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A CODE OF PRACTICE ON GOOD GUIDANCE ON REGULATION

Comments by Mark Boleat on BERR Consultation

Introduction

1. On 7 January 2008, the Department for Business Enterprise and Regulatory Reform (BERR) published a consultation paper on a code of practice for good guidance on regulation. Responses are sought by 31 March 2008. This paper is a personal response by Mark Boleat who has had considerable experience in this area as the head of five trade associations, a consultant to trade associations and regulators and also for one year as the Claims Management Regulator for the Ministry of Justice.

Executive Summary

2. The government is proposing a code of practice on guidance. The objective is to help businesses comply with regulations and to reduce compliance costs. The code of practice has eight golden rules.

3. On most new regulatory requirements there is no official guidance. Trade associations and professional advisers often produce useful guidance, sometimes with the help of relevant officials. The code fails to recognise the difficulties inherent in a government department or regulator producing guidance. The main practical problems are the use of guidance to overcome deficiencies or conflicts in different pieces of legislation, the use of guidance to gold plate and the way that guidance is frequently used, that is to give it the effect of regulation. The code also seems to assume that guidance is issued only when a new regulation is introduced. Much guidance is produced after a regulation has come into effect, to deal with issues that have arisen as a result of the regulation.

4. The code of practice contains eight requirements, all of which are stating the obvious. The detail in respect of one, requiring 12 weeks' notice of guidance, is unrealistic. It would be preferable to produce guidance on guidance rather than a code of practice which will tend to be observed mechanistically, if at all. If the code does go ahead then the provisions on "based on a good understanding of the audience" and "issued in good time" in particular need amending, and new rules are needed on the status of guidance, to prevent guidance being used to gold plate and the ensure a joined-up approach between departments and agencies.

The Proposed code

5. The proposed code of practice has eight golden rules -

a) Based on a good understanding of the audience

b) Designed with input from the audience and their representative bodies.

c) Organised around the users' way of working rather than legislative or departmental structures.

d) Easy for users to understand.

e) Reliable.

f) Issued in good time.

g) Easy to access.

h) Reviewed and improved.

The Purpose of the Code of Practice

6. The consultation paper lists two purposes of a code of practice on guidance -

a) To help businesses achieve compliance by making the requirements clear, in contrast to detailed legal wording.

b) To reduce the cost of compliance as without good guidance businesses may pay for professional advice or over-comply.

7. Rightly, the consultation document points to evidence in the Better Regulation Executive report *Regulation and Business Advice.* This showed that every year almost half of businesses seek external advice about how to follow regulations**,** and they spend at least £1.4 billion a year on this advice. The report identified five drivers behind this use of outside advice, including poor quality government guidance, uncertainty, risk and lack of confidence and low awareness of government guidance. It also cited the National Audit Office *2007 Survey of Business' Perceptions of Regulation* which showed widespread dissatisfaction on the part of business with the availability of guidance on compliance.

Regulatory Guidance in Practice

8. The consultation document has very little analysis of the purpose of guidance or of previous experience. This is unfortunate; as a result the policy prescription is unlikely to achieve its desired purpose.

9. A key point is that on the majority of new regulatory requirements there is no guidance at all from the relevant government department or regulatory agency. Whether or not there is guidance depends not so much on whether there is a need for guidance but rather on the policy of the relevant department or agency and the resources available to it. There is also a tendency for guidance not to be issued on the "too difficult" areas, in particular those where there is uncertainty or which cut across the interests of different departments and agencies.

10. The fact that there is no official guidance is not necessarily a bad thing. For many years much of the best guidance on legislative and regulatory requirements has been produced by trade associations which are much closer to business than any government department or agency can ever be. The good trade association will work closely with the government department or agency, and the guidance that it issues will often have an unofficial sign off from the department or agency. This arrangement is advantageous because in this way the regulator or government department can often get its message over without having to go through the formalities that it would have to do given its statutory position. There is also a very clear distinction between guidance and the specific requirements of the legislation or regulation.

11. There are other sources of good guidance including accountants, solicitors and consultants in specialist areas. Their guidance and that of trade associations is not always perfect but most businesses that wish to do so have managed to find the sort of combination of guidance that they need.

12. The code of practice fails to recognise four inherent problems in the production of regulatory guidance -

a) Much guidance, sometimes euphemistically called "clarification", is actually produced where the regulation is for one reason or another deficient or where there are conflicts between different legislative and regulatory requirements. The paper assumes that there is a mechanistic process of new regulation and accompanying guidance. In practice most guidance is issued because there is a problem with the regulation because of conflicts or new interpretations. For example, over the last few years BERR has issued a steady stream of guidance on the National Minimum Wage all of which has resulted from tribunal decisions or new interpretations of existing regulations. To illustrate this point more generally, employment businesses that are members of the Association of Labour Providers have been notified through guidance in the last 12 months alone of seven significant regulatory changes –
    a. Payment for personal protective equipment (following a tribunal decision).
    b. Charges for accommodation under the National Minimum Wage (new interpretation).
    c. Payment of statutory sick pay (following a court case).
    d. What constitutes a public service vehicle (new interpretation).
    e. Rolled up holiday pay (following an ECJ decision).
    f. Private hire vehicles (new interpretation).
    g. Deductions from wages to pay for transport (new interpretation).

    Not one of these changes resulted from a new regulation, and in very few cases was any notice given, let alone 12 weeks (charges for accommodation under the National Minimum Wage being an honourable exception).

b) Businesses frequently find themselves in difficulty because different departments and regulators have differing views on the same requirements or may have requirements which in themselves might be reasonable but which conflict with those of other agencies or departments. Guidance is particularly needed in such areas but seldom appears.

c) Guidance is frequently used deliberately or carelessly to gold plate regulation. Sometimes it is done deliberately because it is felt that the regulation is not sufficient. More often, guidance tends to set out how businesses can comply but often that guidance on "how" becomes translated into quasi-regulation. Indeed, the consultation document itself falls into this trap in the section on question 3 where it is stated that "As far as possible, guidance should be organised around user's processes, making it clear what action should be taken at each stage." This implies that guidance should be prescriptive in explaining how businesses should do things rather than the desired outcome.

d) Even if guidance on how to comply is acceptable, this guidance is often gold plated by other regulators, by trade associations and by consultants, such that the guidance becomes part of the regulation.

13. A good example of these problems is in respect of verifying entitlement to work in the UK. This is explained in Appendix 1. In brief, with the legislation that existed until earlier this year –

a) It was an offence under Section 8 of the Asylum and immigration Act 1996 to employ an illegal worker. However, if found employing an illegal worker an employer had a defence if he could demonstrate that he had copied certain documents.

b) Home Office guidance clearly implied that copying documents was a legal requirement in itself.

c) The Gangmasters Licensing Authority in its licence conditions required compliance with Home Office guidance.

d) In monitoring their suppliers the supermarkets check that the appropriate documents have been copied.

In these four simple steps, arrangements to establish a defence have been transformed into binding rules through the use of guidance.

14. These issues were considered in some detail in chapter five of the Better Regulation Commission report *Avoiding Regulatory Creep* (2004). Recommendation four of this report was –

> "The task force recommends that the government and regulators should include clear statements in their guidance documents setting out their purpose and legal status.
>
> The regulatory impact unit, working with the small business service, should revise current guidance to policy makers on developing guidance. The guidance should be published by Spring 2005."

15. This analysis should usefully have been included in the consultation document and that specific recommendation included in the code of practice.

The Code of Practice Approach

16. The code of practice is an unsatisfactory method of dealing with the issue of guidance. This is reflected in the golden rules which are clearly the result of some compromise before the consultation document was even published. One test of any rules is whether they are simply stating the obvious. This can be examined by writing the rules in the precise opposite of the original meaning –

a) Based on a bad understanding of the audience.

b) Designed without input from the audience and their representative bodies.

c) Organised around the legislative or department structures rather than the user's way of working.

d) Difficult for users to understand.

e) Unreliable.

f) Not issued in good time.

g) Difficult to access.

h) Not reviewed or improved.

17. The absurdity of such a list merely illustrates that the actual code of practice does no more than state the obvious. It is worrying if guidance has been issued without meeting these straightforward and obvious tests.

18. The code is not the best way to deal with the issue. Rather, guidance on guidance would be preferable. If a code of practice is issued then it will be slavishly followed, much like the consultation code, and a box ticking approach to compliance will be adopted. Those responsible for regulation should be equally responsible for issuing guidance and they should have available to them some guidance based on the experience of others, but then left to come to a judgement as to the best way forward. If officials are not treated as sufficiently responsible to know what sort of guidance is needed then having a code of practice is unlikely to rectify the position.

19. There is one substantive point that merits full consideration. Golden rule number six states the rather obvious "issued in good time", but this is expanded to mean that it should be issued "at least 12 weeks before a regulation comes into effect". This is wishful thinking. Businesses are lucky to get 12 weeks notice of many important regulatory changes; indeed some are imposed at virtually no notice at all. While 12 weeks might be an ideal, particularly for new regulations which have had a long gestation period, it is inappropriate for the many new regulatory requirements that emerge every year, not only as a result of the actions of legislators and regulators but also as a result of court decisions and new interpretations.

20. If there is a requirement to produce guidance 12 weeks before the regulation comes into effect then as with consultation a likely consequence is that guidance will not be issued. Some guidance is generally better than no guidance and the 12 week rule is a typical example of the best being the enemy of the good. It would be likely to reduce guidance or to produce guidance which is only half baked. While the rationale for having a time period is understood (because otherwise there seems little incentive on regulators to do things in good time) the solution to this problem is not to impose a 12 week rule.

Comments on the Proposed Rules

21. Although this response does not favour having a code of practice with rules, it is the assumption that this will actually happen and, accordingly, these comments are designed to improve what is considered to be an unsatisfactory solution to a problem.

22. There is one general issue. The code is at three levels –

a) The "golden rules", just a few words, eg "issued in good time".

b) The shaded sentences, which give more detail, eg "guidance should be issued at least 12 weeks before a regulation comes into effect".

c) The subsequent explanation, eg "as far as possible guidance will be issued 12 weeks before these [common commencement] dates".

23. It is not clear how many of the three levels constitute the actual code. There is a substantial difference between them. This needs to be clarified in the code itself (and not through subsequent guidance).

24. On the specific rules –

a) *Based on good understanding of the audience*. This is stating the obvious. However, there is often not one but many different audiences for any regulation. There will be those for whom the regulation is of central importance, those for whom it is of reasonable importance and those that are affected only peripherally, where the issue is how to get to them at all. The businesses affected are also likely to range from small businesses, even sole traders, up to multinational companies. For example, the regulatory requirements in relation to transporting people by minibus

are of central importance to employment businesses, significant importance to schools and minimal importance to newsagents. Where workers are at or near the minimum wage there are added complications. A single piece of guidance will not be appropriate. Rather, guidance needs to be specific to the various audiences. The trade associations for these audiences will produce the appropriate specific guidance for their members, hopefully with the help of relevant departments and agencies.

b) *Designed with input from the audience and their representative bodies*. Again, this is stating the obvious. The reference to representative groups is weak. The final sentence of the note should be modified to:

> "representative groups such as trade associations are essential to the process of drafting guidance and should be fully involved from as earlier a stage as possible."

c) *Organised around the user's way of working rather than legislative or departmental structures*. This is highly desirable but is wishful thinking. The text rather suggests that businesses will in future receive wide ranging guidance covering a number of different areas of regulation. Clearly this will not be the case. Government does not work like this. Rather, as at present, guidance will continue to be related to specific pieces of regulation although the more that this can be put in context the better. However, this rule should include a requirement that all relevant government departments and agencies should sign off the guidance rather than leave scope for different departments and regulators to take different views.

d) *Easy for users to understand*. Again, this is so obvious as to not need stating. It does rather beg the question of why the regulations cannot be written so that they are easy for users to understand in the first place.

e) *Reliable*. Obviously, as guidance that is unreliable is positively damaging. It is wishful thinking to suggest that guidance could state how long it applies for. Guidance applies until the next set of guidance is issued, and this cannot be predicted in advance. New guidance is frequently necessary because a new problem has arisen or because previous guidance was shown to be unsatisfactory. Seldom is there a pre-planned schedule.

f) *Issued in good time*. While the "issued in good time" rule is appropriate, the reference to 12 weeks is wishful thinking for the reasons already explained in paragraph 19, and would have the effect of causing less guidance to be issued or rather causing less "official" guidance to be issued. The reference to 12 weeks should be removed.

g) *Easy to access*. Another rule stating the obvious. However, what is stated subsequently goes against this. It is suggested that "guidance will be accessible through businesslink.gov.uk". This website is probably unknown to many businesses, certainly those subject to specific regulation. The website they would look to is the website of their specific regulator, for example the Financial Services Authority, the Gangmasters Licensing Authority, the Food Standards Agency or the Claims Management Regulator. The guidance should be published on the relevant regulator's or department's website as well as through businesslink.gov.uk.

h) *Reviewed and improved*. Yet another stating the obvious, that guidance should be reviewed to check that it is up-to-date. However, again there is some wishful thinking here as if there is regular "cyclical review" of guidance. This does not accord with reality. Guidance is amended either when it becomes essential to amend because

things have changed or because finally officials have got around to it when the mountain of more pressing issues has diminished.

Additional Rules

25. The following additional rules are suggested -

a) The purpose and status of guidance should be made clear, in particular it should be emphasised that guidance does not form part of regulatory requirements.

b) Guidance should never seek to "gold plate" regulation, either by implying, directly or indirectly, new requirements, or by requiring certain processes to be followed or documentation to be retained when there is no requirement for this in the regulation.

c) Where an issue cuts across a number of government agencies and departments then guidance should be issued by all of the departments and agents jointly.

An example of good guidance

26. The consultation paper asks for an example of good guidance. Appendix 2 comprises a guidance note published by the Ministry of Justice in May 2007. It applies to businesses authorised under the Compensation Act 2006. The regulatory regime came into effect on April 2007. The guidance was therefore produced after the regulation came into effect, and like much guidance dealt with issues that arose after regulation had been finalised. The guidance is a model because –

a) It states in the first paragraph the purpose of the guidance and emphasises that there are no new requirements – "This Guidance Note provides information to help claims management businesses comply with the Rules of Conduct on advertising and marketing and general legal requirements. It does not seek to extend the rules, to introduce new rules or to define best practice."

b) It reproduces relevant regulations and guidance issued by other regulatory bodies, therefore ensuring that all guidance is in one place.

c) It spells out areas where regulated businesses have been found not to be complying with regulations.

d) It gives an example in paragraph 10 of wording on a website that can be used to comply with two different regulations.

e) In a particularly difficult area relating to referring business to solicitors it is specifically stated that the guidance has been prepared in conjunction with the regulator for solicitors: "This section has been drafted in conjunction with the Solicitors Regulation Authority which has confirmed that the wording is in accordance with the rules governing solicitors' conduct."

f) It is brief and easy to understand.

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Appendix 1

Gold plating through guidance – the Home Office

It is an offence for employers to employ workers who are not legally entitled to work in Britain. However, Home Office guidance provides a good example of gold plating, such that there is a general belief that it is a legal requirement to undertake certain document checks and to keep photocopies even if one is employing a family member. Section 8 of the asylum and immigration Act states –

> (1) Subject to subsection (2) below, if any person ("the employer") employs a person subject to immigration control ("the employee") who has attained the age of 16, the employer shall be guilty of an offence if—
>
> (a) the employee has not been granted leave to enter or remain in the United Kingdom; or
>
> (b) the employee's leave is not valid and subsisting, or is subject to a condition precluding him from taking up the employment,
>
> and (in either case) the employee does not satisfy such conditions as may be specified in an order made by the Secretary of State.
>
> (2) Subject to subsection (3) below, in proceedings under this section, it shall be a defence to prove that—
>
> (a) before the employment began, there was produced to the employer a document which appeared to him to relate to the employee and to be of a description specified in an order made by the Secretary of State; and
>
> (b) either the document was retained by the employer, or a copy or other record of it was made by the employer in a manner specified in the order in relation to documents of that description."

The gold plating comes in Home Office guidance. *Changes to the law on preventing illegal working: short guidance for United Kingdom employer* says –

"Section 8 of the Asylum and Immigration Act 1996 requires all employers in the United Kingdom to make basic document checks on every person they intend to employ. By making these checks, employers can be sure they will not break the law by employing illegal workers."

This statement is wrong; there is no such requirement.

The guidance goes on –

> "It is important that you read this guidance if you employ staff in the United Kingdom. It will help you understand what documents you must ask your potential employees to produce from 1 May 2004, so that you can establish whether they can work for you legally. It also explains what steps you must take under the law to satisfy yourself that any documents produced by your potential employee actually belong to that person."
> The guidance then specifies in detail how the document check must be done including checking photographs. checking any United Kingdom Government stamps or endorsements to see if the potential employee is able to do the type of work and finally making a photocopy "using only the Write Once Read WORM software package" of relevant documents."

In other words a fairly simple legal requirement not to employ illegal workers has been transformed with no legal authority into detailed requirements on checking and photocopying documents which most employers believe are actually legal requirements.

This guidance then gets repeated by other regulators. For example the Gangmasters Licensing Authority licence conditions state that “Employers will be required to show that they have complied fully with Section 8 of the Asylum and Immigration Act 1996”. They only way that they can “show” this is by making the document checks. The Authority’s guidance makes this explicit: It is essential that the gangmaster ensures that proper records are kept and checks made in line with Home Office Guidance.”

Appendix 2

Ministry of Justice Guidance, May 2007

Claims Management Services Regulation

Marketing and Advertising Claims Management Services Guidance Note

Introduction

1. This Guidance Note provides information to help claims management businesses comply with the Rules of Conduct on advertising and marketing and general legal requirements. It does not seek to extend the rules, to introduce new rules or to define best practice.

Executive summary

2.

- Use of the expression "no win no fee" must in accordance with the CAP Help Note.
- Websites are deemed to be advertising and must not include inaccurate or misleading statements.
- Websites must comply with the Electronic Commerce Regulations and therefore must include the name of the business and its geographic address.
- Once authorised a business must include on its website the statement that it is "regulated by the Ministry of Justice in respect of regulated claims management activities" and it must indicate that its registration is recorded on the website www.claimsregulation.gov.uk.
- Claims management businesses that are also companies must include on their websites their name, registered office address and registration number.
- Cold calling in person, which is prohibited, includes any face to face contact initiated by the claims management business.
- Any business passed on to solicitors must be acquired in accordance with the rules governing solicitors' conduct which, among other things, prohibit cold calling members of the public either in person or by telephone and require a referral fee to be disclosed by the referrer. The referrer must do nothing which compromises the solicitor's duty to act independently in the client's best interests.
- The rules on advertising and marketing are monitored through intelligence information, website surveillance and mystery shopping.

The requirements in the Rules of Conduct

3. The relevant Rules of Conduct are set out below:

2. All advertising, marketing and other soliciting of business must conform to the relevant code –

The British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code)
The BCAP Television Advertising Standards Code
The BCAP Radio Advertising Standards code
The BCAP Code for Text Services.

These codes are accessible at www.cap.org.uk/cap/codes/.

For the purposes of this rule a business's website shall be deemed to constitute advertising, and must comply with the CAP Code.

3. A business must not engage in high pressure selling.

4. Cold calling in person is prohibited. Any other cold calling (by telephone, e-mail, fax or text) shall be in accordance with the Direct Marketing Association's Direct Marketing Code of Practice.

5. Business must not be solicited in any way, including leaflets and advertising, in medical facilities or public buildings without the approval of the management of the facility or building.

6. In soliciting business through advertising, marketing and other means a business must –

a) Clearly identify the name of the advertiser.

b) Not offer an immediate cash payment or a similar benefit as an inducement for making a claim.

c) Not promote the idea that it is appropriate that compensation may be used in a way that is not consistent with the cause of the claim.

d) Not imply that the business is approved by the Government or is connected with any government agency or any regulator. (If a business wishes to mention in advertising and marketing material that it is authorised it may use only the following words which must be used in their entirety: "Regulated by the Ministry of Justice in respect of regulated claims management activities".) [The original wording in the Rules referred to the Department for Constitutional Affairs; this has been amended.]

7. Use of the expression "no win no fee" must be in accordance with the CAP HelpNote on "No Win No Fee claims".

8. Where business is introduced to a solicitor, the business must not act in a way that puts the solicitor in breach of the rules governing solicitors' conduct.

9. A business must seek to ensure that any publicity for its services issued by a third party and which is intended to solicit business for it complies with these rules.

Use of the expression "no win no fee"

4. The expression "no win no fee" must not be used in ways that do not meet the requirements of the CAP Help Note on "no win no fee" claims. The full text of the Help Note is available at http://www.cap.org.uk/cap/search/search.htm?xsearch=no%20win%20no%20fee. A copy is appended to this Guidance Note [not appended]. In brief, it is considered that "no win, no fee" is potentially misleading because consumers may infer it to mean "no win, no cost". The term is not outlawed, but must be qualified if consumers may be liable to pay costs in some circumstances. The Help Note sets out some examples of what sort of qualifying statements could be made in different circumstances. Where there is no liability to pay additional costs under any circumstances, no qualification is needed.

Websites are subject to rules on advertising

5. Under paragraph 2 of the Rules of Conduct, websites are deemed to be advertising and must comply with the CAP Code. This is different from the position applying to businesses generally. Websites are reviewed as part of the application process and will be regularly monitored. Many websites, in particular those of companies dealing with endowment mis-selling, have breached the CAP Code by making statements which were untrue. Problems have included –

a) Exaggerating the complexity of claiming compensation directly.

b) Exaggerating the proportion of cases that fail when people claim directly. The ABI, in a press release dated 11 December 2006, said:" 71% of complaints made direct so far in 2006 were upheld, compared to only 51% received through a CMC." Any company that makes statements that imply a higher failure rate of claims made directly has to be able to justify them.

c) Claiming that the business is regulated by the Claims Standards Council (it is of course in order to state that a company is a member of the Council).

d) Exaggerating the qualifications of staff.

e) Exaggerating the size of the business in absolute terms or in relation to others.

f) Misleading comparisons with other claims management companies in respect of charges.

Rules governing websites generally

6. The Electronic Commerce (EC Directive) Regulations 2002 provide that the websites of businesses offering a service must include -

a) The name of the business.

b) The geographic address at which the business is established (PO box numbers are permitted only in conjunction with an actual address).

c) The details of the business including an electronic address.

7. The Regulations have specific requirements in respect of regulated businesses –

(a) Where the service provider is registered in a trade or similar register available to the public, details of the register in which the service provider is entered and his registration number, or equivalent means of identification in that register.

(b) Where the provision of the service is subject to an authorisation scheme, the particulars of the relevant supervisory authority.

8. The Rules of Conduct provide that a business must: "Not imply that the business is approved by the Government or is connected with any government agency or any regulator. (If a business wishes to mention in advertising and marketing material that it is authorised it may use only the following words which must be used in their entirety: "Regulated by the Ministry of Justice in respect of regulated claims management activities")." The original rules referred to the Department for Constitutional Affairs. This Ministry of Justice took over the responsibilities of the Department for Constitutional Affairs on 9 May 2007. Where businesses have used the original wording they are asked to change it as soon as possible but not at the expense, for example, of reprinting documents. It will be in order to refer to Department for Constitutional Affairs until 30 September 2007.

9. Businesses can be identified on the public register that is now on the claims management regulation website so it is not necessary to give a registration number as well.

10. The requirements of para 7 and 8 together can best be met by the following statement on a website –

ABC is regulated by the Ministry of Justice in respect of regulated claims management activities; its registration is recorded on the website www.claimsregulation.gov.uk.

Additional provisions for companies

11. There are additional requirements for organisations that are limited companies under Regulations made under the Companies Act 2006 which came into effect on 1 January 2007. Companies must also record on their websites and on business letters –

- The company's full corporate name.
- The company's registered office address.
- The company registration number and country of registration.

Meaning of cold calling in person

12. Client specific rule 4 states that "cold calling in person is prohibited". There have been a number of questions on what is meant by cold calling in person. The term should need little explanation. Any face to face contact initiated by the claims management businesses is cold calling in person. This includes knocking on doors and approaching people in the street or shopping centres, including what is known as "clipboarding". It is permissible to have a booth or stand in a shopping centre or exhibition as long as the people manning it do not attempt to make the first contact.

Meaning of high pressure selling

13. Client specific rule 3 states that "A business must not engage in high pressure selling." Again, the Regulator has been asked to explain what this means, and again the term should be self-explanatory. The following are examples of high pressure selling –

- Persistent attempts to persuade a person who initiated a contact with a claims management business to claim compensation when the person has decided that they do not want to do so.
- Contacting people at unreasonable hours or in unreasonable circumstances in attempt to pressurise them into agreeing to do something.
- A threat that cannot be implemented to take legal action.
- The use of threatening or abusive behaviour.

Compliance with the rules governing solicitors' conduct

[This section has been drafted in conjunction with the Solicitors Regulation Authority which has confirmed that the wording is in accordance with the rules governing solicitors' conduct.]

14. Client Specific Rule 8 states that: "Where business is introduced to a solicitor, the business must not act in a way that puts the solicitor in breach of the rules governing solicitors' conduct." This means that the referrer must do nothing which compromises the solicitor's duty to act independently in a client's best interests. The key rule (2(A)) of the Solicitors' Introduction and Referral Code) is set out below –

(1) A solicitor must not make any payment to a third party in relation to the introduction of clients to the solicitor, except as permitted below.

(2) Solicitors may enter into agreements under this section for referrals of clients with introducers who undertake in such agreements to comply with the terms of this code.

(3) A solicitor may make a payment to a third party introducer only where immediately upon receiving the referral and before accepting instructions to act the solicitor provides the client with all relevant information concerning the referral and, in particular, the amount of any payment.

(4) The solicitor must also be satisfied that the introducer:

  (a) has provided the client with all information relevant to the client concerning the referral before the referral took place and, in particular, the amount of any payment;

  (b) has not acquired the client as a consequence of marketing or publicity or other activities which, if done by a solicitor, would be in breach of any of the Solicitors' Practice Rules and in particular by "cold calling"; and

  (c) does not, under the arrangement, influence or constrain the solicitor's professional judgement in relation to the advice given to the client.

(5) If the solicitor has reason to believe that the introducer is breaching terms of the agreement required by this section the solicitor must take all reasonable steps to procure that the breach is remedied. If the introducer persists in breaches the solicitor must terminate the agreement in respect of future referrals.

On 1 July 2007 the current provisions governing solicitors' conduct will be replaced by the Solicitors Code of Conduct. This is issued by the Solicitors Regulation Authority (the independent regulatory arm of the Law Society) and is available at

www.sra.org.uk (see in particular Rule 9: Referrals of business). However, the substance of the key provisions which currently govern solicitors accepting referrals will not be changed.

15. The Solicitors Regulation Authority has issued a warning card to solicitors stating that it is "cracking down on solicitors whose referral arrangements compromise their clients' interests, and who undermine public confidence in solicitor". The warning card asks solicitors to ask themselves -

- Do I always explain the nature of any referral arrangements, and disclose any referral fees, to my client at the outset?
- Am I being up-front with my clients about the nature of these payments? Am I trying to disguise the payments as something they are not e.g. administration or marketing fees?
- Am I sure that the introducer has also disclosed this information to my client?
- Do I know how the introducer obtained the client?
- Is the agreement between the introducer and the client fair and in the client's best interests, and if it isn't, am I able to advise my client accordingly?
- Am I sure that there is nothing in my agreement with the introducer which compromises my independence and/or my ability to act in my client's best interests, for example:
  - restrictions on my client's choice of advocate or expert;
  - the introducer, rather than the client, telling me how to deal with my client's money?

16. More information is available on the following website www.referrals.sra.org.uk.

17. In summary, the provisions governing solicitors' conduct mean that where business is being referred to a solicitor, directly or through an intermediary, an authorised claims management business must, among other things –

- Not seek to impose conditions on the way the solicitor handles the case that would compromise his independence or his ability to act in his client's best interests.
- Not engage in cold calling of any form (eg no unsolicited telephone calls). It is not legitimate to telephone a prospective client simply because they have ticked a box on a general consumer survey.
- Disclose to the client any referral fee.

Compliance and enforcement

18. With the exception of the requirements in paragraphs 7 – 10 (which clearly are not relevant in the case of a business applying for authorisation) and paragraph 11 (which is a new and as yet little known requirement) the other requirements on advertising have been enforced through the application process; that is businesses have not been authorised unless they are compliant.

19. The Monitoring and Compliance Unit has now begun a programme to check the websites of all authorised businesses for compliance with all legal requirements, including those in paragraphs 7 – 11.

20. Compliance with the rules on cold calling will be enforced through intelligence information, surveillance and mystery shopping.