 14 December 2012 and ends on 13 December 2013;

- The application was published on the LSB website on 21 December 2012;
- The advice from the mandatory consultees, selected consultee and the ICAEW's representations to that advice were published on the LSB website on 1 October 2013;
- This decision notice will be published on our website on 11 December 2013.

Legal Services Board

11 December 2013

Authority for the decisions

Applications for designation as an approved regulator

1. Paragraph 3(2) of Schedule 4 to the Legal Services Act 2007 (**the Act**) enables a body to apply to the Legal Services Board (**LSB**) requesting that the LSB recommends that an order be made by the Lord Chancellor to designate that body as an approved regulator in relation to identified reserved legal activities⁹. The remainder of paragraph 3 of Schedule 4 to the Act identifies other requirements that are imposed by the Act or given effect to by the LSB Rules in relation to the application made by that body.
2. Part 2 of Schedule 4 to the Act also documents the processes, participants and criteria that will be applied to any such application that is made. These provisions enable the LSB to make rules at paragraphs 3(3) for the form and manner of the application and 3(4) for the amount of the prescribed (application) fee. In accordance with paragraph 4(2), the LSB must make rules about the procedures and criteria that it will apply when determining whether to refuse to consider, or to continue its consideration of an application. Additionally, in accordance with paragraph 11(3), the LSB must make rules governing the making of oral and written representations.
3. Paragraph 13(1) of Schedule 4 to the Act also requires the LSB to make rules about how it will determine if it should recommend to the Lord Chancellor that an application for designation by a body to become an approved regulator in relation to identified reserved legal activities should be made. These Rules for Approved Regulator and Qualifying Regulator designation came into effect on 1 January 2010 (“Designation Rules”).¹⁰
4. The LSB may only grant an application in relation to a particular reserved legal activity if it is satisfied in relation to the requirements under the Designation Rules giving effect to paragraphs 13(2)¹¹ and 13(3)¹² of Schedule 4. The

⁹ The term “approved regulator” is defined in section 20 of the Act and a list of the Approved Regulators and the reserved legal activities for which they are approved is contained in Schedule 4 Part 1 of the Act. The term “reserved legal activities” is defined at Section 12 of the act and a list of the reserved legal activities and a definition of what is comprised within each of them is contained in Schedule 2 of the Act. Both Schedules will be amended from time to time in accordance with activities conducted in accordance with provisions of the Act.

³ The Rules for Approved Regulator designation application can be found at http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/Qualifying_Regulator_status/201103_28_Rules_for_applications_Approved_Regulator_Qualifying_Regulator_designation_1_April.pdf

¹¹ Paragraph 13 (2) of Schedule 4 states that rules under sub-paragraph 1 must, in particular provide that the Board may grant an application in relation to a particular reserved legal activity only if it is satisfied – (a) that, if an order were to be made under paragraph 17 designating the body in relation to that activity, the applicant would have appropriate internal governance arrangements in place at the time the order takes effect, (b) that, if such an

Designation Rules provide the mechanism through which the LSB carries out its assessment against these requirements and the LSB has therefore satisfied itself of compliance with the requirements of paragraphs 13(2) and 13(3) by an assessment of the application and proposed regulatory arrangements against the Designation Rules.

5. The LSB is also required to approve what the body proposes as its regulatory arrangements if the proposed order is made.
6. The LSB will approve regulatory arrangements in so far that they appear to achieve their intended outcome and satisfy the conditions in paragraphs 13(2) (a) to have appropriate internal governance arrangements in place and 13(2) (c) of Schedule 4 that the proposed regulatory arrangements make appropriate provision for the proposed reserved legal activity. The LSB is also required under paragraph 13(2)(d) to ensure that the proposed regulatory arrangements comply with the requirement imposed by sections 52 and 54 of the Act (resolution of regulatory conflict) and that such arrangements comply with the requirements imposed in relation to the handling of complaints (sections 112 and 145) – under paragraph 13(2)(e).

Applications for designation as a licensing authority

7. Paragraph 1(2) of Schedule 10 to the Act enables a body to make an application requesting that the LSB recommends that an order be made by the Lord Chancellor to designate that body as a licensing authority in respect of identified reserved legal activities. Paragraph 1(3) of Schedule 10 provides that a body may only make such an application if it is an existing approved regulator in relation to the activity or it has made an application under Part 2 of Schedule 4 (designation of approved regulators) for the Board to recommend that an order be made by the Lord Chancellor designating the body as an approved regulator in relation to the activity.

order were to be made, the applicant would be competent, and have sufficient resources, to perform the role of approved regulator in relation to the reserved legal activity at that time, (c) that the applicant's proposed regulatory arrangements make appropriate provision, (d) that the applicant's proposed regulatory arrangements comply with the requirement imposed by sections 52 and 54 (resolution of regulatory conflict) and (e) that those arrangements comply with the requirements imposed by sections 112 and 145 (requirements imposed in relation to the handling of complaints).

¹² Paragraphs 13(3)(a) and (b) of Schedule 4 provides that the LSB must in particular be satisfied that the exercise of the applicant's regulatory functions would not be prejudiced by any of its representative functions and that decisions relating to the exercise of regulatory functions would, so far as reasonably practicable, be taken independently from decisions relating to the exercise of representative functions.

8. Part 1 of Schedule 10 to the Act also documents the processes, participants and criteria that will be applied to any such application that is made. These provisions enable the LSB to make rules at paragraphs 1(4) specifying the form and manner of the application and 1(5) for the amount of the prescribed (application) fee. In accordance with paragraph 2(2), the LSB must make rules about the procedures and criteria that it will apply when determining whether to refuse to consider or to continue its consideration of an application. Additionally, in accordance with paragraph 9(3), the LSB must make rules governing the making of oral and written representations.
9. Paragraph 11(1) of Schedule 10 to the Act also requires the LSB to make rules about how it will determine if it should recommend to the Lord Chancellor that an application for designation by a body to become a licensing authority in relation to identified reserved legal activities should be made. These Rules for Licensing Authority Designation Applications came into effect on 1 January 2010¹³ (“LA Designation Rules”).
10. The LSB may only grant an application in relation to a particular reserved legal activity if it is satisfied in relation to the requirements under its Rules giving effect to paragraphs 11(2)¹⁴ and 11(3)¹⁵ of Schedule 10. The LA Designation Rules provide the mechanism through which the LSB carries out its assessment against these requirements and the LSB has therefore satisfied itself of compliance with the requirements of paragraphs 11(2) and 11(3) by an assessment of the application and proposed regulatory arrangements against the LA Designation Rules.
11. Paragraph 16(1) provides that where an order is made by the Lord Chancellor under Paragraph 15 of Schedule 10, the applicant’s proposed licensing rules are at the same time treated as having been approved by the LSB.

¹³ The Rules for Licensing Authority Designation Applications can be found on the LSB website:

http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/designating_la_rules_v2_june_2011_final.pdf.

¹⁴ Paragraphs 11(2)(a) to (d) provide that the LSB may only grant an application if satisfied that the applicant’s proposed licensing rules in relation to the activity comply with the requirements of section 83; that if an order to be made under paragraph 15 designating the body in relation to the activity there would be a body with power to hear and determine appeals; the applicant would have appropriate internal governance arrangements in place at the time the order takes effect; and the applicant would be competent, and have sufficient resources to perform the role of licensing authority in relation to the activity at the time the order takes effect.

¹⁵ Paragraphs 11(3)(a) and (b) of Schedule 4 provides that the LSB must in particular be satisfied that the exercise of the applicant’s regulatory functions would not be prejudiced by any of its representative functions and that decisions relating to the exercise of regulatory functions would, so far as reasonably practicable, be taken independently from decisions relating to the exercise of representative functions.

Annex 2

Extract from the Board paper

1. Assessment of the applications against the criteria for approval in the Legal Services Act 2007 (the Act) and the LSB’s Rules for Approved Regulator and Qualifying Regulator designation (LSB’s Designation Rules).

- 1.1. The following table is a summary of the criteria to be satisfied for designation as an approved regulator as set out in Schedule 4, Part 2, paragraph 13 of the Act and the LSB’s Designation Rules.

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
<p>Appropriate internal governance arrangements at point of designation; regulatory functions will not be prejudiced by its representative functions; as far as reasonably practical, regulatory decisions will be taken independently of representative ones.</p>	<p>The LSB is satisfied the arrangements for the Probate Committee (PC) will allow it to operate independently from the representative functions of the ICAEW.</p> <p>The ICAEW is not an Applicable Approved Regulator (AAR) under the LSB’s Internal Governance Rules (IGRs) and so is not required to adhere to the LSB’s full IGRs. The ICAEW must ensure their governance arrangements are in the spirit of independence and we are satisfied that the arrangements are capable of delivering this.</p> <p>The ICAEW’s definition of lay <u>excludes</u> both accountants and lawyers. The ICAEW definition goes one step further than the definition of lay person within paragraphs 2(4) and (5) of Schedule 1 to the Act which excludes lawyers only (as authorised persons), but not accountants.</p>	<p>MET</p>
<p>Applicant competent has sufficient resources to perform the role of approved regulator in</p>	<p>The LSB is satisfied that the ICAEW is competent and has sufficient resources in which to regulate probate activities.</p> <p>This assessment is based on a review of the ICAEW’s regulatory capacity and capability; resources; budget and fees scale for probate firms. We conducted three</p>	<p>MET</p>

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
<p>relation to probate activities.</p>	<p>site visits to the ICAEW offices to gather information in relation to the approach to authorisation and supervision, and reviewed the proposed programme for inspection visits.</p> <p>The ICAEW is a well-established regulator of accountancy services. Much of the regulatory framework for probate activities is based on a tailored version of the ICAEW’s current processes for audit and insolvency. We have taken into consideration that the current oversight regulators (the Financial Reporting Council and the Insolvency Service) consider the ICAEW to be a competent regulator in the areas they currently regulate including audit and insolvency.</p> <p>The LSB is satisfied that the ICAEW has met this criterion in full.</p>	
<p>Applicant’s proposed regulatory arrangements make appropriate provision for the regulation of those it wishes to authorise; examples of evidence found in Part 2 of LSB’s Designation Rules (approved regulator)</p>	<p>The LSB has conducted a thorough review of the proposed regulatory arrangements for the ICAEW as an approved regulator. There has also been a review by the LSB legal team.</p> <p>The LSB is satisfied that the regulatory arrangements make appropriate provision for those who it wishes to authorise for probate activities. The regulatory arrangements cover the requirements set out in the LSB’s Designation Rules which include:</p> <ul style="list-style-type: none"> • Client money; • Acting in client’s interest; • Compliance with professional principles; • Complaints handling; • Supporting competition; • Independence; • Rule of law; • Diversity; and <p>Consumers being actively involved in decision making throughout their dealings with the profession.</p>	<p>MET</p>
<p>Compliance with s.52 of the Act makes such provision as is</p>	<p>The ICAEW has included within its proposed probate regulations a requirement that firms inform the ICAEW promptly – within 10 business days – if they consider that any other regulatory requirement to which they are</p>	<p>MET</p>

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
<p>reasonably necessary to prevent regulatory conflicts.</p>	<p>subject (including the requirements of another approved regulator) might cause them to compromise their compliance with the ICAEW regulations.</p> <p>Since 2010, the ICAEW has been involved in an inter-regulator working group that has been considering the issues around regulatory conflict in multi-disciplinary practices and Alternative Business Structures (ABS). This has led to the creation of a Multi-Disciplinary Practices Framework Memorandum of Understanding (MDP MoU). The ICAEW is a signatory to the MDP 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 practicably and lawfully can.</p> <p>The LSB is satisfied with the procedures in place to deal with regulatory conflict if it arises.</p>	
<p>Compliance with s.54 of the Act as is reasonably practicable - (i) to prevent external regulatory conflicts; (ii) to provide for the resolution of any external regulatory conflicts that arise; and (iii) to prevent unnecessary duplication or regulatory provisions made by an external body</p>	<p>The ICAEW envisages that conflict could arise with the requirements of other regulators that are not approved regulators under the Act. Given the nature of its members' work, the ICAEW considers that the most likely source of conflict would be with the regulatory requirements of the FRC, the Financial Conduct Authority (FCA) and the IS.</p> <p>The FCA is a signatory to the MDP MoU and a member of the working party. The ICAEW anticipates that the FCA and other professional bodies will discuss issues around the scope and risks of regulatory conflict under the Act.</p> <p>The LSB is satisfied with the procedures in place to deal with external regulatory conflict if it arises.</p>	<p>MET</p>

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
Compliance with s.112 of the Act to make provision for each authorised person to establish and maintain a complaints procedure ;	<p>The ICAEW's regulatory arrangements make provision for firms to notify their existing clients of their right to make a complaint at the first opportunity.</p> <p>The ICAEW also indicates that in keeping with an outcomes focussed 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.</p> <p>The LSB is satisfied that the regulations for complaints handling are compliant with section 112 of the Act. We also note that the ICAEW's arrangements in relation to complaints handling are in line with the LSB's Guidance on First-tier complaints handling.¹⁶</p>	MET
Compliance with s.145 of the Act requiring each authorised person to give ombudsmen assistance when requested; and to make provision for enforcement of that requirement;	<p>The ICAEW has set out a framework for compliance with section 145 of the Act. It requires authorised persons to give the Legal Ombudsman (LeO) assistance when requested. This is supported in the probate regulations. If a firm fails to cooperate with the Legal Ombudsman (probate regulation 7.9), this may result in disciplinary procedures against that firm.</p> <p>The ICAEW is in the process of agreeing a MoU with LeO to ensure procedures are in place for the sharing of information. This is expected to be completed and in place before the ICAEW is designated.</p> <p>The LSB is satisfied that the ICAEW's regulations are compliant with section 145 of the Act.</p>	MET
Authorised persons may	Not relevant to this application as the ICAEW is not seeking Qualifying Regulator status. ¹⁷	N/a

¹⁶ For further information on the Guidance, please refer to the LSB website at this link: http://www.legalservicesboard.org.uk/Projects/pdf/10_05_24_lsb_signposting_requirement_and_guidance_Decision_document.pdf.

¹⁷ Means a body, which is a Qualifying Regulator for the purposes of Section 86A of the 1999 Act by virtue of Part 1 of schedule 18 to the Act 2007 (Approved Regulators approved by the Board in relation to immigration matters).

Criteria for designation as an approved regulator	Summary of the LSB assessment	MET or not MET by the applicant
not provide immigration advice unless authorised by the ICAEW to do reserved legal activities;		
Consistency of regulatory arrangements with s.28 of the Act (RO, BRP etc).	The ICAEW's application includes a statement of policy on how they will exercise their regulatory functions as an approved regulator and licensing authority in accordance with the requirements of section 28 of the Act. The statement demonstrates how their proposed regulatory arrangements will support the regulatory objectives and professional principles set out in section 1 of the Act.	MET

1.2. The following information sets out our assessment of the ICAEW's application against the criteria for designation as a licensing authority as set out in paragraph 11 of Schedule 10 to the Act and the LSB's Rules for Licensing Authority Designation Applications (**LSB Designation Rules**).

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
<p>Licensing Rules must comply with s.83 of the Act.</p> <p>When considering the application the Board will consider how consistent an applicant's proposed licensing rules are with the LSB's guidance</p>	<p>Section 83(5) of the Act sets out what must be contained in the licensing rules of a licensing authority; the licensing authority application has been assessed against this and the LSB's Designation Rules we are satisfied that the proposed regulatory arrangements meet the requirements.</p> <p>We note that the ICAEW has aimed to provide a single regulatory framework for the regulation of authorised and licensed firms and that the regulations for licensed firms will differ only where required by the Act.</p> <p>The ICAEW expects to accredit mainly firms whose principal business is accountancy. The ICAEW does not intend to place restrictions on the nature or the</p>	MET

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
<p>on licensing rules.</p>	<p>extent of external ownership other than those set out in the Act. The Probate Committee will (at least initially) consider all applications on a case-by-case basis, and the ICAEW will impose conditions and/or restrictions on accreditation where necessary to protect the public interest.</p> <p>The ICAEW will not restrict its members from working within entities regulated by other approved regulators or licensing authorities.</p> <p>The LSB is satisfied that the licensing rules comply with section 83 of the Act.</p>	
<p>An appeals body in place to hear and determine appeals against decisions of the applicant</p>	<p>The ICAEW sets out in its original application that it has elected to have the General Regulatory Council of the First Tier Tribunal (GRC) as the single appellate body for all regulatory decisions relating to probate activities. Therefore, there will be a consistent mechanism in place between regulatory appeals for decisions made in relation to both authorised and licensed firms.</p> <p>To achieve this, section 69 and section 80 orders are needed so that the ICAEW can make the relevant rules to allow the GRC to consider the ICAEW decisions and for the GRC to be established as the appellate body for all probate decisions.</p> <p>However, due to the length of time needed to complete the necessary Ministry of Justice (MoJ) reviews and the parliamentary processes to lay the orders, the ICAEW has proposed an interim measure to achieve designation at an earlier date. This interim measure would establish the existing ICAEW Appeals Committee as the single appellate body for all probate decisions until such time as the relevant orders are in place. The ICAEW's Appeals Committee is independent of ICAEW as the representative body.</p> <p>The LSB accepts this approach as an interim measure; our assessment is that there will be a limited number of cases for the ICAEW Appeal Committee to consider in the interim period.</p>	<p>MET</p>

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
	The LSB is satisfied that an appeals body will be in place (both in the interim and for the long term) to hear and determine appeals against licensing authority decisions.	
Appropriate internal governance arrangements at point of designation; regulatory functions not to be prejudiced by its representative functions; as far as reasonably practicable, regulatory decisions to be taken independently of representative ones	The same governance arrangements apply to the ICAEW whether acting as an approved regulator or as a licensing authority. The LSB is satisfied that the ICAEW will have appropriate internal governance procedures in place to meet the independence requirement when acting as a licensing authority.	MET
Applicant competent and has sufficient resources to perform the role of licensing authority in relation to probate activities	<p>The ICAEW's regulatory resources and processes will be applied equally to the regulation of authorised and licensed firms.</p> <p>The LSB is satisfied that this criterion has been met in relation to the ICAEW's status as a licensing authority.</p>	MET
Approach to licensing rules are consistent with requirements in s.28 of the Act	<p>The ICAEW will have a single regulatory framework in its capacity as an approved regulator and as a licensing authority (except where it explicitly states specific requirements in relation to ABS).</p> <p>Having reviewed the ICAEW's licensing rules, the LSB</p>	MET

Criteria for designation as an licensing authority	Summary of the LSB assessment	MET or not MET by the applicant
(RO, BRP etc)	is satisfied that this criterion has been met.	
In accordance with s.82 of the Act, an applicant must prepare and issue a policy statement as to how, in exercising functions under Part 5 of the Act, it will comply with s.28 of the Act	<p>The ICAEW has provided a policy statement demonstrating how the ICAEW’s proposed regulatory arrangements will support the regulatory objectives and professional principles in section 1 of the Act.</p> <p>The LSB is satisfied that the criterion has been met in relation to ICAEW’s status as a licensing authority.</p>	MET

- 1.3. During the process of the LSB’s assessment, we identified specific parts of the applications, which required further detailed analysis.
- 1.4. *Independence of the ICAEW’s governance structures in relation to probate*
 - 1.4.1. The criteria on independence for both the approved regulator and licensing authority applications indicate that the applicant must have ‘appropriate internal governance arrangements at point of designation; regulatory functions not be prejudiced by its representative functions; as far as reasonably practicable, regulatory decisions be taken independently of representative ones’.
 - 1.4.2. The ICAEW has created the Probate Committee (**PC**), a new quasi-judicial body with responsibility for overseeing the ICAEW’s regulatory framework for probate activities. It will have fully delegated responsibility from the ICAEW for dealing with all matters concerning probate practitioners including rule making, policy/strategy setting, budget setting and day-to-day casework.
 - 1.4.3. The PC has ten members, split equally between lay and non-lay (professional). It is a requirement of the terms of reference of the PC that the Chair is a lay member with a casting vote. A lay member is defined as “a person who has never qualified or practised as a professional accountant. Solicitors and persons with legal training are also unable to act as lay members on the committee.” The

exclusion as a lay member of anyone with legal training is broader than the definition in the IGRs where the reference is to authorised persons only. It is possible that the make up of non-lay members on the PC, by virtue of being a mixture of both accountants and lawyers, may in fact result in the ICAEW meeting the definition of a lay-majority as set out in Schedule 1, paragraphs 2(4) and (5) to the Act. A further safeguard in the absence of a lay majority membership of the PC is the fact that the lay-Chair has a casting vote in the event of a split decision.

- 1.4.4. The Chair of the PC has been appointed. Brian Yates has a professional background in civil engineering and experience on a number of regulatory and consumer panels and councils. Recruitment of lay and non-lay members is in progress. Training of appointed members will take place in January and February 2014.
- 1.4.5. We are satisfied that the arrangements for the PC will allow it to exercise the regulatory functions in a way that is not prejudiced by the ICAEW's representative functions. There will be some circumstances whereby the representative body is consulted for some decisions, for example, when developing the ICAEW policy for probate practitioners the PC will consult with the Professional Standards Board and other stakeholders (where appropriate). However, decision-making powers are solely up to the discretion of the PC.
- 1.4.6. We have considered whether these arrangements are consistent with the LSB's IGRs.
- 1.4.7. All approved regulators must comply with general duties in relation to independence set out in rules 6 and 7 of the IGRs. This includes having arrangements that observe and respect the principle of regulatory independence; acting in a way that is compatible with it; ensuring regulatory functions are not prejudiced by and are independent from representative functions; and making available reasonable resources to deliver regulatory functions. Our assessment is that the arrangements are designed to meet these general duties.
- 1.4.8. We have concluded that the ICAEW is not an applicable approved regulator (**AAR**) and therefore do not have to comply fully with the IGRs.
- 1.4.9. An AAR is an approved regulator that is responsible for the discharge of regulatory and representative functions in relation to legal activities in respect of persons whose primary reason to be regulated by that approved regulator is those person's qualifications to practise a reserved legal activity, which is regulated, by

that approved regulator.¹⁸ The majority of those who are expected to seek authorisation from the ICAEW for probate will be accountants who are already subject to regulation by the ICAEW. Their primary reasons for regulation by the ICAEW is accountancy related activities and not to practise a reserved legal activity. The regulatory arrangements allow non-accountants to apply to the ICAEW for authorisation for probate; the ICAEW will not be discharging any representative function for these individuals (it is expected that non-accountants will be mainly solicitors for whom the Law Society provide representative functions).

1.4.10. Consequently, the full schedule (which includes the requirement for a lay majority on the governing body of the regulatory function) to the IGRs does not apply to the ICAEW. However, as explained in previous paragraphs, it is possible that the ICAEW meets our definition of a lay-majority board in any event, by virtue of an accountant (either qualified or trained as an accountant) being excluded from the definition of a lay-member.

1.4.11. When considering the ICAEW's proposals for regulatory independence, it was important to determine what a proportionate approach would be. Taking into account the scale of probate activities (compared to other ICAEW regulatory activity), we consider that placing responsibility for governance with the PC is appropriate. The terms of reference, membership and powers of the PC are capable of delivering regulatory functions independent from representative functions.

1.4.12. We note that the ICAEW proposes a membership review within three years, which would ensure that the PC has had some time in practice to review whether the 50:50 membership split is the most appropriate approach.

1.4.13. We also understand that the independent report into the governance of the ICAEW, chaired by Sir Christopher Kelly, which is due to report very shortly, is likely to recommend further strengthening of independent lay input into the work of the Institute at a number of levels more generally.

1.5. *Client protection arrangements for consumers of probate services*

1.5.1. The ICAEW intends to address client protection through the following sets of arrangements:

¹⁸ For further information, please refer to the IGRs (http://www.legalservicesboard.org.uk/Projects/pdf/internal_governance_rules%202009_final_km.pdf)

- a requirement for authorised firms and accredited probate firms to hold Professional Indemnity Insurance (**PII**);
- the setting up of a Probate Compensation Scheme to provide redress for consumers on a comparable basis in cases where PII is invalidated (i.e. in some cases of fraud);
- the requirement for accredited firms to have arrangements in place to handle complaints made against a firm or an individual employed within a firm; and
- a requirement for those holding client monies to comply with the ICAEW's client monies regulations.

1.5.2. In relation to PII, accredited probate firms must comply with the ICAEW's existing PII requirements as amended to include reference to probate¹⁹ which place an obligation on firms to take reasonable steps to meet claims arising from being in public practice. Insurance can only be obtained from participating insurers who have agreed to provide cover under terms which match those of the ICAEW's approved minimum wording. In regard to the scope of cover for claims, authorised work will fall within the general definition of 'professional business'²⁰ contained within the minimum approved wording.

1.5.3. An accredited probate firm will be required to carry a minimum of £500k PII per claim arising in connection with authorised work which includes probate and estate administration. This is a minimum level of indemnity only; the majority of medium-sized and large firms will carry PII at levels far in excess of these limits to reflect the nature of their businesses. 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, of their specific level of cover.²¹

1.5.4. The PII policies are on an "each and every claim" basis; therefore, multiple claims (each up to the £500k limit) can be made rather than having an upper limit on a policy.

¹⁹ For the full details of the ICAEW's PII regulations please see the ICAEW's website at this link: <http://www.icaew.com/en/members/regulations-standards-and-guidance/practice-management/professional-indemnity-insurance-regulations-guidance-current>.

²⁰ Professional Business is defined as advice given or services provided of whatsoever nature by or on behalf of the Insured to a third party, wherever or by whomsoever given or provided irrespective of whether or not a fee is charged, but provided that if a fee is charged in respect of such advice or service then that fee is taken into account in ascertaining the income of the Firm(s). For further details on the ICAEW's Minimum Approved Wording, please see the ICAEW's website at this link: <http://www.icaew.com/~media/Files/Members/practice-centre/professional-indemnity-insurance-pii/icaew-minimum-policy-wording-1-january-2014.pdf>.

²¹ In developing these arrangements, ICAEW have been conscious of the need to ensure the proposals do not act as a deterrent to market entry (Source: ICAEW application, para. 4.103, pg.34).

- 1.5.5. In terms of the probate compensation fund, individual grants from the scheme will be capped at a level comparable to the ICAEW's minimum requirements for PII i.e. £500K per estate.
- 1.5.6. The maximum amount that may be paid from the compensation fund in any one year is capped at £5m. There is a risk that this cap could cause temporary consumer detriment if a systematic issue is identified affecting multiple cases – those who make later claims may find that the cap is reached before their claim is settled. In these circumstances, or if a single claim would take the payment for the year over the cap, the PC will be able to defer payment to the following year. This appears to be an appropriate approach.
- 1.5.7. The ICAEW will not be prescriptive about the way in which firms deal with complaints, provided firms can demonstrate that they have mechanisms in place to deal with complaints in a fair, prompt, constructive and honest manner by a principal of the authorised firm or, in the case of a licensed firm, by the HOLP. The complaints regulations meet the requirements of the Act and the LSB Guidance on First Tier Complaints Handling.
- 1.5.8. Members and firms holding client monies must comply with the ICAEW's client money regulations. These regulations require firms to place any clients' monies in a separate, interest bearing 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.
- 1.5.9. We are satisfied that these arrangements are consistent with the requirements of the Act and will provide an appropriate level of consumer protection.

2. Requests for advice to the mandatory and selected consultees²²

- 2.1. The Act requires the LSB to seek advices from mandatory consultees in relation to all designation applications; these bodies include the Office of Fair Trading (**OFT**), the Legal Services Consumer Panel (**the Panel**) and the Lord Chief Justice (**LCJ**).
- 2.2. The Act also allows the LSB to seek advice from selected consultees when considering a designation application. We considered it reasonable to seek advices from the FRC and the IS in light of the important role both bodies play as oversight regulators for the ICAEW's current regulatory work.

²² Links to each of the advices provided by the mandatory consultees may be found on the LSB's website here: http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm.

2.3. *Office of Fair Trading*

- 2.3.1. The advice from the OFT was that it had found no evidence (actual or theoretical) that the ICAEW becoming an approved regulator and licensing authority would (or would be likely to) prevent, restrict or distort competition within the market for reserved legal services. Furthermore, the OFT considered that by allowing the ICAEW members to be authorised to deliver probate services as accredited probate firms, it may strengthen competition for these services, e.g. the ICAEW members could act as an alternative supply to solicitors in the conduct of probate activities, especially as an ABS. This could potentially place competitive pressure on the pricing of these services and broaden access to justice.
- 2.3.2. The ICAEW welcomed the advice made by the OFT.

2.4. *The Panel*

- 2.4.1. The Panel was asked to provide advice on the likely impact on consumers of the Lord Chancellor making an order for designation in accordance with a recommendation from the LSB.
- 2.4.2. The Panel submitted a detailed response to the ICAEW when it consulted on its draft proposals and met regularly with ICAEW officials during the last two years as their plans have evolved. The Panel commended the ICAEW for the level and nature of its engagement with them, which has led to their proposals becoming more consumer focused.
- 2.4.3. The Panel indicated that they continue to support the ICAEW's proposal to include estate administration within the scope of regulation when an accredited probate firm conducts the activity. It highlights that there is a high risk to consumer detriment in estate administration work.
- 2.4.4. The ICAEW informed the LSB that it wishes to make some minor changes to their regulatory arrangements set out in the original applications. The LSB considered it appropriate to consult on these changes with the Panel for a second time due to its impact on the proposed client protection arrangements. In particular, the ICAEW wished to introduce a new regulation giving the PC the ability to refuse to make a grant if payment could exhaust all the funds available in the Compensation Fund for payment. The Panel indicated that it supports the proposal because the interests of all potential claimants should outweigh those of a single individual.

2.4.5. The Panel had some further specific comments in relation to detailed parts of the application that relate to consumers. We believe that the ICAEW has provided a satisfactory response to the Panel's concerns.

2.5. *The Lord Chief Justice (LCJ)*

2.5.1. The LCJ was asked to provide advice on the likely impact on the courts of England and Wales if the applications were granted. The LCJ had some concerns in relation to the applications, which are explained in more detail in the paragraphs below.

2.5.2. The LCJ made a wider point (which he had made before in respect of previous designation applications), that competition will have a detrimental effect on standards and that a variation in standards between regulators is inappropriate in principle.

2.5.3. As with consideration of all applications for rule changes and designation as approved regulators or licensing authorities, this application is not simply about regulatory competition. We consider it to be about the competence and capacity of the ICAEW to regulate probate and from a thorough review of the ICAEW's regulatory arrangements, we are satisfied that the ICAEW is competent and has sufficient resources in which to regulate probate activities). It is also about ensuring that the right protections are in place for consumers, that the ICAEW's regulatory arrangements meet the requirements, and criteria for being an approved regulator and licensing authority as set out in the Act and in our rules. We are of the view that the ICAEW's experience as a regulator of audit and insolvency and the proposed regulatory arrangements will result in an appropriate level of regulation of probate activities.

2.5.4. We are also satisfied that the ICAEW's proposed training and assessment of authorised persons for probate activities do not represent a variation in standards of existing regulators.

2.5.5. In developing their education and training regime the ICAEW conducted a full review of the requirements for trainee solicitors for the areas of wills, probate and estate administration as set out in the Legal Practice Course (LPC) Learning Outcomes 2011. The ICAEW also made a comparison of the LPC and ACA qualifications to ascertain which of the SRA's education and training requirements relating to wills, probate and estate administration were covered by the ACA qualification. Further work around developing learning outcomes were also considered in relation to the work involved in both contentious and non-contentious probate to ensure that the ICAEW authorised practitioners who

successfully complete the ACA qualification or an equivalent qualification are trained, as a minimum, in the same areas and to the same standard as trainee solicitors.

- 2.5.6. The LCJ also expressed a concern about the absence of a clear statement in the ICAEW's Code of Ethics (**the Code**) that those working in non-contentious probate must not recklessly or knowingly mislead the court and must only act when competent to do so, and questioned whether the enforcement mechanisms are sufficient to enforce such a requirement.
- 2.5.7. The ICAEW in its response clarified that the Code does not refer to the types of work that members undertake specifically but takes a general approach that its principles apply to all professional and business activities. **Annex A** indicates several references to the Code which guide members' behaviour including a requirement to ensure professional competence and due care. The section on integrity specifically sets out that all members 'shall not knowingly be associated with reports, returns, communications or other information where the professional accountant believes that the information and among other things, omits or obscures information required to be included where such omission or obscurity would be misleading'.
- 2.5.8. In response to the LCJ concerns on enforcement, we are satisfied that the ICAEW is committed to enforcing the Code by disciplining members who do not meet the reasonable ethical and professional expectations of the public and other members. The ICAEW and the PC have the power to take regulatory action against a firm if the firm does not comply with the probate regulations. The ICAEW may also impose conditions or restrictions on a firm, with which they need to comply and failure to do so would result in disciplinary action against the firm.
- 2.5.9. Some other concerns were noted by the LCJ in relation to the definition of non-contentious probate and the ICAEW membership in relation to those working in a licensed firm. We are satisfied that the ICAEW has provided a satisfactory response to the LCJ's concerns in these two areas.

2.6. *Financial Reporting Council & Insolvency Service*

- 2.6.1. The LSB requested advice from the FRC and the IS who are currently oversight regulators for the ICAEW's audit and insolvency work. Both bodies confirmed that the ICAEW is a competent regulator for what they currently do and did not raise any specific concerns regarding the ICAEW in its current capacity.
- 2.6.2. The ICAEW welcomed the advice made by the FRC and the IS.

3. Other correspondence received by the LSB in relation to the applications – letter from The Law Society

- 3.1. The Law Society (**TLS**) did not make a submission to the ICAEW during the public consultation held in June 2012 on their draft applications. TLS instead chose to wait until after the ICAEW made its final submission to the LSB in December 2013 before issuing a letter directly to the LSB setting out a number of concerns about the applications, which it felt, should lead to the applications being refused.
- 3.2. The LSB invited the ICAEW to respond to the issues raised in the letter and both the TLS letter and the ICAEW response has been published on the LSB's website.²³
- 3.3. We are of the view that the response from ICAEW was clear, concise, and overall provided an adequate response to address TLS' concerns.
- 3.4. We have explored the ICAEW's governance arrangements for probate in some detail, in previous paragraphs. We have determined that the ICAEW's governance regulations are in line with the relevant criteria in the Act for approval of designation as an approved regulator and as a licensing authority. We recognise that there may be some risk to challenge from existing regulators and other bodies to the LSB's approach to the ICAEW's independence status. There may also be mixed views towards the 50:50 membership split between lay vs. non-lay of the PC. However, we acknowledge the ICAEW's commitment to a wider review of lay majorities on all decision-making bodies within their governance structure, which is due to be completed by the end of 2013 with implementation sometime in 2014. In response to the requirements of another oversight regulator, the ICAEW has indicated that it will be moving towards a lay majority for its Appeals Committee.
- 3.5. It is worth noting that the criteria for approving the approved regulator applications makes specific reference to the requirement that the ICAEW must make reasonable provision for the prevention of regulatory conflicts (including those with other approved regulators and external bodies). Although this issue was not specifically referred to in the TLS letter, the LSB must take an important criterion into account before making a recommendation for designation to the Board and to the Lord Chancellor thereafter. As discussed in previous paragraphs in this paper indicates that both the criteria for both types of regulatory conflict have been met

²³ LSB website with the published copies of the TLS letter and ICAEW response to that letter are at this link: http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm

by the ICAEW. The LSB is satisfied with the procedures in place, to deal with external regulatory conflict if it arises.

4. Other statutory orders related to the designations

- 4.1. In addition to the designation order, there are two other statutory orders related to the ICAEW designations.
- 4.2. A section 69 order is required to:
- give the ICAEW intervention powers when acting as an approved regulator to match those that would be granted automatically for the ICAEW status as a licensing authority on designation (under schedule 14 of the Act);
 - give the ICAEW a power to create regulatory arrangements and licensing rules providing for appeals against its decisions to be sent, heard and determined by the First Tier Tribunal (**FTT**) of the GRC;
 - give the FTT a standalone power to hear and determine appeals on ICAEW decisions (whether acting as an approved regulator or as a licensing authority);
- 4.3. A section 80 order will establish the FTT as the body to hear and determine appeals against decisions of the ICAEW as a licensing authority.
- 4.4. Due to the length of time expected to complete the MOJ and parliamentary processes to lay the orders, the ICAEW has proposed an interim measure to help it gain designation at an earlier date. The following paragraphs set out the proposal in further detail:
- The ICAEW will rely on its existing interventions powers in its Charter, at the point of designation as an approved regulator. In the interim period, the ICAEW will have a wider set of powers when acting as a licensing authority. The ICAEW is aware that there will be a difference but is content that these powers will be sufficient as an interim measure.
 - The ICAEW will use its existing Appeals Committee as the body to consider appeals for all approved regulator and licensing authority decisions. The Appeals Committee is independent of the ICAEW's representative responsibilities. This will require some technical changes to the regulatory arrangements, which will be completed before the recommendation is made to the Lord Chancellor.
 - The interim proposal would mean that the designation order would not be immediately dependent on the section 69 and section 80 orders going through the necessary parliamentary procedures, thereby allowing the designation order to be laid earlier.

- 4.5. The LSB is content with this approach as an interim measure.
- 4.6. As mentioned in previous paragraphs of this paper it is necessary for changes to be made to the ICAEW Supplemental Charter, which must be approved by the Privy Council. We have been advised by the ICAEW that the Privy Council is aware of the changes and has not raised any objections.

Annex 3

Regulatory arrangements

The regulatory arrangements in relation to the applications have been published separately on the LSB's website.²⁴

²⁴ Please refer to the LSB's website at this link: http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/icaew.htm, under the Decision column on the right-hand side of the page.