

# **LSB Guidance on Internal Governance Rules**

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This is statutory guidance under Section 162 Legal Services Act 2007

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## Introduction

1. The LSB is the independent body which oversees the regulation of legal services in England and Wales. The LSB was created by the Legal Services Act 2007 ('the Act') to hold regulators for the different branches of the legal services profession to account.
2. Section 30 of the Act obliges the LSB to make internal governance rules ('IGR') which set out requirements for each Approved Regulator ('AR') to ensure the separation of its regulatory and representative functions. These requirements must ensure that:
  - a. the exercise of regulatory functions by an AR is not prejudiced by its representative functions; and
  - b. decisions relating to the exercise of the regulatory functions by an AR are, so far as reasonably practicable, taken independently from decisions relating to representative functions.
3. The IGR must also include requirements to ensure that sufficient resources are allocated to regulatory functions and that those engaged in regulatory functions are able to communicate with the LSB, the Consumer Panel, the Office for Legal Complaints (OLC) and other ARs.
4. This guidance must be taken into account by ARs in determining their approach to the IGR. In accordance with section 162(5) of the Act, the LSB will have regard to an AR's compliance with this Guidance in assessing regulatory performance and considering any enforcement action.

### Structure of Guidance

5. The first section of the Guidance is the Legal Context and sets out the relevant sections of the Act for the making of, and compliance with the IGR. This section sets out, in brief, the role of the LSB, the AR and the *regulatory body* (see Section 1, paragraph 14) to provide a context and framework for the IGR and Guidance which follows it.
6. The second section sets out the Guidance on each rule. With the exception of Rules 15 (Guidance) and 17 (Exemptions), the Guidance for each rule is divided into three parts, as follows:
  - a. Application: This section sets out who the rule applies to. Some rules apply to all ARs and some apply only to ARs with both representative and regulatory functions.
  - b. Relationship with other provisions in the IGR: This section sets out how this rule relates to and interplays with other provisions in the IGR.
  - c. Compliance: This section set how the LSB expects an AR to comply with the rule.

## Section 1: The legal context

### The statutory duties and the IGR

7. Under Section 3 of the Act, the LSB has a duty to promote the regulatory objectives and have regard to the better regulation principles and best regulatory practice in discharging its functions.
8. Under Section 28 of the Act, each AR has a duty, so far as reasonably practicable, to act in a way which is compatible with the regulatory objectives, and have regard to the better regulation principles and best regulatory practice in discharging its regulatory functions.
9. Under Section 29 of the Act, the LSB may not exercise any of its functions in relation to representative functions of an AR except to ensure their separation from regulatory functions.
10. Under Section 30 of the Act, the LSB must make rules which set out requirements on each AR to (essentially) separate and maintain the independence of its regulatory functions from its representative functions. In discharging this obligation, the LSB must comply with its duty under Section 3 of the Act.

### Compliance with the IGR and Section 28 of the Act

11. In following the IGR, the AR must comply with its duty under Section 28 of the Act. The IGR and the duty must be complied with simultaneously, and nothing in the IGR is intended to, or does, limit an AR's duty to comply with its obligations under Section 28 of the Act or its other obligations under statute.
12. The LSB recognises the difficulty which this creates for each AR with both regulatory and representative functions. It must separate its regulatory functions but has a duty to discharge those functions in accordance with Section 28 of the Act.
13. The LSB considers that there are three central requirements for compliance with both Section 28 of the Act and the IGR:
  - a. Each AR must put in place arrangements for separating its regulatory functions which are, themselves, consistent with Section 28 of the Act (transparent, proportionate etc.).
  - b. Each AR with both representative and regulatory functions must delegate its regulatory functions to a body who will act on the AR's behalf to discharge those functions in compliance with Section 28 of the Act.
  - c. Each AR which has delegated its functions must be confident that they are being discharged in compliance with its statutory duty under Section 28 of the Act. However, the AR's ability to influence must be limited to prevent infringing the separation of the representative functions from the regulatory functions which the AR has retained. However, these limitations must not prevent the AR from

properly discharging its representative functions, as this would be contrary to the LSB's duty under Section 29 of the Act.

### The effect of delegation on Section 28 of the Act

14. Each AR is required under the IGR to delegate the discharge of its regulatory functions to a separate body ('regulatory body'). The regulatory body must act independently of the AR to prevent any prejudice on those functions by the AR's representative functions.
15. The LSB's powers to enforce the proper discharge of regulatory functions lie against the AR as a whole, not the regulatory body.
16. By delegation, the regulatory body assumes responsibility for discharging regulatory functions. It therefore is acting as the AR in relation to that role. The AR's duties under Section 28 of the Act in discharging regulatory functions must be met by the regulatory body (except in relation to assurance of compliance and the delegation itself).<sup>1</sup> The regulatory body must act in a way which is compatible with the regulatory objectives and have regard to the better regulation principles and best regulatory practice in discharging regulatory functions. The regulatory body is acting as the AR for the purposes of all obligations related to the functions delegated to it.

### The AR's residual role

17. Ultimate responsibility for compliance with the Act remains with the AR as the LSB can only enforce the IGR against the AR.
18. Due to this responsibility, the AR cannot separate regulatory functions completely. These functions may be discharged by a regulatory body at arm's length, but the AR must be assured that they are being discharged in a way that is consistent with Section 28 of the Act.
19. Following delegation of its regulatory functions to a regulatory body, an AR must retain only the limited role which it needs to be assured that the regulatory functions are being carried out in compliance with Section 28 of the Act (or as otherwise required by law). This is the *residual role*; to be assured of the proper and lawful discharge of regulatory functions by the regulatory body. In obtaining this assurance (and carrying out any representative role it has), the AR must ensure that it does not adversely affect the separation or independence of the discharge of the regulatory functions.

### The AR's assurance and the LSB's oversight

20. The LSB holds regulatory bodies to account by monitoring, reviewing and assessing performance through the LSB's regulatory performance assessment framework. The

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<sup>1</sup> See Guidance on Rule 2: Duty to delegate

LSB also considers applications from regulatory bodies to change their regulatory arrangements (rule change applications) and their budgetary requirements (Practicing Certificate Fee (PCF) applications). The AR should not duplicate any of these roles.

21. The AR needs to be assured that its regulatory body is discharging its functions properly. This must be carried out in a way which does not infringe the separation of regulatory functions or duplicate the LSB's oversight role (see further detail on the latter in the Guidance on Rule 3). The AR will have been closely involved in the design of the arrangements under which its regulatory functions are delegated to its regulatory body, and this should help assure the AR that its regulatory body is set up to function appropriately. In addition, the AR is entitled to the information reasonably required so that it may be assured that the regulatory body is in practice operating properly.

## Section 2: Guidance on the IGR

### Interpretation

#### Regulatory arrangements and regulatory functions

22. The terms used in the IGR adopt the same definitions as in the Act, with two exceptions. For the purposes of the IGR, *regulatory arrangements*<sup>2</sup> and *regulatory functions*<sup>3</sup> do not include delegation of regulatory functions or the residual role to be assured of compliance with Section 28 of the Act in the discharge of those functions.
23. These two functions have been carved out of the definition in the IGR in recognition that these are functions which cannot be carried out by the regulatory body.
24. However, each AR should note that delegation and assurance are regulatory functions under the definition in the Act (see Sections 21 and 27 of the Act) and are therefore subject to the other requirements which apply to regulatory functions outside of the IGR. For example amendments to delegation arrangements must comply with the separate LSB Rules and guidance for applications to alter regulatory arrangements.

#### Regulatory body and residual role

25. Two terms have been created which are used in the IGR. Both of these terms are created by Rule 2 (Duty to Delegate). The first; *regulatory body* is the separate body to which the functions are delegated. The second; *residual role* is the assurance role retained by the AR after delegation.

#### Delegation:

26. By delegation, the regulatory body assumes responsibility for discharging regulatory functions. It therefore is acting as the AR in relation to that role. The AR's duties under Section 28 in discharging regulatory functions must be met by the regulatory body (except in relation to assurance of compliance and the delegation itself). The regulatory body must act in a way which is compatible with the regulatory objectives and have regard to the better regulation principles in discharging regulatory functions and best regulatory practice. The regulatory body is acting as the AR for the purposes of all obligations related to the functions delegated to it.

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<sup>2</sup> Defined in Section 21 of the Act

<sup>3</sup> Defined in Section 27 of the Act

## Rule 1: The overarching duty

- 1.1. Each AR must determine and implement arrangements which are as effective as reasonably practicable for separation of its regulatory functions and which are consistent with Section 28 of the Act.

### Application

- 1.2. This rule applies to every AR.

### Relationship with other IGR

- 1.3. This rule is pre-eminent; it should direct the relationship between the regulatory and representative functions and interests of an AR. Each AR is obliged to adhere to this duty when interpreting and complying with the IGR and managing the relationship between its regulatory functions and any representative functions it may have.
- 1.4. The IGR apply to each AR, which includes its regulatory body.<sup>4</sup> In order to comply with the overarching duty, the regulatory body should have responsibility for any of the other rules or parts of the rules where this facilitates effective separation of regulatory functions.<sup>5</sup>

### Compliance

- 1.5. This rule applies to all regulatory functions<sup>6</sup> which must be separated from representative functions.

### Arrangements for separation and independence

- 1.6. The AR must put in place arrangements to separate its regulatory and representative functions which are as effective as is:
  - a. reasonably practicable; and
  - b. consistent with Section 28 of the Act.
- 1.7. In order to comply with this rule, each AR should consider the areas in which there is potential for its regulatory functions to interact with its representative functions and identify the reasonably practicable options for separating regulatory functions from the AR's representative functions in these areas. The duty recognises that ARs have different structures and it is for each AR to identify which methods of separation are practicable in its particular circumstances.
- 1.8. Where there are a number of alternatives, the AR is obliged to implement the arrangement which separates its regulatory functions from its representative

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<sup>4</sup> Please refer to Legal Context above and Rule 2: Duty to Delegate

<sup>5</sup> Please refer to Legal Context paragraph 10 above

<sup>6</sup> Subject to the exception of delegation and the residual assurance role which are not included in regulatory functions within the Rules. Please refer to the interpretation section above.



functions most effectively. In doing so the AR may not disregard its duty under the Act, to act so far as is reasonably practicable in a way which is compatible with the regulatory objectives and have regard to the better regulation principles.

- 1.9. If, for example, there were two alternative arrangements available to an AR, the first of which was slightly more effective for achieving separation but disproportionately more expensive, the AR would not be obliged to implement the first arrangement. This is because it may not be consistent with its duty under Section 28 to act in a way which is compatible with the regulatory objective of *protecting and promoting the interests of consumers* (onto whom the cost would be passed) and to have regard to the better regulation principle of proportionality.
- 1.10. The Act does not require full legal and structural separation, however an AR with both representative and regulatory functions should consider whether it may be practicable for its regulatory body to have the ability to enter into contracts (such as employment contracts or contracts for goods and services) without the AR's participation. This would strongly support the separation of the regulatory functions from representative functions.

### **Periodic review and improvement**

- 1.11. By sub-rule (3), each AR must periodically review and, if reasonably practicable, improve its arrangements for separation of its regulatory functions. Arrangements for the separation of regulatory functions would include arrangements which are required by other relevant rules.
- 1.12. It is a matter for each AR to determine the frequency of reviews, but the requirement that the reviews be periodic means that each AR must review its arrangements regularly and consistently. Where an AR and/or regulatory body identify that there is an issue in any particular arrangement, i.e. that it is not fit for purpose, the review should take place as soon as possible after the issue is first identified.
- 1.13. The obligation to improve the arrangements if reasonably practicable recognises that the degree of separation which is achievable may increase over time as circumstances develop and change.

## **Rule 2: Duty to delegate**

- 2.1. Representative and regulatory functions shall be discharged by separate bodies.

### **Application**

- 2.2. This rule applies only to ARs with both representative and regulatory functions.

### **Relationship with other IGR**

- 2.3. This rule is the starting point for compliance with the IGR by each AR with both representative and regulatory functions.

- 2.4. This rule has a particularly close relationship with Rule 3: Provision of assurance and is expressly curtailed by the limitations on seeking further information set out in sub-rule (2).
- 2.5. Each AR should further be aware of Rule 14(2), which provides that if there is a dispute between itself and its regulatory body about any matter arising under the IGR, it must be referred to the LSB before any further action is taken.

## Compliance

### Three stages to compliance: Action, result, and communication

- 2.6. This rule is in three parts;
- a. Sub-rule (1) is what the AR must *do* – delegate its regulatory functions to a separate body
  - b. Sub-rule (2) is what the AR must *achieve* by delegation – retain a role in regulatory functions only to the extent that this is necessary to be assured of compliance with section 28 of the Act or as otherwise required by law.
  - c. Sub-rule (3) requires the AR to inform the regulatory body if it makes or intends to make any arrangement which may undermine the regulatory body's ability to properly discharge regulatory functions.

### *Delegation of regulatory functions*

- 2.7. Regulatory arrangements are defined in Section 21 of the Act. Regulatory functions are defined in Section 27 of the Act as, essentially, any function relating to regulatory arrangements.
- 2.8. In order to comply with this Rule, each AR must delegate these functions *in their entirety* to the regulatory body<sup>7</sup>. Following delegation, those functions should be carried out solely by the regulatory body.
- 2.9. In order to comply with this Rule, the delegation must ensure that it is for the regulatory body to independently:
- a. determine how to discharge its regulatory functions, in a way which is compatible with the regulatory objectives,
  - b. assess, under Section 28(2)(b) of the Act, the most appropriate way of meeting those objectives,
  - c. have regard to the better regulation principles and best regulatory practice in discharging its regulatory functions, and

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<sup>7</sup> Noting the exceptions in relation to: the arrangements for delegation themselves, the making of which cannot be delegated; and assurance of the regulatory body's compliance with section 28 of the Act, see paragraphs 22 to 26 above.

- d. determine any principles beyond the better regulation principles which represent the best regulatory practice under Section 28(3)(b) of the Act.

#### *Retaining a role to be assured of compliance*

- 2.10. Following delegation, the AR's role in regulatory functions should go no further than is reasonably necessary for it to be assured of compliance with Section 28 of the Act in relation to the discharge of regulatory functions. The AR's assurance will come via the regulatory body's concurrent obligation in Rule 3(1) to provide sufficient information for assurance. The guidance on Rule 3 sets out the LSB's expectations of how an AR will carry out its assurance function.

#### *Retaining a role as otherwise required by law*

- 2.11. This provision recognises that an AR may have a legal role in regulatory functions beyond its obligations under the Act.
- 2.12. For example:
  - a. Some ARs are governed by Royal Charters which can only be amended on application by the AR to the Privy Council. Where the amendment involves regulatory arrangements, the AR's involvement is therefore *otherwise required by law*. However, the AR must limit its role to only that which is necessary. If the amendment relates to the arrangements under which the AR has delegated its regulatory functions, LSB approval will be needed for changes to those arrangements under Schedule 4, Part 3 of the Act. If the amendment relates to matters which have been delegated to the regulatory body, the AR must not influence the substance of the application insofar as it relates to those matters - these decisions must be made by the regulatory body. Again, the LSB will need to be involved and will ultimately need to approve the changes under Schedule 4, Part 3 of the Act.
  - b. The LSB considers it is highly likely to be simplest and most efficient for the regulatory body to have its own legal personality for the purposes of compliance with Rule 1: The overarching duty<sup>8</sup>. However, if this is not the case, the AR may be the named party to any contract and some matters arising from that contract, such as legal claims, will necessitate the AR's involvement.
  - c. If the regulatory body falls into non-compliance with the IGR and the AR does not remedy this, the LSB can issue directions under Section 32 of the Act. These directions will be issued to the AR, who will then be obliged to ensure that its regulatory body complies with them.
- 2.13. This provision also recognises that there may be legal obligations under other legislation which necessitate the AR's involvement. If it is not agreed by the

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<sup>8</sup> Please refer to the Guidance on Rule 1: The overarching duty

regulatory body that the AR's involvement is legally required, the matter must be referred to the LSB under Rule 14(2) before any action is taken.

### *Informing of arrangements which may undermine the regulatory body*

- 2.14. Compliance with this section requires the AR to communicate with the regulatory body if the AR makes or intends to make a decision, plan, communication or other arrangement which may undermine the regulatory body's ability to discharge regulatory functions in accordance with Section 28 of the Act. The AR must consider if any such action may undermine the efficacy of the regulatory body or require the regulatory body to act in a way not consistent with Section 28 of the Act. In the case of decisions which the AR intends to make, the regulatory body should be informed before the decision or plan is finalised.
- 2.15. Examples would include:
- a. A management decision by the AR which would negatively affect the resources of the regulatory body, as it is reasonably likely that this would curtail the regulatory body's ability to *act in a way which [it] considers most appropriate for the purpose of meeting [the regulatory] objectives*.
  - b. An arrangement or communication by the AR which would or does negatively affect public confidence in the regulator as a whole as this may undermine the regulatory body's ability to discharge its functions in a way which protects and promotes the public interest.
- 2.16. Compliance with this section will enable the regulatory body to:
- a. take whatever preventative action is available in order to mitigate the impact of the decision, plan, communication or other arrangement so that it may continue to comply with Section 28 of the Act;
  - b. work with the AR to see if there may be a more favourable alternative; or
  - c. if neither of the above are sufficient and the risk of undermining the discharge of regulatory functions is significant, the LSB should be asked for advice.

## **Rule 3: Provision of assurance to approved regulator**

- 3.1. The AR and regulatory body shall cooperate with one another to provide and accept assurance.

### **Application**

- 3.2. This rule applies only to ARs who have delegated their regulatory functions to a regulatory body in accordance with Rule 2.

### **Relationship with other rules**

- 3.3. This rule has a particularly close relationship with Rule 2: Duty to delegate.

- a. Sub-rule (1) of this rule obliges each regulatory body to provide assurance to the AR and is reciprocal to the duty of the AR to retain only an assurance role in regulatory functions under Rule 2(2).
- b. Sub-rule (2) of this rule limits the ability of the AR to require further information (and the use of that information) and follows the provision in Rule 2(2) that the AR must only retain a role which is reasonably necessary to be assured of the regulatory body's compliance. It would not be reasonable to require further information without reasonable grounds or to require information which would undermine the regulatory body's independence or effectiveness.

## Compliance

3.4. This rule is divided into two parts:

- a. Sub-rule (1) places a duty on the regulatory body (as a part of the AR) to provide sufficient information to the AR for the AR to be assured that regulatory functions are being discharged in compliance with Section 28 of the Act.
- b. Sub-rule (2) places limits on the AR's right to require further information and the use of information received for assurance purposes.

### **The regulatory body's duty to provide sufficient information for assurance**

- 3.5. In order to comply with this rule, each regulatory body must cooperate with its AR to provide the information needed for the AR to be confident that the regulatory body is discharging regulatory functions in accordance with Section 28 of the Act.
- 3.6. It is not purely for the regulatory body to determine what information is required:
  - a. If the AR requests information and the need for this information is justified on reasonable grounds, the regulatory body should provide it.
  - b. The regulatory body should equally volunteer information when of the view that it is reasonable that the AR should be aware of this information to be assured of the compliance of the regulatory body.
- 3.7. In order for the AR to be assured of the regulatory body's compliance, the AR must also be confident that if an issue of non-compliance arose then the regulatory body would inform the AR of the issue and the action taken to remedy this. The regulatory body must therefore provide the AR with sufficient information about issues in its exercise of regulatory functions.
- 3.8. Each AR should have regard to good corporate governance in assessing what role is reasonably necessary to be assured of the regulatory body's compliance and should not duplicate the oversight role of the LSB. In particular, the AR should not duplicate (in whole or part) the LSB's role in assessing regulatory performance, assessing PCF applications or assessing applications by regulatory bodies to change regulatory arrangements.

3.9. It would be reasonably necessary for the AR to be provided with information about the regulatory body's:

- a. governance arrangements;
- b. arrangements for financial management and control; and
- c. systems and processes for risk management and internal audit

in order for it to be assured that the regulatory body is acting in compliance with Section 28 of the Act.

3.10. This information may be provided by reports from the board of the regulatory body which oversees these arrangements or a committee (such as an audit committee) within the regulatory body. It would not be reasonably necessary for assurance that this information contains minute detail or evidences day-to-day adherence to these arrangements.

3.11. Unless there are reasonable grounds for requiring further information from the regulatory body, the AR should accept the information provided by the regulatory body under Rule 3(1) as sufficient for it to be confident of the regulatory body's compliance.<sup>9</sup>

3.12. The LSB expects that each AR and its regulatory body will endeavour to agree a protocol for the provision of information. This protocol should ensure there is consistency about what information the AR receives, how often and in what form and the methods by which the AR may seek further information, clarification or detail where appropriate.

3.13. The publication of this protocol would be in compliance with the better regulation principle of transparency and support the principle of consistency.

3.14. As set out above, if the AR and regulatory body are unable to agree on whether any information is reasonably necessary, this must be referred to the LSB under Rule 14(2) before any further action is taken.

3.15. The LSB recognises that there may be circumstances in which the AR must intervene in regulatory functions in order to ensure compliance with Section 28 of the Act. The LSB expects that such intervention will be exceptional, arising only when the regulatory body becomes ineffective or ceases to operate within the ambit of the Act and the IGR and, due to delegation, the issues fall outside the AR's control.

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<sup>9</sup> See Rule 3(2)(a)

- 3.16. As the oversight regulator the LSB will work with the AR to remedy the situation and recognise the ultimate responsibility borne by the AR. For example, the LSB may on application provide written authorisation under Rule 16(1)(c) for any action by the AR which would otherwise constitute a breach of (any of) the provisions of the IGR. ARs should also note the saving provisions in Rule 16(1)(a) and (b) that any act required for the residual role or by primary legislation does not constitute a breach of the IGR.<sup>10</sup>

### **Limits on requests for further information and use**

- 3.17. There are three limitations placed on each AR in sub-rule (2):
- a. it only requires further information if it has reasonable grounds to do so;
  - b. it must not require information which may undermine the independence or effectiveness of the regulatory body; and
  - c. it must not use the information received for representative functions.

#### *Only require further information if it has reasonable grounds to do so*

- 3.18. As noted, each AR and its regulatory body should consider agreeing and publishing a protocol which sets out how and what information is to be provided by the regulatory body.<sup>11</sup> The LSB expects that such a protocol will significantly reduce the likelihood of the AR requiring further information under the provisions of Rule 3(2).
- 3.19. The regulatory body must assess what further information is reasonably necessary for the AR to be assured of compliance with Section 28 of the Act, and then provide that information under Rule 3(1). In the event that an AR deems it to be insufficient (either incomplete or questionable), it may request further information only if it has reasonable grounds to do so. In order for the regulatory body to assess whether the information requested should be provided, the AR must communicate its grounds for making the request.
- 3.20. Whether the AR has reasonable grounds is not a subjective assessment. The AR must not request information unless it can be objectively justified, nor can the regulatory body provide the information unless it can be objectively justified. The LSB will pro-actively seek assurance that these provisions are being properly followed.<sup>12</sup> In particular the LSB may request that the AR and regulatory body provide the written correspondence setting out the basis for the request and agreement to it.
- 3.21. Examples of when the AR would have reasonable grounds to request further information include:

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<sup>10</sup> Please refer to the Guidance on Rule 16: Saving Provisions.

<sup>11</sup> For more detail, please refer to the Guidance on Rule 2: Duty to Delegate

<sup>12</sup> For example by requests for information under Rule 13: Candour about Compliance

- a. where the level of detail is inadequate for the AR to comply with other statutory obligations.
  - b. where the information is materially inconsistent with other information it has received from the regulatory body or from other reliable sources.
  - c. where the information indicates that there have been issues of non-compliance with delegated duties which have not been disclosed to the AR.
- 3.22. An AR must not request information using a reasonable grounds justification simply if it seeks to challenge the underpinning rationale of the regulatory body where it has a different view on how to meet the regulatory objectives or how to uphold the better regulation principles than the AR (as these are assessments which have been delegated). An AR may only seek to challenge the view of the regulatory body if it appears to be outside the range of reasonable responses. This is a very high bar and is likely to apply only in the exceptional circumstances where the regulatory body appears to be discharging its functions in a way which no reasonable person, acting reasonably, would.
- 3.23. If the regulatory body agrees, it should provide the information. If it does not, the parties should endeavour to discuss and reach an agreement, failing which they will have to refer the dispute to the LSB under Rule 14(2) and the information must not be provided until the LSB responds.

*Not to require information which may undermine the independence or effectiveness of the regulatory body*

- 3.24. It is recognised that there will be situations in which the interests or priorities of the AR and its regulatory body diverge. This section is intended to prevent the requirement on the regulatory body to provide assurance being misused.
- 3.25. Examples of requirements for information which would undermine the regulatory body's *independence* would include requirements targeted at issues in dispute between the parties relating to the IGR or other matters affecting their separation, e.g. disputes between the parties about the IGR which have been referred to the LSB for clarification under Rule 14(2).
- 3.26. Examples of requirements for information which would undermine the regulatory body's *effectiveness* would include overly onerous, repetitive or duplicative requirements which would impair the regulatory body's ability to carry out its duties on a day-to-day basis, unduly divert it away from pursuing its legitimate strategy or otherwise require the regulatory body to allocate resources to the detriment of effective regulation.

*Not to use information for representative purposes (until received for that purpose or it is published)*

- 3.27. This provision prevents information received by the AR for its residual role being used for its representative functions.



- 3.28. To ensure compliance with this section, the AR should consider carefully who has access to the assurance information, their obligations on its use and how to prevent the dissemination of the information more widely within the AR or outside of it.
- 3.29. Under this provision, the prohibited use of information for representative purposes includes situations where the data itself (e.g. the report) has not been shared. If the knowledge of the contents of the document is used (either by the individual who was privy to it, or by another to whom it has been communicated) in any way for representative purposes, that will be in breach of this provision.
- 3.30. In pro-actively monitoring compliance, the LSB expects each AR to be able to evidence the safeguards put in place to prevent the misuse of information received for assurance purposes.

## **Rule 4: Regulatory autonomy**

- 4.1. The regulatory body shall decide how to regulate free from inappropriate influence by the AR. For the avoidance of doubt, Rule 4 is, like all other rules in the IGR, subject to Rule 2(2) and Rule 16.

### **Application**

- 4.2. This rule applies only to ARs who have delegated their regulatory functions to a regulatory body in accordance with Rule 2.

### **Relationship with other IGR**

- 4.3. This rule follows on from Rule 2: Duty to delegate. After delegation, the regulatory body assumes responsibility for compliance with Section 28 of the Act for those regulatory functions delegated to it. This includes making assessments; i.e. of how to meet the regulatory objectives and have regard to the better regulation principles. Sub-rule (1) of this rule makes clear that those assessments now fall to the regulatory body.

### **Compliance**

- 4.4. The regulatory body must independently:
- a. assess how to comply with Section 28 of the Act for those regulatory functions delegated to it; and
  - b. determine its structure, strategy and any amendments to the regulatory arrangements.

### **Assessing how to comply with Section 28 of the Act**

- 4.5. Section 28 of the Act is an outcome-focused, qualitative duty. It essentially requires that the exercise of regulatory functions is carried out in a way that is, so far as is reasonably practicable, compatible with the regulatory objectives and that has regard

to the principles under which regulatory activities should transparent, proportionate, accountable, consistent and targeted only at cases in which action is needed.<sup>13</sup>

### **Determining governance and structure, priorities and strategy, and amendments to regulatory arrangements**

- 4.6. In order for the regulatory body to execute its assessment of how regulatory functions should be discharged to comply with Section 28 of the Act, it must have autonomy over all of the constituent parts. This section of the rule defines those parts as:
- a. governance and structure
  - b. priorities and strategy
  - c. amendments to regulatory arrangements

#### *Governance and Structure*

- 4.7. Determining its own governance and structure essentially requires that the regulatory body has control over its constitution including:
- a. its hierarchy
  - b. its decision-making processes
  - c. the make-up of its board(s) and committee(s)
  - d. election and recruitment of members
  - e. the division of power between those bodies and its executive
  - f. its conduct rules
  - g. terms of reference for its bodies.
- 4.8. In order to comply with this rule, each AR must carefully consider its own arrangements and the extent to which these include or dictate any of the above. Where they do, changes must be made so that control is passed to the regulatory body.
- 4.9. For example, if an AR has provisions in its constitution about the election and/or recruitment of members of the regulatory board or recruitment to senior positions in the regulatory body, this must be removed or amended so that sole control lies with the regulatory body itself.

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<sup>13</sup> The better regulation principles.

- 4.10. It is expected that once the AR has implemented the necessary changes (if any) it will have no ongoing role in those matters. It will then be for the regulatory body to periodically review and improve its own arrangements in accordance with Rule 1(3).

#### *Priorities and strategy*

- 4.11. Independently determining its priorities and strategy requires that the regulatory body decides its own strategy and business plan. It is for the regulatory body to determine what it should prioritise at any given time and how best to operate to meet those priorities.

#### *Amendments to regulatory arrangements*

- 4.12. The regulatory body should have sole control over regulatory arrangements (as defined in the IGR) including deciding to make applications to the LSB for any revisions or amendments. It follows from the regulatory body's independence in determining its priorities and strategy under sub-rule (2)(a), that it must also have the power to make or apply to the LSB for any changes necessary to execute that strategy.
- 4.13. In particular, it should be the regulatory body not the AR who drafts an application to make alterations to their regulatory arrangements, setting out the context and policy rationale for the amendment as well as the justification for the change. It should be the regulatory body that submits the application and the LSB will recognise that it acts with the delegated authority of the AR.

#### **AR influence on regulatory body decisions under sub-rule (3)**

- 4.14. In seeking to influence the regulatory body the role of the AR is strictly limited to when it is acting in its representative capacity. The AR must only use its residual role when carrying out its assurance functions and a clear separation must be made, including (but not limited to) in discussions and correspondence.

### **Rule 5: Prohibition on dual roles**

- 5.1. No person may be involved in both regulatory decisions and representative functions, unless that person's role is within a shared service in accordance with Rule 11.

#### **Application**

- 5.2. This rule applies only to ARs who have delegated their regulatory functions to a regulatory body in accordance with Rule 2.

#### **Relationship with other IGR**

- 5.3. This rule stands alone, though it complements and follows on from Rule 1: The overarching duty.
- 5.4. It should be noted that this rule does not apply to persons engaged in shared services in accordance with Rule 11.

## Compliance

- 5.5. This rule is a prohibition on any person who is involved in decisions relating to regulatory functions also being involved in the representative functions of the AR unless that person's role is within a shared service in accordance with Rule 11.
- 5.6. The starting point for compliance is to identify those individuals who are involved in decisions relating to regulatory functions, and then ensure that those persons do not become involved in representative functions (including by joining the board which controls those functions).

### **Involved in decisions relating to regulatory functions**

- 5.7. In order to assess whether an individual is affected by this provision, the AR should consider each role on a case-by-case basis. The AR should ask whether a reasonable person would consider that their representative role may prejudice their judgment in regulatory decisions in any way. It should be noted that this covers individuals whether remunerated or not and so applies to elected or voluntary positions as well as employees.
- 5.8. The AR must carefully consider the level of representative involvement the role requires and whether that involvement could lead to a reasonable impression of a conflict of interest. For example, an individual working in a general administrative capacity limited to processing documents, copying and filing is unlikely to have a role which influences regulatory decisions or how regulatory functions are exercised, whereas the personal assistant to a senior executive for the AR may have an influential role. It is unlikely that those whose views are proactively sought on specific matters by the regulatory body or who are otherwise engaged in an advisory capacity to the regulatory body would be covered by this rule in relation to those matters.
- 5.9. In order to assess whether an individual is affected by this provision, the AR should consider his or her role in relation to regulatory decisions on a case-by-case basis. This rule does not apply to every person who is engaged in regulatory functions in any way, only to those who have an impact upon decision-making with regards to regulatory functions. This would include substantive decisions, for example whether to impose sanctions on a practitioner or firm, policy decisions, for example decisions about how to act in a way which is compatible with the regulatory objectives, and decisions about the process for carrying out the regulatory functions. The key issue is whether there is any possibility of a conflict of interest if that person is also involved in representative functions. It is unlikely that those whose views are proactively sought on specific matters by the regulatory body or who are otherwise engaged in an advisory capacity to the regulatory body would be covered in relation to those matters by this rule.

### **Avoiding dual roles**

- 5.10. Records should be made of the decisions in relation to each role and how those decisions were reached. The AR should cooperate with the regulatory body in providing this information when required. The regulatory body should also review

their recruitment and appointment procedures (both for employment and to elected or voluntary positions involving decisions about regulatory functions) and include consideration of any conflict which may arise as a result of a current or former representative role of candidates.

## **Rule 6: Individual conduct**

- 6.1. The AR is responsible for the knowledge and compliance of each individual with a role within regulation or which may affect regulatory functions

### **Application**

- 6.2. This rule applies to every AR.

### **Relationship with other IGR**

- 6.3. This rule relates to all other rules and the arrangements in place under them. Individuals should have knowledge of the rules and arrangements and act in compliance with them.
- 6.4. Each AR should note the particularly close relationship between this rule and Rule 13: Candour about compliance and Rule 14: Disputes and referrals for clarification. The AR must be aware of every issue in order to comply with its obligation to remedy any issues relating to compliance with the IGR or, failing this, notify the LSB. This relies on individuals complying and consistently recording and reporting any issue which comes to their attention.
- 6.5. It should be noted that the test for which individuals are affected by this rule is entirely distinct from the test for Rule 5: Prohibition on dual roles. This rule has much wider application.

### **Compliance**

- 6.6. Whilst this rule is focused on individual knowledge and conduct, responsibility for ensuring compliance rests with the AR. It is for the AR to put in place effective systems to ensure that relevant individuals are: firstly, aware of the IGR and arrangements and, secondly, comply with them. For each AR to whom Rule 2 applies, responsibility for ensuring the compliance of individuals with a role in the exercise of regulatory functions will rest with the regulatory body.<sup>14</sup>
- 6.7. Individuals working solely within representative functions will be affected only if their role may reasonably be considered likely to affect regulatory functions.
- 6.8. Although this rule does not apply to roles which are unlikely to affect regulatory functions, the AR should be aware of its overarching duty under Rule 1 which may include arrangements for ensuring that these roles do not infringe or undermine the separation of regulatory functions.

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<sup>14</sup> See highlight box text at paragraph 26 on page 5

### **Individuals with a role (whether remunerated or not)**

- 6.9. Whether an individual has a role is a question of fact and degree. The AR should assess whether the rules, arrangements or any part thereof will have a bearing on what the individual should or should not do. For example, an individual employed in IT support (whether as part of a shared service or for one or other function) may not have a role under this rule, whereas a board member with decision making powers regarding the allocation of resources is likely to have a role.
- 6.10. The inclusion of whether remunerated or not means that the rule applies not only to employees, but also to board members or other officer-holders.
- 6.11. The LSB expects each AR to identify which individuals are caught by this rule, and keep this under review as their roles and responsibilities change.

### **Role which may affect regulatory functions**

- 6.12. The IGR apply only to the separation and independence of the regulatory functions. If the AR considers that any part of these IGR or the arrangements made under them may reasonably affect the way a role is carried out, then the individual in that role should be aware of and comply with the IGR. The AR must do enough to be confident at all times of the relevant individuals' knowledge and compliance.

### **Awareness**

- 6.13. Ensuring the awareness of relevant individuals is a matter of providing appropriate and comprehensive training. The regularity and form of the training is a matter for the AR.<sup>15</sup> To ensure that relevant individuals are continuously aware of the IGR and any arrangements made under them is likely to require:
- a. initial training for persons entering the organisation or moving within the organisation
  - b. refresher training at regular intervals and when there is a change to the IGR or arrangements
  - c. training and supportive materials to be available to relevant individuals at all times
  - d. a clear route for assistance when required.
- 6.14. In pro-actively seeking assurance of compliance with this rule, the LSB would expect the AR to be able to produce training materials and logs of dates when the courses were provided, and of the attendees. The LSB would also expect knowledge of the IGR and arrangements to form part of the role description and the individuals' objectives.

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<sup>15</sup> Or regulatory body where delegation has taken place – See highlight box text at paragraph 26 on page 5

## Compliance

- 6.15. The compliance of individuals relies on effective mechanisms for the AR to:
- a. monitor and be notified of issues with compliance; and
  - b. enforce relevant individuals' compliance when this is necessary.
- 6.16. The guidance under Rule 13: Candour about compliance, addresses what is likely to be required for each AR to remedy or report issues of non-compliance. This includes having arrangements in place for individuals to internally report any such issues which come to their attention.
- 6.17. When an incident of non-compliance by an individual is reported to the AR, it must be in a position to take effective action to remedy this. With respect to employees, disciplinary or similar internal procedures may be sufficient.
- 6.18. With respect to Board members or other officer-holders, the AR must give careful consideration to how it can enforce compliance. The LSB expects this will involve either inclusion of appropriate and enforceable provisions in the organisation or board's constitution or terms of appointment for the individuals, or an equivalent enforceable procedure which applies to these positions.

## Rule 7: Governance: Lay composition

- 7.1. Regulation should be predominantly governed by lay persons.

### Application

- 7.2. This rule applies to every AR.

### Relationship with other IGR

- 7.3. This rule stands alone, however (as with all other IGR) the Rule 16: Saving provisions apply.

## Compliance

- 7.4. This rule applies to the board or equivalent body which makes decisions about *how to exercise* regulatory functions. It is concerned only with the decision-making body in control of regulatory functions. Therefore where regulatory functions have been delegated in accordance with Rule 2: Duty to delegate, the obligation for a lay majority and lay chair affects the decision-making board of the regulatory body only.
- 7.5. This rule applies to every AR. For an AR with only regulatory functions, it is likely that this will be the senior decision-making body of that organisation.
- 7.6. There are two parts of this obligation. The board, council or committee must:
- a. be comprised of a lay majority; and
  - b. have a lay chair.

- 7.7. It is recognised that not all members of the board may be required or available for every meeting. If a decision on regulatory functions is taken at a meeting where there is either not a lay majority or not a lay chair (or both), this decision must be ratified at the next meeting when there is both a lay majority and a lay chair. The LSB expects that ratification should take place within a reasonable time and that ratification will take place by correspondence if waiting for the next meeting when there is both a lay majority and a lay chair would cause unnecessary delay. These arrangements should be recorded in the board's terms of reference
- 7.8. A lay person is defined in the Act as, essentially, a person who is not and has never been authorised to conduct any reserved legal activities<sup>16</sup>.

## **Rule 8: The regulatory board: Appointments and terminations**

- 8.1. The regulatory body shall independently appoint, appraise, remunerate and terminate the members of its board. For the avoidance of doubt, Rule 8 is, like all other rules in the IGR, subject to Rule 2(2) and Rule 16.

### **Application**

- 8.2. This rule applies only to ARs who have delegated their regulatory functions to a regulatory body in accordance with Rule 2.

### **Relationship with other IGR**

- 8.3. This rule stands alone, but as with all other rules Rule 16: Saving provisions apply.

### **Compliance**

- 8.4. The regulatory body may choose to involve the AR, as long as this is done in a way which does not undermine, or reasonably appear to undermine its independence.

### **AR influence on appointments and terminations**

- 8.5. If the AR expresses a view, whether formally or informally, to the regulatory body or in public about the appointment, re-appointment or termination of a particular board member, or their appraisal or remuneration, this may amount to influencing these decisions depending on the circumstances.
- 8.6. In seeking to influence the regulatory body the role of the AR is strictly limited to when it is acting in its representative capacity. The AR must only use its residual role when carrying out its assurance functions and a clear separation must be made, including (but not limited to) in discussions and correspondence. This does not affect an individual's whistleblowing rights.

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<sup>16</sup> Please refer to full definition at Schedule 1, paragraph 2(4) of the Act



## Rule 9: Regulatory resources

9.1. Regulation shall have the resources it requires to be effective.

### Application

9.2. This rule applies to all ARs.

### Relationship with other IGR

9.3. For ARs with both regulatory and representative functions, this rule has a particularly close relationship with Rule 10: Regulatory body budget. This specifies that it is for the regulatory body to determine what resources are sufficient for the efficient and effective discharge of regulatory functions.

### Compliance

9.4. In order to comply with this Rule, each AR must assess what resources are reasonably required to exercise its regulatory functions *efficiently* and *effectively*. It must then allocate those resources to regulatory functions. For an AR which has delegated its regulatory functions, this assessment will be carried out by the regulatory body.<sup>17</sup>

9.5. The limitation that it is only those resources reasonably required reflects the better regulation principles of proportionality and targeting action only at cases where action is needed. The resources will be reasonably required if regulatory functions are being discharged in accordance with these principles. The inclusion of reasonable requires that the resources can be objectively justified as necessary and proportionate. Whilst the regulatory body will make the assessment of the resources it requires, it must provide sufficient information under Rule 3: Provision of assurance to approved regulator, so that the AR may be assured that the required resources meet this criteria and more broadly that the regulatory body has complied in determining its resources with Section 28 of the Act.

9.6. The requirements that the resources are provided for regulatory functions to be efficiently and effectively discharged should be given their natural meaning. The resources should be supplied for the discharge of regulatory functions to meet their objectives, without excess or unnecessary cost.

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<sup>17</sup> Please see Legal Context, paragraph 10 above.

## **Rule 10: Regulatory body budget**

- 10.1. It is for the regulatory body to determine and allocate the resources required for regulatory functions. For the avoidance of doubt, Rule 10 is, like all other rules in the IGR, subject to Rule 2(2) and Rule 16.

### **Application**

- 10.2. This rule applies only to ARs who have delegated their regulatory functions to a regulatory body in accordance with Rule 2: Duty to delegate.

### **Relationship with other IGR**

- 10.3. This rule expands upon Rule 9: Regulatory resources but applies only to ARs with both regulatory and representative functions, who have delegated their regulatory functions to a separate body.
- 10.4. Whilst Rule 9: Regulatory resources obliges each AR to allocate sufficient resources to regulatory functions, this rule gives the regulatory body decision-making power over the budget (i.e. the sufficient resources) and the allocation of funds.
- 10.5. It should also be noted that this rule may affect PCF applications, reference should be made to Section 51 of the Act and the separate LSB Rules and Guidance on this.

### **Compliance**

- 10.6. To comply with this rule, the regulatory body should independently carry out its own budget process in accordance with its priorities and strategy.
- 10.7. Once the budget has been determined by the regulatory body, it will then form part of the PCF application. It should be noted that, by Rule 10(2), in seeking to influence the regulatory body the role of the AR is strictly limited to when it is acting in its representative capacity. The AR must only use its residual role when carrying out its assurance functions and a clear separation must be made including (but not limited to) in discussions and correspondence. The AR cannot approve or reject the proposed budget from the regulatory body, though it may seek further information under Rule 3(2)(a) where it has reasonable grounds to do so.
- 10.8. When the PCF has been approved by the LSB, it will be for the regulatory body to independently determine how to allocate the resources it receives from this, and any other source.

## **Rule 11: Shared services**

- 11.1. The AR and regulatory body must not share services unless specific requirements are met.

### **Application**

- 11.2. This rule applies only to an AR which has delegated its regulatory functions to a regulatory body in accordance with Rule 2: Duty to delegate.

## Relationship with other IGR

- 11.3. This rule complements Rule 1: The overarching duty. If an AR and its regulatory body share any service, it must be in accordance with the provisions of this rule to be deemed to be in compliance with the overarching duty, i.e. an arrangement for separation of regulatory and representative functions which is as effective as reasonably practicable and consistent with Section 28 of the Act.
- 11.4. It should be noted that, by Rule 5(1), the prohibition on dual roles does not affect persons engaged in shared services.

## Compliance

- 11.5. In order for an AR and its regulatory body to share services:
- a. they must be in agreement that this satisfies the factors listed under sub-rule (1); and
  - b. the services themselves must be provided to the regulatory body on terms (at least) as favourable as the services are provided to the AR.

## Agreement regarding shared services

- 11.6. The requirement that an AR and regulatory body must agree about shared services operates on two levels. Firstly, considering the service in principle (e.g. office space, IT or HR support) and, secondly, looking at the detail of the exact service which they propose to share.
- 11.7. In order to comply with this section, the LSB would expect an assessment of the three tests set out in Rule 11(1)(a) to (c) to be undertaken regularly. At a minimum this would include the point that the service is first contracted and then on significant variation to the terms of the service. In proactively seeking assurance, the LSB may request the documentation containing the agreement to share services and assessments of how these services comply with the requirements of this section.

### *Sharing the service does not undermine, and could not reasonably be seen to undermine, the separation of regulatory and representative functions*

- 11.8. In order for the shared service not to undermine the separation of functions, the AR and regulatory body must consider carefully what areas will, by the sharing of this service, necessarily overlap and any risks that this might create in terms of compliance with the IGR or for separation more generally. For example, the risk of information being inappropriately shared and the risks of public perceptions of a lack of separation.
- 11.9. The LSB would expect a full assessment including a risk assessment relating to IGR compliance to be undertaken by both the AR and regulatory body at the time of first contracting and at the point of any significant change.

*Sharing the service is effective and appropriate for the regulatory body to discharge its functions*

- 11.10. Whether or not the proposed service meets this requirement is primarily a matter for the regulatory body to determine, however they should seek the agreement of the AR to that assessment if the regulatory body is of the view that the service is effective and appropriate.
- 11.11. The regulatory body should consider its own requirements in relation to the service and whether the proposed shared services meet these requirements.
- 11.12. The regulatory body should then look closely at the proposed service to assess whether it meets or exceeds all of its requirements. Only if this is satisfied, should the regulatory body and AR agree that the service is effective and appropriate for the regulatory body to discharge its functions.

*Sharing the service is necessary to be efficient and reasonably cost-effective*

- 11.13. This requirement focuses on the efficiency and cost-efficacy of the AR and regulatory body together. The sharing of services between regulatory and representative functions necessarily creates risks to the separation and independence of regulatory functions. To justify those risks, there must be a marked benefit in terms of cost savings.
- 11.14. In order for the proposed shared service to be *necessary to be efficient and reasonably cost-effective*, it must provide a material cost saving overall. The LSB would expect both the AR and the regulatory body to demonstrate that quotes for comparable services have informed the assessment of whether this provision is met. If, for example, the regulatory body is able to obtain the same service by itself elsewhere at a similar level of cost and sharing the service provides the AR with only a small saving, it is unlikely that it is necessary to be efficient and reasonably cost effective. Under no circumstances should the regulatory body pay more for a shared service than if it contracted independently, irrespective of the saving to the AR.

**Services must be provided on (at least) an equal footing**

- 11.15. This provision requires that the AR does not receive the service on a preferential basis to the regulatory body and that both the AR and the regulatory body have the same powers and authority under the contract for the service. The regulatory body must be able to enforce the terms of the service provision and alter those terms to suit its requirements as and when necessary.
- 11.16. Compliance with this provision is likely to require that either the regulatory body is a party to the contract or is able to enforce as a third party. If only the AR is a party to the contract and the regulatory body cannot enforce compliance without its participation, then this provision is unlikely to be satisfied.
- 11.17. For regulatory bodies without separate legal personality, one way to ensure that the shared service is provided on an equal footing would be to form a committee which holds all decision making power about the contract and has, at least, equal representation from members of the regulatory body.

## **Rule 12: Communication by persons involved in regulation**

- 12.1. There should be a direct line of communication between the regulator and key statutory bodies including the LSB.

### **Application**

- 12.2. This rule applies to every AR.

### **Relationship with other IGR**

- 12.3. This rule supports compliance with all of the IGR by ensuring that issues, including issues of compliance and independence, can be raised directly by persons involved in regulation.
- 12.4. For each AR who has delegated its regulatory functions to a regulatory body, it has a particularly close relationship with Rule 13: Candour about compliance and Rule 14: Disputes and referrals for clarification.

### **Compliance**

- 12.5. In order to comply with this rule, ARs may not (in any way) inhibit direct contact and communication between the LSB, Consumer Panel, OLC or other ARs and any person involved in the discharge of the regulatory functions.<sup>18</sup>
- 12.6. If, for example, an AR in any way limits the sharing of certain information regarding the IGR with the LSB, this would be in breach of this section as the LSB acts as the oversight regulator to ensure the independence of regulatory functions. Therefore any restrictions on the sharing of information regarding the IGR with the LSB would potentially prejudice the independence or effectiveness of those functions.<sup>19</sup>
- 12.7. Non-disclosure agreements are also likely to be in breach of this rule if the information restrained relates, in any way, to the independence or effectiveness of regulatory functions.

## **Rule 13: Candour about compliance**

- 13.1. Each AR shall be honest and open with the LSB about compliance issues.

### **Application**

- 13.2. This rule applies to every AR.

### **Relationship with other IGR**

- 13.3. This is a duty regarding information about compliance with all of the rules. As such, this applies to every other rule affecting the AR.

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<sup>18</sup> This includes those regulatory functions which remain with the AR after delegation, namely assurance of compliance with section 28 of the Act and the delegation itself

<sup>19</sup> See sub-rule (2) of this rule.

- 13.4. This rule has a particularly close relationship with Rule 6: Individual conduct. In order for the AR to provide full information and notify the LSB when necessary, it must ensure that individuals are raising every issue of non-compliance.

## **Compliance**

- 13.5. There are two aspects to this rule:

- a. Responding promptly and fully to requests for information from the LSB
- b. Notifying the LSB of non-compliance which cannot be or has not been remedied

### **Responding to requests for information from the LSB**

- 13.6. This rule requires the AR to monitor its own compliance with the IGR so that it is in a position to respond promptly and fully to a request for information from the LSB at any point.
- 13.7. It should be noted that the requirement to respond promptly means as quickly as possible and within the timescale set by the LSB. The requirement to respond fully means providing the information requested in full and any further information which is directly relevant.
- 13.8. In devising the arrangements under the IGR, ARs must have regard to this. Systems should be in place for logging and recording compliance matters so that the information is accessible and can be provided when required.
- 13.9. This would include but may not be limited to:
- a. protocols setting out: delegation agreements; the separation arrangements and the justification for choosing these arrangements; protocols for information exchange between the regulatory body and AR; agreements for any shared services between a regulatory body and AR.
  - b. logs of any referrals to the LSB for clarification including the efforts made internally (including between an AR with a residual role and its regulatory body, where relevant) to resolve the issue
  - c. records of any disputes referred to the LSB and the discussion between the regulatory body and AR prior to the referral
  - d. logs of non-compliance issues, action taken and result
  - e. logs of training provided to relevant individuals

### **Notifying the LSB of non-compliance**

- 13.10. In order to comply with sub-rule (2), each AR must maintain a record of all non-compliance issues with their remedy. It must also ensure that it is notified of all non-compliance issues by its regulatory body together with details of how each was

remedied if possible within a reasonable time. The AR and the regulatory body<sup>20</sup> will therefore need to put in place a system for the internal reporting of issues arising under the rules. It is expected that this would require robust procedures which are clearly understood by all individuals covered by Rule 6: Individual conduct. The procedures should include a record of all non-compliance instances and the actions taken to remedy the issue which the LSB may call for from time-to-time.

13.11. There are two situations in which an AR will be required to notify the board of non-compliance:

- a. if the issue cannot be remedied within a reasonable time, or
- b. if the issue has not been remedied within a reasonable time.

#### *Can the issue be remedied?*

13.12. When the AR first becomes aware of the issue, it should evaluate whether it is possible to remedy it within a reasonable time. For a breach to be remedied, it must be undone and prevented from recurring in future. What is a reasonable time depends on all the circumstances but is subject to an overall limit of three months.

13.13. The AR is required to consider the breach and its consequences objectively to form a judgment as to whether it can be remedied within a reasonable time. It is likely that small breaches of the rules by individuals should be corrected quickly, however for systemic or long-term breaches a remedy may not be implemented within a reasonable time. If the AR is of the view that the issue cannot be remedied within a reasonable time, it must report it immediately to the LSB.

#### *Has the issue been remedied?*

13.14. If the AR is of the view that it can remedy the issue within a reasonable time, it should identify what needs to be done and set a date for completion (i.e. the end of the reasonable time).

13.15. On the date set, the AR must reconsider the issue, the action taken and whether the issue has been remedied.

- a. if the steps have not been carried out effectively or, for any reason, they have failed to fully remedy the issue, the AR will now be obliged to report the issue to the LSB.
- b. if the steps have been effective and the issue has been remedied, the AR should ensure it has complete records to provide to the LSB as and when required.

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<sup>20</sup> See highlight box text at paragraph 26 on page 5

## Rule 14: Disputes and referrals for clarification

- 14.1. The LSB may provide clarification to assist with compliance if an AR cannot resolve an issue.

### Application

- 14.2. This rule applies to every AR, with the exception of sub-rule (2) which applies only to ARs which have delegated their regulatory functions to a regulatory body in accordance with Rule 2: Duty to delegate.

### Relationship with other IGR

- 14.3. This rule applies to all issues or disputes arising under the IGR. For ARs to whom Rule 2: Duty to delegate applies, referrals may be made directly by the regulatory body.<sup>21</sup>

### Compliance

#### Voluntary referral for clarification

- 14.4. Sub-rule (1) provides that an AR may refer a point arising under the IGR to the LSB which it has been unable to resolve. This provision is not obligatory, it is open to the AR to resolve the issue by another reasonable means. It is advised that if all other reasonable means are exhausted, the AR should refer to the LSB to avoid non-compliance.

#### *Point arising under the IGR*

- 14.5. A point arising under the IGR should be given its ordinary meaning. If the matter goes directly to compliance with a rule or this Guidance, it will be a point arising under the IGR. Equally issues over, for example, delegation arrangements or shared services, will also be points arising under the IGR.
- 14.6. Where unclear, the question is whether it is a matter that relates to the separation of regulatory and representative functions.

#### *Which the AR has been unable to resolve*

- 14.7. It is for each AR and regulatory body where applicable to determine how to comply with the IGR. The LSB will not intervene unless there is a genuine difficulty which cannot be resolved without the assistance of the LSB.
- 14.8. Before a matter is referred to the LSB for clarification, the AR must first make a reasonable effort to resolve the matter itself. It is expected that the AR will seek relevant external advice if none is available in-house before referring the issue to the LSB. On referral, the LSB will review the steps taken and if it is of the view that the effort made was insufficient, it is likely to require the AR to take further steps before

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<sup>21</sup> Please see Legal Context, paragraph 10



providing the clarification requested. It should be noted that the LSB is not obliged to provide clarification under sub-rule (3). However, where the LSB decides not to provide the clarification requested, reasons will be given.

### **Obligatory referral for clarification**

- 14.9. Sub-rule (2) provides that an AR and/or regulatory body must refer a point arising under the IGR which is in dispute between them before any further action is taken. The obligation to refer only arises when the disagreement has evolved into a dispute and, at the point of referral, any action in relation to that matter must cease.

### *Dispute*

- 14.10. A disagreement between an AR and regulatory body is not a dispute unless, and until, all reasonable efforts at resolution have been exhausted. Each AR and its regulatory body should therefore agree a system for resolving issues as and when they arise. This may involve an informal discussion, followed by a formal negotiation, followed by referral to an external source for advice. The AR and regulatory body should recognise that urgency may curtail the time available and tailor their resolution process to be as expedient as possible where the circumstances necessitate this.
- 14.11. All persons with a role in regulatory functions or which may reasonably be considered likely to affect regulatory functions must be aware of and follow this process in accordance with Rule 6: Individual conduct. The AR and its regulatory body should ensure that their resolution process is formally set out and available to all such persons, such as by publication on its website(s) and in training documentation.
- 14.12. When a dispute is referred to the LSB, evidence should be provided about the internal resolution process and the outcome. The LSB is unlikely to interfere with any progress in resolving the matter unless it is of the view that it is incorrect and may lead to non-compliance. If the LSB does not receive this information or finds that no process exists or the process has not been properly followed, the matter is likely to be remitted to the AR and regulatory body to resolve before any clarification is given.

### **Response by the LSB**

- 14.13. The LSB is not obliged to respond to any referral for clarification, whether voluntary under sub-rule (1) or mandatory under sub-rule (2). The LSB is more likely to provide clarification if there is clear evidence that all reasonable efforts have been made by the AR and/or the regulatory body to resolve the issue. Where the LSB declines to provide the clarification requested, reasons will be provided.
- 14.14. When the LSB provides clarification, it is determinative. This means that the AR and/or regulatory body must then accept and follow the clarification, to be in compliance. If the clarification is interim or provisional, it will be expressly indicated that it is not determinative.

## Rule 15: Guidance

- 15.1. This rule requires ARs to have regard to this Guidance in seeking to comply with the IGR. Under Section 162(5) of the Act, the LSB will have regard to the extent to which an AR has complied with this Guidance when the LSB exercises its statutory functions, including enforcement powers.

## Rule 16: Saving provisions

- 16.1. No AR will breach the IGR if its action or omission is necessary to comply with its legal obligations or authorised by the LSB.

### Application

- 16.2. This rule applies to every AR.

### Relationship with other IGR

- 16.3. This rule relates to all other rules in the IGR. It provides that an action or omission which, but for this rule, would constitute a breach of any rule in the IGR will not be a breach if it falls within the exceptions in sub-rule (1).

### Compliance

- 16.4. Sub-rule (1)(a) to (c) sets out three circumstances in which an action or omission by an AR or regulatory body which appears to breach a rule will not be in breach of that rule:

#### *Reasonably necessary for residual role*

- 16.5. This saving provision only applies to each AR with both regulatory and representative functions, which has delegated its representative functions and retained a residual role in accordance with Rule 2: Duty to delegate.
- 16.6. Each AR should refer to the Guidance on Rule 2: Duty to delegate and Rule 3: Provision of assurance to approved regulator which sets out the parameters of the residual role. Ordinarily, the residual role should be limited to receiving assurance from the regulatory body of compliance with Section 28 of the Act.<sup>22</sup> However, it is recognised that there may be exceptional circumstances in which an AR must intervene to ensure that compliance, i.e. when the regulatory body has ceased to operate within the ambit of the Act or the IGR. This saving provision enables that intervention when it is reasonably necessary.
- 16.7. Each AR should note that reliance on this saving provision is subject to sub-rule (2). If there is a dispute with the regulatory body about whether the AR's intervention is reasonably necessary, it must be referred to the LSB before any action is taken.

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<sup>22</sup> Or as otherwise required by law

### *Required by Primary Legislation*

16.8. This saving provision recognises that there are numerous legal requirements on ARs and those obligations may not always be consistent with their obligations under the IGR. Any AR who relies on this saving provision is advised to notify the LSB in writing of the legislation relied upon for its action or omission.

### *Carried out with the prior written authorisation of the LSB*

16.9. This saving provision gives the LSB discretion to allow an AR to breach a rule if it can demonstrate good reasons why that breach is necessary. It should be noted that this discretion will be used sparingly. The starting point is that each AR must comply with each and every rule in the IGR which applies to it.

16.10. If an AR wishes to receive authorisation for an action or omission which would otherwise be breaching the IGR, it must apply to the LSB before taking any action. The discretion of the LSB to provide authorisation or refuse to provide authorisation is absolute. The LSB will consider each application on a case-by-case basis. The LSB will expect a strong case supported by clear evidence that non-compliance with any rule would not reasonably be considered likely to undermine or be seen to undermine the regulatory body's independence or effectiveness.

16.11. The LSB may also provide written authorisation without a formal application when it identifies itself that this is necessary for a particular AR.

### **Referring disputes to the LSB**

16.12. Sub-rule (2) provides that disputes about the application of any of the saving provisions must be referred to the LSB. This recognises the risk to an AR if it erroneously relies on a saving provision as it will be in breach of the IGR by that reliance. Equally the AR may voluntarily refer the matter to the LSB for clarification under Rule 14: Disputes and referrals for clarification.<sup>23</sup>

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<sup>23</sup> Please refer to the Guidance on Rule 14: Disputes and referrals for clarification.

## **Rule 17: Exemptions**

- 17.1. This rule sets out which of the IGR do not apply to ARs which have only regulatory functions.
- 17.2. All of the IGR apply to ARs with both regulatory and representative functions.

## Glossary of Terms

<b>Act</b>	The Legal Services Act 2007.
<b>AR</b>	Approved Regulator, as defined in Part 1 of Schedule 4 to the Act or designated under Part 2 of Schedule 4 of the Act.
<b>Better regulation principles</b>	The principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed (see Section 3(3)(a) and Section 28(3)(a) of the Act).
<b>Consumer Panel</b>	The Consumer Panel established by the Legal Services Board in accordance with Section 8 of the Act.
<b>LSB</b>	Legal Services Board – the independent body responsible for overseeing the regulation of lawyers in England and Wales, as defined in and created by Section 2 of the Act.
<b>IGR</b>	Internal Governance Rules.
<b>Lay person</b>	As defined in paragraph 2(4) of Schedule 1 to the Act.
<b>OLC</b>	The Office of Legal Complaints, as defined in Section 114 of the Act.
<b>Regulatory arrangements</b>	As defined in Section 21 of the Act, except for the arrangements for delegation of regulatory functions to a regulatory body and assurance of compliance with Section 28 of the Act, in accordance with Rule 2 of the IGR.
<b>Regulatory body</b>	A body which has been delegated the regulatory functions of an Approved Regulator, as defined in Rule 2(1) of the IGR.
<b>Regulatory functions</b>	As defined in Section 27 of the Act, except for functions relating to the arrangements for delegation of regulatory functions to a regulatory body and assurance of compliance with section 28 of the Act, in accordance with Rule 2 of the IGR.
<b>Regulatory objectives</b>	<p>As defined in Section 1 of the Act, apart from arrangements for delegation of regulatory functions to a regulatory body and assurance of compliance with section 28 of the Act, in accordance with Rule 2 of the IGR.</p> <p>There are eight regulatory objectives:</p> <ul style="list-style-type: none"> <li>• protecting and promoting the public interest</li> <li>• supporting the constitutional principle of the rule of law</li> <li>• improving access to justice</li> <li>• protecting and promoting the interests of consumers</li> <li>• promoting competition in the provision of services in the legal sector</li> <li>• encouraging an independent, strong, diverse and effective legal profession</li> <li>• increasing public understanding of citizens legal rights and duties</li> <li>• promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality</li> </ul>
<b>Representative functions</b>	As defined in Section 27(2) of the Act.

<b>Residual Role</b>	As defined in Rule 2(2) of the IGR.
<b>Services</b>	Information technology, equipment, administration, human resources, finance and corporate services, office space and facilities.