

CURRENT GUIDANCE

After the Event Insurance Guidance

Introduction

1. This guidance document is for prospective and existing BSB entities, and self-employed barristers, who wish to recommend and arrange After the Event (ATE) insurance policies for clients.
2. This may occur where a BSB entity or self-employed barrister is acting directly for a lay client under a conditional fee agreement. In the wider legal services market, recommending and arranging an ATE insurance policy is particularly common when conducting personal injury litigation.
3. There is a distinction between a) a BSB entity or self-employed barrister informing a client that ATE insurance policies are available in the market and suggesting the client investigate them (which is not regulated and may be sound advice), and b) recommending a particular insurance policy or provider and/or arranging the insurance. Recommending and arranging an ATE insurance policy is an insurance distribution activity (formerly known as an insurance mediation activity). As such, it is a regulated activity for the purposes of the Financial Services and Markets Act 2000 (FSMA). Under section 19 of the FSMA, any person carrying on a regulated activity must be regulated by the Financial Conduct Authority (FCA) or exempt from this requirement. Under section 23 of the FSMA, it is a criminal offence for a person to carry on a regulated activity when neither authorised nor exempt.
4. Part XX of the FSMA enables firms who are authorised and regulated by a regulator other than the FCA to be treated as exempt professional firms and undertake exempt regulated activities. A firm will only be an exempt professional firm if its regulator is one of the designated professional bodies (DPBs) recognised by the FCA.¹
5. As the BSB is a specialist regulator of advocacy and legal advice, it is not a DPB for financial services activities. **BSB entities wishing to recommend and arrange ATE insurance policies must therefore either a) apply for and obtain FCA regulation, or b) become an appointed representative (AR) of an FCA regulated firm. See Section 1 or 2 below.**
6. As FCA regulation is firm-based, self-employed barristers are not able to obtain FCA regulation. **Self-employed barristers wishing to recommend and arrange ATE insurance policies must therefore become an AR of an FCA regulated firm. See Section 2 below.**

¹ <https://www.handbook.fca.org.uk/handbook/glossary/G286.html>

Section 1: BSB Entities – FCA Regulation

7. A BSB entity wishing to recommend and arrange ATE insurance policies can apply for and obtain FCA regulation. **If a BSB entity obtains FCA regulation, they will be responsible for complying with the FCA’s regulatory requirements in addition to BSB regulation.**
8. The BSB’s view is that recommending and arranging ATE insurance policies is an example of an incidental activity which is carried on in the course of supplying the main service, and does not materially detract from the focus of the entity being legal. **Recommending and arranging ATE insurance policies therefore does not automatically mean that a BSB entity is unsuitable for BSB regulation.**

Prospective BSB Entities – FCA Regulation

9. A prospective BSB entity applying for authorisation and wishing to recommend and arrange ATE insurance policies should either:
 - a) In response to the question ‘please provide details of any services, other than legal services, that you will provide’, indicate that it intends also to apply for and obtain FCA regulation; or
 - b) In response to the question ‘are you [the applicant entity] authorised to carry out non-legal professional services by an organisation which is not an approved regulator under the Legal Services Act 2007?’, indicate that it has already obtained FCA regulation.
10. Prospective BSB entities should be aware that if a substantial part of the services to be provided are high-volume, standardised legal transactional services direct to lay clients, this factor would indicate that it may not be appropriate for the BSB to regulate the entity (paragraph 15d of the BSB’s entity regulation policy statement).²
11. However, the BSB will assess all of the information which is provided by an applicant in a flexible way to determine whether the entity is appropriate for the BSB to regulate. Applicants are encouraged to read the full entity regulation policy statement, which explains the BSB’s approach in more detail:
https://www.barstandardsboard.org.uk/media/1668991/entity_regulation_policy_statement.pdf
12. If the application is approved the authorisation will normally, in accordance with Rule S114 of the BSB Handbook, be given subject to the following conditions:
 - a) Recommending and arranging ATE insurance policies is the only financial services activity which the BSB entity will be permitted to carry on;

² https://www.barstandardsboard.org.uk/media/1668991/entity_regulation_policy_statement.pdf

- b) This activity must arise out of, or be complementary to, supplying legal services to clients, and must be incidental to supplying legal services to clients. It is not permitted to carry on this activity for clients in isolation;
 - c) The BSB entity must be regulated by the FCA in respect of this activity;
 - d) The BSB must be notified within 7 days of the date on which the BSB entity first becomes regulated by the FCA in respect of this activity; and
 - e) The BSB must be notified within 7 days if the BSB entity is no longer regulated by the FCA in respect of this activity.
13. The authorisation may also be given subject to such other conditions as the BSB considers appropriate.

Existing BSB Entities – FCA Regulation

14. If an existing BSB entity obtains FCA regulation in order to recommend and arrange ATE insurance policies, this will be a material change to the entity which must be notified to the BSB. This is because it may affect the BSB's supervision of the entity, or its suitability to be regulated by the BSB.
15. In addition, the authorisation of the BSB entity will normally, in accordance with Rule S116 of the BSB Handbook, be modified to make it subject to conditions identical to those in paragraph 12 above. The authorisation may also be modified to make it subject to such other conditions as the BSB considers appropriate.

Section 2: BSB Entities and Self-Employed Barristers – Appointed Representatives

16. A BSB entity wishing to recommend and arrange ATE insurance policies can also become an AR of an FCA regulated firm.
17. Notwithstanding that they are not themselves FCA regulated, an AR is entitled to engage in regulated activities as they act as a representative of an FCA regulated firm. **The FCA regulated firm is required to undertake its own due diligence in relation to the BSB entity to ensure its own compliance with the FCA’s regulatory requirements.**
18. Rule C21 of the BSB Handbook also requires BSB entities to avoid conflicts of interest between their interests and the interests of clients in respect of particular matters. If a BSB entity becomes an AR of an FCA regulated firm and recommends and arranges ATE insurance policies, in each case they are required to undertake due diligence to avoid a conflict of interest. This requires robust governance arrangements to be in place between the BSB entity and FCA regulated firm (see paragraphs 32 to 34 for further guidance). BSB entities should also ensure that they avoid receiving any prohibited commission for recommending and arranging ATE insurance policies.

Prospective BSB Entities – Appointed Representatives

19. A prospective BSB entity applying for authorisation and wishing to recommend and arrange ATE insurance policies should either:
 - a) In response to the question ‘please provide details of any services, other than legal services, that you will provide’, indicate that it intends to become an AR of an FCA regulated firm; or
 - b) In response to the question ‘do you have any associates or associations as defined in the BSB Handbook?’, indicate that it is already an AR of an FCA regulated firm.
20. If the application is approved the authorisation will normally, in accordance with Rule S114 of the BSB Handbook, be given subject to the following conditions:
 - a) Recommending and arranging ATE insurance policies is the only financial services activity which the BSB entity will be permitted to carry on;
 - b) This activity must arise out of, or be complementary to, supplying legal services to clients, and must be incidental to supplying legal services to clients. It is not permitted to carry on this activity for clients in isolation;
 - c) The BSB entity must be an AR of an FCA regulated firm in respect of this activity;

- d) The BSB entity must provide such details of the FCA regulated firm to the BSB as it may require;
 - e) The BSB entity must take reasonable steps to satisfy itself that the FCA regulated firm has appropriate risk management procedures in place which are being complied with, and that the FCA regulated firm is in good standing with the FCA;
 - f) The BSB entity must agree a protocol with the FCA regulated firm which (i) details the governance arrangements in place between them, (ii) ensures the entity's compliance with Rule C21 of the BSB Handbook and (iii) will be made available to the BSB on request;
 - g) The BSB must be notified within 7 days of the date on which the BSB entity first becomes an AR of the FCA regulated firm in respect of this activity; and
 - h) The BSB must be notified within 7 days if the BSB entity is no longer an AR of the FCA regulated firm in respect of this activity, or if the firm is no longer regulated by the FCA.
21. The authorisation may also be given subject to such other conditions as the BSB considers appropriate.

Existing BSB Entities – Appointed Representatives

22. If an existing BSB entity becomes an AR of an FCA regulated firm in order to recommend and arrange ATE insurance policies, this will be a material change to the entity which must be notified to the BSB. This must be done:
- a) **During the annual entity renewal process**, by completing the material change declaration. Refer to the entity renewal guidance for more information: https://www.barstandardsboard.org.uk/media/1729846/entity_renewal_guidance.pdf; or
 - b) **Outside of the annual entity renewal process**, by completing the associations notification form and returning it to the BSB's Supervision Team. The form must be completed as, in addition to being a material change to the entity which must be notified to the BSB, acting as an AR falls within the definition of 'an association' in the BSB Handbook.³ Rule C80 of the BSB Handbook states that associations must be notified to the BSB. The form is available on the BSB's website: <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/supervision/>.

³ BSB authorised persons are sharing premises and/or costs and/or using a common vehicle for obtaining or distributing work with any person other than a BSB regulated person, in a manner which does not require the association to be authorised as an entity under the Legal Services Act 2007

23. In addition, the authorisation of the BSB entity will normally, in accordance with Rule S116 of the BSB Handbook, be modified to make it subject to conditions identical to those in paragraph 20 above. The authorisation may also be modified to make it subject to such other conditions as the BSB considers appropriate.

Self-Employed Barristers – Appointed Representatives

24. Self-employed barristers wishing to recommend and arrange ATE insurance policies must become an AR of an FCA regulated firm.
25. Notwithstanding that they are not themselves FCA regulated, an AR is entitled to engage in regulated activities as they act as a representative of an FCA regulated firm. **The FCA regulated firm is required to undertake its own due diligence in relation to the self-employed barrister to ensure its own compliance with the FCA’s regulatory requirements.**
26. Rule C21 of the BSB Handbook also requires self-employed barristers to avoid conflicts of interest between their interests and the interests of clients in respect of particular matters. If a self-employed barrister becomes an AR of an FCA regulated firm and recommends and arranges ATE insurance policies, in each case they are required to undertake due diligence to avoid a conflict of interest. This requires robust governance arrangements to be in place between the self-employed barrister and FCA regulated firm (see paragraphs 32 to 34 for further guidance). Self-employed barristers should also ensure that they avoid receiving any prohibited commission for recommending and arranging ATE insurance policies.
27. If a self-employed barrister becomes an AR of an FCA regulated firm in order to recommend and arrange ATE insurance policies, they must complete the associations notification form and return it to the BSB’s Supervision Team. The form must be completed as acting as an AR falls within the definition of ‘an association’ in the BSB Handbook.⁴ Rule C80 of the BSB Handbook states that associations must be notified to the BSB. The form is available on the BSB’s website:
<https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/supervision/>
28. The BSB may then, in accordance with Rule S72 of the Handbook, place conditions on the self-employed barrister’s practising certificate which are similar to those in paragraph 20 above. The BSB may also place such other conditions on the self-employed barrister’s practising certificate as it considers appropriate.

⁴ BSB authorised persons are sharing premises and/or costs and/or using a common vehicle for obtaining or distributing work with any person other than a BSB regulated person, in a manner which does not require the association to be authorised as an entity under the Legal Services Act 2007

Section 3: Compliance with Other BSB Handbook Requirements

29. **If a BSB entity obtains FCA regulation, they will be responsible for complying with the FCA's regulatory requirements in addition to BSB regulation.** BSB entities obtaining FCA regulation should also note that the Insurance Distribution Directive (IDD) 2016 goes beyond the Insurance Mediation Directive (IMD) 2002, and will be transposed into national law by 23 February 2018. However, under current proposals FCA regulated firms will not be required to comply with the IDD until 1 October 2018. BSB entities obtaining FCA regulation should refer to the FCA's website (<https://www.fca.org.uk/>) for updates, and the FCA Handbook (<https://www.handbook.fca.org.uk/>) for details of the rule changes.
30. **If a BSB entity or self-employed barrister becomes an AR of an FCA regulated firm, the FCA regulated firm is required to undertake its own due diligence in relation to the BSB entity or self-employed barrister to ensure its own compliance with the FCA's regulatory requirements.** BSB entities and self-employed barristers which become ARs of FCA regulated firms should also refer to the following sections of the BSB Handbook in more detail: Rule C21 on accepting instructions and conflicts of interest (and associated guidance), and Rules C79 – C85 on associations with others (and associated guidance).
31. In addition, **all BSB entities and self-employed barristers which recommend and arrange ATE insurance policies should note that this does not affect the need for compliance with other BSB Handbook requirements.** In particular:

Acting in Clients' Best Interests and Conflicts of Interest

32. Core Duty 2 in the BSB Handbook states that 'you must act in the best interests of each client'. It may, for example, be in clients' best interests to obtain ATE insurance to protect against adverse costs orders and disbursements that arise in personal injury cases, but only if they do not already have sufficient legal expenses insurance in place. Clients may also be exempt from some court fees and so do not need to obtain ATE insurance for this purpose. In addition, while BSB entities and self-employed barristers may recommend ATE insurance policies, clients should retain the ultimate choice as to whether to obtain them.
33. Rule C21 of the BSB Handbook also requires BSB entities and self-employed barristers to avoid conflicts of interest between their interests and the interests of clients in respect of particular matters. They should therefore only recommend and arrange an ATE insurance policy if this would be in the interests of the client, and not because this would be in the financial interest of the BSB entity or self-employed barrister.
34. If a BSB entity or self-employed barrister becomes an AR of an FCA regulated firm and recommends and arranges ATE insurance policies, in each case they also are required to undertake due diligence to avoid a conflict of interest. This requires robust

governance arrangements to be in place between the BSB entity/self-employed barrister and FCA regulated firm.

Maintaining Independence and Prohibition on Referral Fees

35. Core Duty 4 in the BSB Handbook states that ‘you must maintain your independence’. Guidance C18 also states that ‘offering, promising or giving: any commission or referral fee...to any client, professional client or other intermediary’ may reasonably be seen as compromising independence. BSB entities and self-employed barristers should familiarise themselves with BSB guidance on referral fees⁵ and ensure they avoid receiving any prohibited commission for recommending and arranging ATE insurance policies.
36. In addition, referral fees and inducements (as defined in the Criminal Justice and Courts Act 2015) are prohibited where they relate to a claim or potential claim for damages for personal injury or death, or arise out of circumstances involving personal injury or death personal injury claims (section 56 Legal Aid, Sentencing and Punishment of Offenders Act 2012 and section 58 Criminal Justice and Courts Act 2015).

Duty to Report Certain Matters to the BSB

37. Rule C65.3 of the BSB Handbook states that ‘you must report promptly to the Bar Standards Board if: you (or an entity of which you are a manager) to your knowledge are the subject of any disciplinary or other regulatory or enforcement action by another Approved Regulator or *other regulator*, including being the subject of disciplinary proceedings’. The reference to ‘action by...[another] regulator’ includes the FCA.

Client Money and Third Party Payment Services

38. Rule C73 of the BSB Handbook states that ‘you must not receive, control or handle client money apart from what the client pays you for your services’. If BSB entities and self-employed barristers are recommending and arranging ATE insurance policies for clients, they may therefore not hold ATE fees in their account on behalf of the client to pay the insurer.
39. BSB entities and self-employed barristers are also reminded that, if they use a third party payment service for making payments to, from or on behalf of their clients, Rule C74 of the BSB Handbook states that they must:
 - Ensure the service they use will not result in their receiving, controlling or handling client money;

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https://www.barstandardsboard.org.uk/media/1666553/9_guidance_on_referral_and_marketing_arrangements_for_barristers_permitted_by_the_bsb.pdf

- Only use the service for payments to, from or on behalf of their clients which are made in respect of legal services (such as fees, disbursements or settlement monies); and
 - Take reasonable steps to check using the service is consistent with their duties to act competently and in their clients' best interests.
40. In addition, BSB entities and self-employed barristers which are using third party payment services should refer to the guidance to Rule C74 in the BSB Handbook, particularly Guidance C109 – C111.
41. If BSB entities and self-employed barristers are not arranging ATE insurance policies themselves, but doing so through other providers, the client will need to make any payment direct or use a third party payment service themselves.

Section 4: Professional Indemnity Insurance

42. If a BSB entity or self-employed barrister becomes an AR of an FCA regulated firm, the FCA regulated firm is responsible for complying with the FCA's professional indemnity insurance requirements.
43. If a BSB entity obtains FCA regulation, the provision of ATE insurance is likely to be excluded from their legal services insurer's terms of cover (this is excluded from the Bar Mutual Indemnity Fund's terms of cover). In any event, BSB entities must ensure that they comply with the FCA's professional indemnity insurance requirements.

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