

 the compliance office.

SRA COLP and COFA requirements
e-book

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About this guide

When the Solicitors Regulation Authority's (SRA) requirements for law firms to appoint compliance officers came into effect in 2012, it understandably caused a great deal of anxiety within the profession.

Since then there have been a number of publications and courses which provide an overview of the new requirements but few perhaps provide the level of detail and context which most firms and compliance officers will need.

Our aim has been to provide a more in-depth analysis of the COLP and COFA requirements. It forms part of a suite of free information and support which we offer to law firms to help them achieve SRA compliance. Please do take a look on our [website](#) to check out the other support available, including checklists, template documents, training and free compliance updates.

We very much hope that this guide is helpful to you and your firm. We would really welcome any feedback which you have via our website.

the compliance office

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Fast Facts: an overview

- all firms must nominate a compliance officer for: (i) legal practice (COLP) and (ii) finance and administration (COFA);
- compliance officers must 'take all reasonable steps to ensure compliance' by the law firm and its staff and owners with the regulatory requirements. This responsibility is divided between the COLP and the COFA;
- the COFA's responsibilities relate to compliance with the Solicitors Accounts Rules, though there is overlap between these rules and others. On close analysis, the COLP's responsibilities appear to cover every aspect of compliance by the firm, its staff and owners;
- compliance officers must record all breaches by the firm, staff or owners and report all 'material' breaches to the SRA;
- compliance officers are not solely responsible for compliance. The firm and the individuals involved in the firm retain primary responsibility to meet their duties. Partners in a firm and the firm itself actually have a more onerous regulatory burden than the compliance officers. The compliance officer's role relates to the facilitation and monitoring of compliance by others;
- a COLP and a COFA must generally speaking be an individual 'manager' (any partner in a partnership for example) or employee of the firm and be of sufficient seniority and responsibility to fulfil the duties. A COLP must in addition be a specific type of lawyer;
- great care should be taken by both the firm and the candidate to frankly assess whether the proposed candidate will in practice be able to effectively fulfil his or her duties. The role could include taking the sort of decisions usually reserved for senior management. There should be clarity about the individual's role, powers, duties, reporting lines, access to the business and resources. A weak candidate or a poor structure for the role could pose a risk to the firm and the 'managers' (such as partners) which is even greater than that for the COLP or COFA concerned;
- firms should plan in advance for what they would do if their COLP or COFA were to suddenly be unable or unwilling to continue with his or her role;
- the COLP and COFA requirements apply to sole practitioners, though the systems and structures involved would be far simpler than that for firms of multiple fee earners.

The SRA's Compliance Officer (COLP/COFA) Requirements

What is a compliance officer?

A compliance officer is an individual employee or manager ('manager' in this context includes all partners, members of an LLP or directors in a company) of a Solicitors Regulation Authority (SRA) regulated law firm who has specific duties to:

- a. help the firm comply with the regulatory requirements involved in being a law firm;
- b. keep a record of any failure to meet the regulatory requirements; and
- c. report to the regulator all 'material' failures.

There are two types of compliance officer:

- a compliance officer for legal practice – a 'COLP'; and
- a compliance officer for finance and administration – a 'COFA'.

While the compliance officer has some additional duties as compared with others working in a law firm, the SRA have stated on a number of occasions that the compliance officer is definitely not solely responsible for a firm's compliance with the regulatory requirements.

All firms must have both a COLP and a COFA in order to practise as an SRA regulated practice.

What areas of compliance is the COFA responsible for?

The COFA's duties relate to compliance by the law firm, its managers ('manager' includes all partners, members of an LLP or directors in a company) and its employees with the SRA Accounts Rules¹.

Significantly, the Accounts Rules now overlap with some of the other SRA rules and regulations. The Accounts Rules² require compliance with "the Principles set out in the Handbook, and the outcomes in Chapter 7 of the SRA Code of Conduct in relation to the effective financial management of the firm".

The SRA Principles are ten overarching mandatory rules about core ethical issues, such as acting in the best interests of the client, acting with integrity and protecting client money. The Principles also include a requirement to run a business in accordance with sound financial and risk management principles. Chapter 7 of the SRA Code of Conduct also places regulatory obligations on firms to take certain

¹ See rule 8.5 of the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies Rules 2011 ('the SRA Authorisation Rules').

² See rule 1.2 of the SRA Accounts Rules 2011.

steps to manage their business effectively, including maintaining systems and controls for monitoring the financial stability of the firm.

The COFA should therefore take care to understand the broader ethical and financial management issues which are now covered by the rules as well as the more detailed provisions about accounting procedures. The SRA publication 'OFR at a glance' for example includes a case study in which a COFA becomes aware of facts indicating financial difficulty in the firm and is required to consider whether to report the matter to the SRA.

An appreciation of the broad scope of the COFA's duties is also important when a firm and a candidate come to defining the role. A COFA will be unable to effectively fulfil his or her duties it seems without access to financial management information and working closely with the COLP as regards compliance with other parts of the SRA rules and regulations (see below for details of the COLP's responsibilities).

We will consider separately what steps a COFA must take to fulfil his or her duties to facilitate and monitor compliance with the Accounts Rules later in this guide.

What areas of compliance is the COLP responsible for?

A COLP's duties relate to compliance³:

- by the law firm with the 'terms and conditions' of its authorisation to provide legal services (except that the COFA no the COLP has responsibility for compliance with the Accounts Rules);
- by the law firm, the managers of the law firm (remember that 'manager' includes all partners, members of an LLP or directors in a company), the employees and owners of the business with their 'statutory obligations' in relation to the provision of legal services by the firm.

It will not be immediately obvious to most lawyers what is meant by the 'terms and conditions' of authorisation or which statutory obligations are referred to. These are however fundamental to both the firm and the compliance officer achieving compliance and so are explained in more detail below.

The terms and conditions of authorisation

The reference to 'terms' of a law firm's authorisation appears to be intended to mean the reserved legal activities⁴ which the firm is authorised by the SRA to undertake, such as to conduct litigation or to complete a conveyancing transaction. In the past, all law firms could offer practically all types of legal services to clients, whether reserved to lawyers or not. However, alternative business structures (ABSs), which unlike traditional law firms are permitted to have external investment by non lawyers in the business, are now regulated by the SRA alongside traditional law firms. While traditional law firms will generally retain the right to offer most types of legal services, ABSs in theory may be restricted to offering only some reserved legal

³ Rule 8.5(c) of the SRA Authorisation Rules.

⁴ For the full list and meaning of reserved activities, see section 12 and schedule 4 to the Legal Services Act 2007.

activities. In most traditional firms this regulatory requirement will likely present little risk therefore but compliance officers for legal practice (COLPs) in ABSs in particular should check the terms of the firm's licence and take care to ensure that the firm does not offer or provide any legal services which it is not permitted to.

In the context of conditions on authorisation, until 2012 it was unusual for law firms to have 'conditions' on their authorisation to provide legal services. Normally these would have only been considered where there were concerns about a firm or individual and the SRA wished, for example, to prevent a person from engaging in some sort of behaviour or activity. However, all law firms now have 'general' conditions⁵ on their authorisation to provide legal services. These standard conditions tend not to restrict what a firm can do and instead provide for additional regulatory requirements which a firm must comply with.

The standard conditions include that the firm and its managers must:

- ensure compliance with regulatory requirements imposed by law and by the SRA and have 'suitable arrangements' in place to achieve this;
- provide information to the SRA annually about its business where required to do so;
- obtain SRA approval of every new manager and owner of the firm, such as a new partner in a partnership; and
- pay its fees for authorisation as a law firm.

The SRA may still impose additional conditions upon law firms if, for example, it has concerns about the firm and wishes to prevent the firm from undertaking what it considers to be a particularly high risk activity.

Now that the use of conditions is being expanded so significantly by the SRA, achieving compliance with them will be much more challenging. All firms and compliance officers should understand exactly what conditions their practice is subject to and make sure that they have the necessary arrangements in place to comply with them. Ignorance to these provisions poses a significant risk. The starting point is to understand the general conditions imposed under rule 8 of the SRA Authorisation Rules 2011 and then have regard to any additional conditions imposed by the SRA (which firms should be aware of already if there are any). We have an SRA compliance checklist available on our [website](#) for those who would like to see a summary of the requirements.

What is clear from the outset of examining this limb of the COLP's responsibilities is that the areas of the business which he or she must monitor and facilitate compliance in respect of are exceptionally wide. Compliance with the terms and conditions of authorisation, for example, includes compliance with all of the SRA rules and regulations (except the SRA Accounts Rules, but see below).

The statutory duties

⁵ See rules 7 and 8 of the SRA Authorisation Rules 2011.

Acts of Parliament, like SRA rules and regulations, also place duties on a law firm and those involved in the law firm which aim to encourage good practice and compliance.

The indication⁶ is that the SRA primarily has in mind obligations imposed upon principals and staff under the Legal Services Act, Administration of Justice Act 1985 and the Solicitors Act 1974. These statutes place a very large number of obligations upon law firms and those involved in the firms and there are some duties which are not replicated (or not obviously replicated) in the SRA's conduct provisions.

The following are some important statutory duties which every COLP should be aware of:

- law firms, solicitors, managers (such as a partner in a partnership or a member of an LLP) and employees have a statutory duty to comply with the 'regulatory arrangements' of the SRA⁷, which includes all of the SRA rules and regulations as they apply to each person (as will be considered later, this does appear to duplicate part of the first limb of the COLP's responsibilities discussed above);
- a solicitor must only practise when he or she has a practising certificate in force⁸;
- solicitors and law firms must not employ solicitors who are suspended or have been struck off the roll of solicitors or non solicitors who had an order made against them which prevents them from working for solicitors or law firms⁹;
- traditional law firms must apply to become licensed as an alternative business structure (ABS) if they have an arrangement with an individual or organisation which is not authorised to provide legal services in England and Wales and it gives that person a right to shares, capital or profits in the firm¹⁰;

⁶ See guidance note (viii)(a)(C) to the SRA Authorisation Rules 2011.

⁷ See section 176 of the Legal Services Act 2007. 'Regulatory arrangements' principally refers to the SRA's Handbook of rules and regulations but it is wider than that - see section 21 of the act. Note that although this duty stems from the Legal Services Act it appears to apply to traditional law firms and those connected with traditional law firms as well as ABSs. Note also that the Solicitors Act and Administration of Justice Act also requires firms and those involved with firms to comply with the SRA rules and regulations.

⁸ See section 1 of the Solicitors Act 1974.

⁹ See sections 41 and 43 of the Solicitors Act 1974 and paragraphs 9 and 18A of the Administration of Justice Act 1985. The Legal Services Act 2007 does not appear to have replicated these obligations for ABSs (though the SRA Authorisation Rules do).

¹⁰ The actual test which is applied varies depending upon the type of firm - see section 72 of the Legal Services Act 2007. Note that there are currently some transitional provisions about how existing 'Legal Disciplinary Practices' with SRA approved non lawyers are to be dealt with.

- non lawyers who have an ownership interest in an ABS have a duty not to do anything which causes or substantially contributes to a breach of the SRA's 'regulatory arrangements'¹¹;
- a COFA and a COLP within an ABS also have statutory duties which overlap with the COLP and COFA duties set out in the SRA rules and regulations¹² (which are considered in more detail below).

Similar to the responsibilities in respect of terms and conditions of authorisation, compliance with statutory duties is very wide and includes compliance with all of the SRA rules and regulations.

There are also various other statutory obligations which law firms need to comply with which arguably relate to a greater or lesser degree to the provision of legal services: the Proceeds of Crime Act, the Terrorism Act, the Bribery Act, the Data Protection Act and the Equality Act. It is perhaps academic whether the rule in question was intended to cover these statutory duties as there is a separate obligation under the SRA Code of Conduct to comply with all "legislation applicable to your business"¹³ anyway.

It is of no great surprise that those participating in legal practice are required to comply with statutory obligations. The point to note is that the COLP's duty under the SRA rules to facilitate and monitor compliance includes facilitating and monitoring compliance with statutory duties which are not his or her own.

The overlapping nature of the duties of a COLP

While the compliance officer for legal practice's (COLP) areas of responsibility have been particularised in SRA rules (the terms and conditions of the firm's authorisation and the statutory duties), on close analysis these areas appear to cover every aspect of compliance by the firm and those involved in it. This includes all aspects of the SRA Handbook of rules and regulations.

There appears to be overlap with the responsibilities of the COFA. If the statutory duties of those involved in the firm and the firm itself are complied with then the SRA Accounts Rules should be complied with¹⁴. This is despite the impression given at one point within the relevant provisions that the Accounts Rules are the responsibility of the COFA and not the COLP.

We will consider below what a COLP must do in practice to fulfil his or her duties in respect of compliance with the SRA Handbook and other requirements.

So the COLP has responsibilities in respect of every area of compliance by the firm?

¹¹ See section 90 of the Legal Services Act 2007.

¹² See sections 91 and 92 of the Legal Services Act 2007.

¹³ See outcome 7.5 in Chapter 7 of the SRA Code of Conduct 2011.

¹⁴ In that these form part of the SRA's 'regulatory arrangements' and firms and those involved in the firm have a statutory duty to comply with the 'regulatory arrangements'.

Yes, that appears to be correct. While at one point the SRA Authorisation Rules suggest that the COLP is not responsible for compliance with the SRA Accounts Rules, a separate part of the COLP's duties do relate to the firm and those involved in the firm fulfilling their obligations to comply with all SRA rules and regulations (including the Accounts Rules).

While a COLP is not solely responsible for compliance with all such obligations and can satisfy his or her duties by taking certain steps (see below), it would appear unwise for a COLP not to at least have some oversight of all aspects of compliance within the law firm. This includes responsibilities which others also have responsibility for, such as the COFA and the money laundering reporting officer. It appears appropriate therefore for a COLP to agree with others who are delegated compliance responsibilities who will do what. This will avoid duplication, minimise the risk of something being missed and assist the COLP and COFA in fulfilling his or her duty without having to physically do everything his or herself.

What must a compliance officer do to fulfil his or her duty?

A compliance officer has three duties¹⁵:

- a. to "take all reasonable steps to ensure" compliance by the firm and those involved in the firm with the relevant regulatory and legal requirements;
- b. to "record any failure" to comply with the relevant requirements and to make these records available to the SRA on request;
- c. to actively report any "material failures" to comply with the relevant requirements to the SRA.

For a compliance officer for legal practice (COLP), the relevant regulatory and legal requirements appear to be all aspects of compliance by a firm and those involved in the firm. For a compliance officer for finance and administration (COFA), the requirements are those set out in the SRA Accounts Rules (though there is overlap with other rules and regulations as noted above).

Taking all reasonable steps to ensure compliance

SRA guidance¹⁶ expands a little on this duty: "COLPs and COFAs are responsible for ensuring that the firm has systems and controls in place to enable the firm, as well as its managers, employees and anyone who owns any interest in the firm, to comply with the requirements on them".

The compliance officer is not responsible for every compliance failure or breach of the SRA rules which occurs. This is very important to note. The duty to take steps to ensure compliance should not be confused with a duty to actually ensure compliance. Imagine that a compliance officer takes all reasonable steps to ensure compliance in a law firm but a dishonest individual nevertheless finds a way to

¹⁵ See rule 8.5 of the SRA Authorisation Rules.

¹⁶ See guidance note (vii) to rule 8 of the SRA Authorisation Rules.

evade the systems and controls and misappropriate money from a client. In this scenario, the dishonest individual will clearly be in substantial regulatory difficulty but the compliance officer on the face of it has complied with his or her duty.

It is the firm and the individuals involved in providing legal services who retain the primary responsibility for complying with their legal and regulatory requirements. The compliance officers' duties relate more to facilitating and monitoring that compliance (although in practice the individual compliance officer will also have his or her own duties as an employee or manager of the firm). Even if the compliance officer's conduct were to fall short of 'taking all reasonable steps', the rules do not deem the actions of the individual who caused the breach to be those of the compliance officer.

Interestingly, the law firm and its managers by contrast are actually required to "ensure" that the legal and regulatory requirements are complied with¹⁷. This is a far more onerous regulatory obligation than the compliance officer's duty to take all reasonable steps to ensure compliance. The rules¹⁸ also require the firm as an entity to have suitable arrangements in place to ensure compliance (overlapping with the compliance officer's duties quite substantially). There are even obligations on all staff and principals to report serious misconduct to the SRA whether the staff member is a compliance officer or not¹⁹. The distinction then between the duties of a compliance officer and other managers (such as partners) and even employees is not as significant as it would first appear.

While on the face of it the compliance officers appear to have additional regulatory duties to achieve compliance, any firm which, or manager who wishes, to fulfil their own regulatory obligations (or provide reasonable evidence of having sought to do so if a problem arises) will also need to take all reasonable steps to ensure compliance.

The precise nature of the necessary compliance arrangements which should be put in place to meet these duties has not been specified by the the SRA and will vary according to factors such as firm size and work area. An in-depth analysis of how a compliance officer can 'take all reasonable steps' is beyond the scope of this guide but there are various provisions and publications available free of charge which indicate the type of approach and systems expected:

- the SRA compliance checklist, template staff and management manuals and other template policies and procedures available on our [website](#);
- rule 8 and guidance notes (iii) and (ix) to rule 8 of the SRA Authorisation Rules;
- chapter 7 of the SRA Code of Conduct on management of your business;
- part 5 of the SRA's 'quick guide to OFR'; and
- the Law Society practice note 'OFR - an overview.

¹⁷ See rule 8.1(a) of the SRA Authorisation Rules.

¹⁸ See rule Rule 8.2 of the SRA Authorisation Rules.

¹⁹ See outcome 10.4 in chapter 10 of the SRA Code of Conduct.

As a general rule, it appears sensible for a compliance officer to be prepared to demonstrate to the SRA for any breach or failure which may occur how the firm had reasonably satisfied itself that the risk of such a problem occurring had been minimised as far as was reasonably practicable. For example, an approval and monitoring process by partners for when staff give undertakings would assist a COLP in demonstrating that his or her duties have been fulfilled if a problem arises with an undertaking given by a member of staff. In contrast, if a COLP were in place in a firm and took no action whatsoever to monitor or manage the use of undertakings in the business and a problem were to arise then he or she appears likely to be found to have failed to fulfil his or her duties.

Recording any failure to achieve compliance

The reference to 'failing to achieve compliance' will in practical terms mean that an SRA rule or regulation has not been complied with or a duty imposed by law in respect of legal practice has not been complied with.

A compliance officer is required to 'take all reasonable steps to record any failure' to comply with the relevant requirements (which will depend upon whether the individual is a COLP, COFA or both as considered above) and then to make those records available to the SRA if requested to do so.

The need to record "any" failure indicates that the COLP and the COFA should have in place a system by which all non compliance in the firm is reported to him or her and presumably a procedure for centrally monitoring compliance. It appears sensible to have a clear reporting line to the compliance officer from staff in place where there is any level of non compliance and to expressly link failures to do so by staff to the firm's disciplinary policies. This would demonstrate a clear commitment by the business to compliance and help ensure that the compliance officers have the information which they need to fulfil their role.

While the literal wording of the rules indicate that the compliance officer must be the one who physically records any compliance issues it appears sensible to interpret this as meaning that the compliance officer has overall responsibility for maintaining such records.

Compliance officers should take care to record the information in a way which will make it as simple as possible to allow a process of central monitoring to spot any trends or wider issues.

Reporting breaches to the SRA

As well as recording any failures the compliance officer will also, sooner or later, need to report each one to the SRA. The guidance to the SRA Authorisation Rules stresses that even breaches which are immediately remedied by the firm must be recorded and reported.

Once in receipt of the reports the SRA will presumably consider whether to follow up on the information received with the firm or not. For this reason it may be sensible for compliance officers to set out at the time of reporting to the SRA what steps have been taken to resolve the problem. The SRA Code of Conduct suggests that firms should produce a plan for remedying 'serious issues' that have been identified when reporting such matters to the SRA²⁰.

All 'material' failures must be reported to the SRA by the compliance officer "as soon as reasonably practicable"²¹.

If the COLP or COFA work in an alternative business structure (ABS) then they will also need to report non-material failures to the SRA. The rules do allow compliance officers in ABSs to delay the reporting of 'non-material' failures however until the SRA carries out its yearly information gathering exercise. However, at the time of writing the SRA does not appear to have confirmed how such reports should be made.

Most firms however, do not need to report non-material failures to the SRA. They simply need to keep a record of the failures and make them available to the SRA upon request²².

The distinction between 'material' and 'non-material' is not entirely clear. The rules provide that a failure to comply may be material either "taken on its own or as part of a pattern of failures"²³. The records kept by the compliance officer should therefore be kept under review to recognise any patterns.

The guidance to the SRA Authorisation Rules provides that in assessing whether a failure to comply is material or not the compliance officer will need to:

"take account of various factors, such as:

- (a) the detriment, or risk of detriment, to clients;
- (b) the extent of any risk of loss of confidence in the firm or in the provision of legal services;
- (c) the scale of the issue;
- (d) the overall impact on the firm, its clients and third parties."

Taking this guidance together with the natural meaning of the words used in the rules it appears as though in order to be described as material the failure to comply should fall into one of the following categories:

- the failure is widespread or has far reaching implications;

²⁰ This is not a mandatory requirement but it is 'indicative behaviour' of compliance - see IB 10.5 in the SRA Code of Conduct.

²¹ See rule 8.5 of the SRA Authorisation Rules.

²² 8.5(e)(i)(B) of the SRA Authorisation Rules

²³ See rule 8.5(c)(ii)(B) and 8.5(e)(ii)(B) of the SRA Authorisation Rules.

- the failure has had an impact upon clients which cannot be described as trivial or as having had no consequence (or there was a greater than nominal risk that such an impact would occur);
- the failure has caused a more than nominal risk that there will be a drop in the confidence which clients or others place in the firm to do its job or in law firms and lawyers in general to do their job; or
- the failure has otherwise had an impact upon the firm, its clients or third parties which cannot be described as trivial or having no consequence.

It is, in our opinion however, not absolutely clear. The SRA have however published some [case studies](#) looking at when a breach is material or non-material which are helpful.

Compliance officers and firms may wish to seek to reserve their position when recording and reporting issues if there is uncertainty as to whether there is in fact non compliance or if such non compliance is material (in some instances it may be unclear).

Finally, it should be noted that there are separate conduct duties for law firms and those working in them to report serious misconduct including the requirements of outcome 10.4 of the SRA Code of Conduct (though one report to the SRA would appear to be sensible if both duties apply to one set of facts). So for example, a partner of a firm may have become involved in a serious breach and report the matter to the COLP or COFA upon realising that there is a problem. Both the COLP and the partner would have an obligation to report the matter to the SRA. It may be sensible to clarify when making reports that they are intended to fulfil the reporting obligations of the compliance officer, the firm, the managers and the staff.

Sole practitioners and small practices

The duty to have compliance officers is intended to apply equally to sole practitioners, who will in practice likely fulfil the role of both COLP and COFA²⁴. The systems and procedures for ensuring compliance for a sole practitioner or a firm of only a handful lawyers are likely to be far simpler than for most firms. If a firm consists of one individual only for example then he or she can obviously more simply manage knowledge of regulatory requirements and knows all that there is to know about the business.

The information in this guide focuses upon the COLP and COFA requirements for law firms. The position for recognised sole practitioners is very similar but regulation 4.8 of the SRA Practising Regulations should be considered as there are some subtle differences in the SRA's approach.

Who can be a COLP or a COFA?

A COLP and a COFA must²⁵:

²⁴ See the SRA Practising Regulations, regulation 4.8 in particular.

²⁵ See Rule 8.5 of the SRA Authorisation Rules.

- be an individual person, the compliance officer cannot be an entity such as a company which specialises in compliance;
- be a manager (so for example a partner in a partnership or member of an LLP) or employee of the law firm. There is one narrow exception however where two closely connected firms may share a COLP or COFA²⁶;
- be of 'sufficient seniority' to fulfil the role;
- be in a position of 'sufficient responsibility' to fulfil the role;
- be approved by the SRA to hold that role in the firm in question;
- not be disqualified from holding the role of COLP or COFA (as appropriate); and
- consent to being the COLP or COFA for the firm (as appropriate).

In addition, a COLP must:

- be a lawyer, which in this context includes barristers, legal executives, licensed conveyancers and registered European lawyers as well as solicitors and
- be entitled to provide at least one of the reserved legal activities (such as the conduct of litigation) which the law firm is authorised to provide.

A COFA does not need to have any professional qualification, though qualifications and experience will presumably assist in satisfying the SRA as to suitability for the role and in conducting the role effectively.

There is nothing which prevents the COLP and COFA posts from being held by the same individual, provided that he or she meets the criteria for each role (see below).

Sufficient seniority and responsibility

The SRA provide a little guidance on what is meant by being of 'sufficient seniority' and 'sufficient responsibility' in the rules. The guidance²⁷ refers to the compliance officer being "in a position of sufficient power" and having "clear reporting lines to enable them to have access to all management systems and arrangements and all other relevant information including client files and business information".

The SRA's decision making criteria for approving COLPs and COFAs²⁸ provides further guidance and is very helpful. The SRA will consider whether the compliance officer has:

²⁶ See 8.5(h) and (i) of the SRA Authorisation Rules

²⁷ See guidance note (vi) to the rule 8 of the SRA Authorisation Rules.

²⁸ The decision making criteria is in respect of COLPs and COFAs in ABSs but it appears reasonable to assume that similar principles could be applied more generally.

- unfettered access to all management and/or financial information about the firm, including the office account for COFAs;
- direct authority or access to those who have authority to make decisions, raise issues and make changes within the authorised body;
- clear lines of reporting to decision-makers;
- a good knowledge of the requirements in the SRA Handbook (COLP) or SRA Accounts Rules (COFA);
- adequate resources in terms of time and money to properly carry out the role, and
- processes and procedures to fulfil their reporting and recording responsibilities.

Disqualification and when a role ceases to have effect

As noted above, a compliance officer must not be disqualified from holding that role. The term 'disqualification' refers to a specific type of disciplinary sanction which is only relevant to those who work or who had previously worked within an ABS. The Legal Services Board (the oversight regulator for the regulators such as the SRA and the Bar Standards Board) are required to keep a list of individuals who have been disqualified by the SRA or by the Council of Licensed Conveyancers from being a COLP or COFA in an ABS. At the time of writing, the roles are so new that very few if any disqualifications will have taken place.

If the compliance officer withdraws his or her consent to undertake the role, is disqualified from undertaking the role or in the case of a COLP ceases to be a lawyer authorised to carry on one or more of the firm's reserved legal activities; then the designation as a compliance officer ceases to have effect. This could be very significant as firms are required to have a COLP and a COFA at all times. Firms should have a plan for what would happen if a compliance officer were to suddenly be unable or unwilling to carry on the role (see 'pitfalls and problems' below).

SRA Approval of a Compliance Officer

The SRA may (and so presumably, will) approve an individual as a Compliance Officer for Legal Practice (COLP) or Compliance Officer for Finance and Administration (COFA) if it is satisfied that the individual is "a suitable person to carry out his or her duties"²⁹.

The SRA will presumably first wish to satisfy itself that the basic requirements for being a compliance officer as set out above, including the seniority and responsibility of the candidate, have been met. However, whether a candidate is a 'suitable person' to be a compliance officer will involve an assessment beyond

²⁹ See 8.5(f) of the SRA Authorisation Rules.

satisfaction that the minimum requirements have been met. In making its decision whether to approve or refuse the SRA will "take into account"³⁰:

- the criteria set out in the SRA's 'suitability test'; and
- "any other relevant information".

The Suitability Test is a set of regulations made by the SRA as part of its 'Handbook' of regulatory requirements. The intention is that, rather than repeating the same criteria for when the SRA will deem various individuals to be suitable for various roles in numerous sets of rules and regulations, those rules and regulations simply refer to one consistent 'suitability test'. The Suitability Test sets out specific factors which the SRA will consider, such as criminal offences, regulatory history or financial difficulties; and for each factor provides a framework for when the SRA will or may refuse to approve that person as suitable for the role in question. The test is split into two parts and both parts of the test will apply to the approval of compliance officers.

In terms of 'any other relevant information', an obvious consideration not expressly referred to in the SRA rules and regulations is any regulatory history which the SRA is aware of which it is felt is relevant to the suitability assessment.

Considerations when appointing a COLP or COFA

A candid assessment of the individual's authority

Most fundamentally, firms and 'managers' (all partners in a partnership, all members of an LLP and all directors in a company) need to appreciate how important it is to them that the compliance officer can carry out his or her role properly and effectively. The firm itself has a regulatory duty to have suitable arrangements in place to ensure that the compliance officer can fulfil his or her role³¹. The firm and the managers are also ultimately responsible for ensuring compliance and actually have a more onerous duty than the compliance officer³² in this respect. Firms should consider the duties which the compliance officers have very carefully and satisfy themselves that the individual or individuals in question will in practice be able to carry out the role effectively. If not, the firm is arguably at greater regulatory risk than the individual holding the role.

A lack of understanding of the regulatory requirements would, for example, clearly pose a significant risk to the firm itself.

Similarly, any candidate for the role of compliance officer should consider very carefully whether in practice he or she will realistically have the information and authority necessary to fulfil the duties. It should be remembered that a compliance officer will be required to take the lead on the sort of issues which would normally be dealt with by the most senior individual or committee within a business:

³⁰ See rule 15 of the SRA Authorisation Rules.

³¹ See rule 8.5(a) of the SRA Authorisation Rules.

³² See rule 8.1(a) of the SRA Authorisation Rules.

- to turn down a highly profitable business opportunity or to bring an existing one to an end, resulting in job losses; and
- to report the firm and its own staff to a body which can levy fines, including against employees, and remove lawyers' practising rights.

Some real life examples may be the best way to illustrate the potential issues. One firm, Beresfords solicitors, are reported to have earned £115 million from miners' compensation claim cases. However, these earnings were made in part by arranging for the receipt of what the High Court later described as "obviously inappropriate and unnecessary payments" from clients' compensation awards. Despite the description of these actions as obviously inappropriate, Beresfords were not alone in receiving such monies. Figures released by the SRA suggest that in the region of one third of the firms visited by the SRA who undertook miners' compensation claims were receiving similar payments from clients' compensation awards. The profitability of the work meant that the individuals involved at the time were some of the highest paid lawyers in the country, some earning millions of pounds in a year. The impact upon clients and the later regulatory impact upon the firms were however enormous. The negative publicity generated by the scandal for the firms involved was virtually unprecedented, the regulatory penalties were severe including the removal of some individuals from practice and the stress and costs of the proceedings were evidently significant.

The role of a wise COLP in this scenario would have been to take steps to bring these highly profitable (though ethically flawed) arrangements to an end, arrange for the repayment of monies to clients from profits previously drawn by the partners and to report the matter to the SRA immediately as a breach of the most fundamental regulatory duties. The long term benefit in doing so for all involved is now clear but at the time one can only begin to imagine the difficulties which a non-senior individual suggesting this course of action within these firms would have faced.

For this reason, many firms will understandably select candidates (for the COLP role in particular) who are already the most senior individuals within the business. The individual will in practice need to have genuine authority to effectively fulfil the role it seems. The less established and senior an individual is within a firm, the more important it appears to be that the structural foundations for the role are carefully and expressly set.

Defining the role and the governance arrangements

There are some structural arrangements which could be insisted upon by the compliance officer to maximise his or her confidence that the duties can be properly fulfilled.

Perhaps the most challenging issue for a compliance officer candidate is how to ensure that their position is protected if through no fault of their own they cannot fulfil their duties. One sensible step appears to be to include the compliance officer's duties, access to the business and powers within the contract of employment or partnership / membership agreement or within a separate contract (including the consequences of those duties being frustrated by the firm). While the SRA requirements mean that the compliance officer's consent to the role is necessary for it to be effective, this may do little to remedy the practical difficulties which an individual may face as an employee or partner designated for this purpose if

consent is withdrawn. Clarity about the role and duties of each party³³ as part of the contract with the business could help greatly if problems later arise.

Looking ahead, some form of process or agreement in principle as to how uncertainties as to whether a particular act or omission does constitute misconduct would also be beneficial. There will be some areas where there is a genuine lack of clarity about how the conduct provisions should apply. A clear process for what steps should be taken to resolve the uncertainty (such as to seek guidance from the SRA's professional ethics helpline) and stressing, for example, that the compliance officer must form his or her own opinion when reporting could be very helpful.

A suitable framework within which the compliance officer can fulfil his or her role would clearly also be desirable from the perspective of the firm. The compliance officers should ideally:

- have their role (including their duty and unqualified authority to report to the SRA, their ability to liaise openly with the relevant regulatory bodies and their responsibilities for compliance matters) clearly defined;
- have the authority to monitor, review and revise the firm's arrangements for achieving compliance³⁴;
- report directly to and have direct access to the most senior members of staff or to a relevant management committee (and have a process for reporting concerns about these individuals to others if necessary);
- have unfettered access to all management meetings and information;
- have express authority to access all relevant reports, files, records and data held by the firm;
- have sufficient time and resources (including in many cases a budget to build and retain the necessary expertise within the firm) to undertake the role - it may be very difficult for an individual to hold the role and fee earn within anything but a small firm;
- have oversight of centralised regulatory compliance matters such as securing professional indemnity insurance, disaster or legacy planning, delivering accountant's reports, practising certificate renewals and new staff vetting checks;
- be the known and established contact for reporting all regulatory failures, including any internal 'whistle blowing' procedures³⁵; and

³³ SRA guidance note (vi) to rule 8 of the SRA Authorisation Rules highlights the firm's duty to not frustrate performance of the role: "Firms and managers need to take care not to obstruct, whether intentionally or unwittingly, a COLP or COFA in fulfilling their role".

³⁴ Such as file review / audit procedures, risk management, conflict of interest checks, recording and monitoring undertakings, procedures for authorising payments from the client account and training staff on compliance issues.

³⁵ The indication from the SRA Code of Conduct (though it is not mandatory) is that firms should have a whistle blowing policy in place - see IB 10.10.

- be subject to review his or herself in order that management is confident in the effectiveness of the individual (though it may be sensible to have a procedure whereby a compliance officer can only be dismissed with the approval of more than one individual within the business).

That being said, the compliance officers do not need to be the individuals who are managing the business overall (though this may be simpler) and the firm need not give unqualified powers to the compliance officers. The critical factor appears to be access to the people and information relevant to the management of the business and to achieving compliance. All key decisions can still rightly be taken by the management team, albeit in the knowledge that ultimately the compliance officer will be under a duty to record and report to the SRA any compliance failures as he or she sees them.

Structural considerations for the role such as these will form part of the firm's work to ensure that suitable arrangements are in place to achieve compliance with its own obligations under the SRA rules³⁶.

Culture

For the firm, developing and maintaining a culture within which the compliance officer roles and the compliance systems can be most effective is perhaps one of the more difficult challenges. An in-depth analysis of this difficult area is beyond the scope of this guide but it is worth considering one or two points in particular.

Compliance officers will need staff and managers to take compliance seriously and to be open about any problems which have arisen. Firms should ideally make clear commitments from the most senior level - by words and by actions - that high ethical standards are valued and that poor ethical standards will not be tolerated. Staff should be encouraged to discuss ethical and compliance issues with line managers and the compliance officer where appropriate. Staff and managers should also be educated on their own compliance responsibilities and the risks posed to them as individuals as well as the firm if there is non compliance.

A whistle blowing policy (though the name in itself is perhaps far from inviting!), assurances about how reports will be dealt with and some means of anonymous reporting as far as practically possible may all assist.

To indemnify or to not indemnify

Whether to indemnify a compliance officer has been debated by a number of commentators. If a firm is proposing to do so then it should perhaps be clear:

- why this role and not others is to be indemnified (if that were to be the case);
- what exactly it is that the firm is prepared to indemnify and how.

³⁶ As required by rule 8.2 of the SRA Authorisation Rules. Guidance note (iii) to rule 8 gives some detail on the areas which should be considered by the firm when putting the compliance arrangements into place.

It would perhaps be odd if a compliance officer and a manager were investigated by the SRA for failing to comply with their respective duties and one was indemnified against SRA fines and costs by the firm but the other was not. As we have seen, the managers of the firm actually appear to have a more onerous duty to ensure compliance than the compliance officer. Employees also have compliance duties. If these are breached then the individual in question could be rebuked, fined, removed from practice and incur potentially substantial costs and adverse publicity (among other things) along the way. The position is no different for the compliance officer - it is simply that there are some additional responsibilities to be complied with. In practice a failure to take a reasonable step to ensure compliance may well in many cases be a far less serious matter than those within the firm who actually cause the non compliance.

Depending upon the existing approach of the firm, a more practical way to reassure the compliance officer may be to be clear about what the firm is doing to empower him or her to fulfil the relevant duties and to make a genuine commitment to this.

From the perspective of the individual candidate, an indemnity of some form would obviously be desirable for any role. If the firm does not arrange for such indemnities however then this should not necessarily dissuade the individual from taking on the compliance officer role any more than it would for any other role. There is perhaps simply an even greater incentive for a clearly defined and well resourced role with a strong position within the firm which enables the duties to be met.

The difficult conversation

Some individuals will find the issues set out above difficult to raise with an employer or with fellow partners, particularly those who are relatively new to a firm. However, if the compliance officer is to succeed then the foundations should be properly set at the very beginning of the relationship. If the candidate is not comfortable insisting upon certain contractual and structural arrangements for the role with the firm then the individual should perhaps ask themselves whether they will be able to have even more difficult conversations within the firm when compliance issues do arise.

Pitfalls and problems

Disciplinary action by the SRA

As discussed above, the compliance officer is in a similar position to any other employee or manager in a law firm. Failure to comply with the duties to take reasonable steps to ensure compliance and record and report non compliance could result in disciplinary action.

However, the compliance officer is not 'vicariously liable' as if he or she were responsible for every act of misconduct connected to the firm. The majority of regulatory issues for compliance officers may well arise from a failure to take 'all reasonable steps' to achieve compliance in the eyes of the SRA or the relevant decision maker. Exactly what 'all reasonable steps' means seems likely to be a fruitful ground for debate. Even so, evidence of a genuine and reasonable effort to meet the duties and engagement with the SRA to put matters right where a problem is identified would appear to remove the risk of the most serious sanctions being

imposed. The most important factor appears to be genuine and effective engagement with the role, duties and regulatory requirements.

Absence and loss of a compliance officer

SRA guidance³⁷ states that "In developing their governance and administrative arrangements firms will need to consider how they approach unexpected risks such as the absence of key staff, including COLP and COFA, and whether the nature of the absence will trigger the need to notify the SRA (see Rule 8.7) and to obtain approval for a replacement."

It is certainly sensible for the firm to have plans in place for compliance reporting when a compliance officer is absent for a short period, though they perhaps need not be elaborate (as noted above, others within the firm have a conduct duty to report serious misconduct). Clarity on who within the firm is responsible for reporting matters to the SRA should the need arise may suffice for short absences, assuming that the broader compliance arrangements can continue without the compliance officer for that period.

For longer absences (in excess of a standard period of annual leave for example) the firm should plan ahead wherever possible it seems. There is a process for temporary emergency approval of a compliance officer which can permit the firm to remain compliant with the rules while a compliance officer is replaced but a failure to act promptly could prevent the firm from taking advantage of these provisions. The provisions could be extremely helpful though where an individual suddenly loses his or her entitlement to practise, leaves the firm or withdraws consent to continue in the role. If a firm finds itself without a compliance officer at any stage then it must immediately (and certainly within seven days):

- inform the SRA of this fact;
- designate another manager or employee as the new or temporary compliance officer; and
- make an application to the SRA for temporary approval of the new or temporary compliance officer (an application for SRA approval of a permanent replacement will need to be made within as little as 28 days from the date of temporary approval being granted).

The relevant provisions are set out in rule 18 of the SRA Authorisation Rules and should be considered.

What next?

Hopefully you now have a good understanding of the SRA's key COLP and COFA requirements.

We have some excellent SRA compliance checklists available on our website free of charge for those who are interested in assessing how their current systems meet the required standards. By signing up to one of our great value training packages you'll

³⁷ See guidance note (xi) to rule 8 of the SRA Authorisation Rules.

www.thecomplianceoffice.co.uk

get access to a full SRA Handbook checklist, template staff and risk management manuals and policies as well as our all staff training packages which include video tutorials, case studies and workshop packs.

If you have further specific queries then the Law Society has a practice advice helpline (www.lawsociety.org.uk) and the SRA has a professional ethics helpline (www.sra.org.uk). These bodies should be able to assist you with your queries free of charge. All of the regulatory requirements mentioned in this guide are also available through the SRA website. For more in-depth assistance or if you don't feel comfortable going to the SRA, we offer a range of consultancy and support services.

If you have any feedback on this guide then we would welcome contact via our [website](#).