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By email: richard.collins@sra.org.uk

Dear Mr Collins

The Separate Business Rule

We are preparing guidance for our members on professional structures they may adopt if they wish to participate in Alternative Business Structures.

Issue

Post Legal Services Act 2007, the Separate Business Rule appears to have unintended consequences for the development of ABS by acting as a barrier to entry by other regulated professionals within a group structure. The Rule prevents regulated professional firms such as chartered accountants, chartered surveyors and actuaries, as well as some of the reputable insurers and other businesses which routinely provide some unreserved legal services to their clients under existing regulatory structures, from forming or acquiring a law firm as an ABS subsidiary. This restriction applies even though such professional organisations are likely to be the most suitable participants in the development of ABS.

However by contrast, the Rule will not prevent such participation by businesses whose main activities are completely unrelated to professional services.

This cannot be in the interests of consumers, or help to support smaller law firms for whom acquisition by an existing professional firm may be the only way to secure financial survival. As a result, the impact of the Rule requires urgent review and a solution needs to be found.

Practical impact of the Separate Business Rule on professional group structures

Professional firms and organisations (such as ICAEW members) will inevitably conduct 'prohibited separate business activities' as part of their routine professional work such as;

- Instructing counsel and advocacy before a court tribunal or enquiry

ICAEW members routinely instruct barristers direct as part of the licensed access scheme (as do a number of other professions) as well as appearing before tribunals and courts.

- Conduct of a matter which could come before a court, irrespective of whether proceedings are started

Tax, insolvency and rent review work are three immediate examples that spring to mind. Accountants routinely conduct tax tribunal cases for their clients, which inevitably concern matters which may later be taken to court.

- Acting as a nominee, trustee or executor

This work has been done by chartered accountants for many years and is an established part of professional practice.

- Providing legal advice and documents not provided as a 'subsidiary but necessary part of some other service which is one of the main services of the separate business'

Many accountants provided legal advice and documentation when undertaking tax work as an accountancy service, and some firms specialise exclusively in it as their main professional service. The provision of consultancy or advice concerning accountancy, auditing, insolvency or taxation are part of our definition of accountancy services requiring a practising certificate, with no distinction made for legal advice on these topics as it is an integral element of such services.

Solutions

We are aware that there were proposals mooted in 2011 for the Rule to be re-examined which we assume will be done by way of a formal and comprehensive consultative process. In the meantime, regulated professionals are effectively and completely barred from participation within ABS by virtue of a group structure with no indication of if, when and how this Rule may be modified.

We suggest that the most appropriate short term solution that the SRA could adopt would be to issue an appropriately drafted Waiver. In this the SRA could state that any solicitors or firms within ABS that are owned by regulated professional firms (such as ICAEW member firms) or other appropriately regulated firms will not be treated as in breach of the Rule if those regulated firms carry out work that they are currently permitted to carry out as part of their professional practice, under the oversight of their professional body or another suitable regulator. This will allow professional firms of various hues to evaluate business opportunities safe in the knowledge that the Rule will not prevent or restrict creation of an ABS subsidiary.

The SRA Waivers Policy requires an applicant to demonstrate 'sufficiently exceptional circumstances' to justify a departure and that 'strict application of the Rule would effectively prevent an unjustifiable barrier to entry into the market and hence potentially impeded the competition and consumer aspects of the regulatory objectives'.

This is a general and structural problem. It cannot be dealt with in a proportionate manner by requiring firms to apply on an individual basis, and without clear guidance allowing them to structure themselves appropriately or have discussions with potential business partners knowing a waiver will be given. This issue specifically restricts participation of non-law regulated professional firms, and it not the mischief that the Rule is designed to prevent.

Next Steps

We trust you will agree this is an issue that requires urgent review if the development of ABS in the interests of consumers is not to be impeded.

In particular please confirm whether the principle of an appropriately drafted general Waiver is

acceptable or if not, how this problem can be addressed and reconciled.

Yours sincerely

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