

■ COLP and COFA approvals: what should law firms learn from the process?

Peter Scott

Compliance officers should now all be in place, and most are. But you would be mistaken in thinking that approval of individuals in their posts is automatic

The Solicitors Regulation Authority (SRA) Update issued on 12 December 2012 brought into sharp focus the approvals process for compliance officers for legal practice (COLPs) and compliance officers for finance and administration (COFAs) (www.sra.org.uk/sra/news/sra-update/issue-28-colp-cofa.page). The SRA in that Update stated that there would be a number of firms who would not have a COLP or COFA in place on 1 January 2013, and would therefore be in breach of their licensing conditions or practice regulations. The SRA finished the Update by saying that it 'will also be taking proportionate enforcement action against those who failed, without good reason, to meet the deadlines set out in the nomination process, or who failed to disclose information when they were required to do so'.

It will be interesting to see how the SRA defines 'good reason' and how it decides whether a firm has failed to meet the deadlines 'without good reason'. It will also be of interest to see how many firms were left without a COLP or COFA on 1 January 2013 and the nature and scale of enforcement action which may be taken.

This state of affairs is in sharp contrast to the assumption by many in the legal profession that once nominated as their firm's COLP or COFA, that person would automatically be approved. This was never a view the writer held, given the words of Samantha Barrass, executive director of the SRA, in a speech she gave in December 2011:

'We will expect ... the COLP ... to be completely on top of risk and compliance in your firm. A titular COLP will not be acceptable.'

This strong message to the profession regarding compliance officer roles has been further emphasised by the SRA Update of 12 December 2012, which included the statement that:

'Approved role-holders will act as "guardians" for managing risks within their individual businesses.'

This begs the question, guardians for whom? Are COLPs and COFAs expected to be guardians for the SRA, for their firms or for both?

A clear indication of the SRA's approach was set out in the guide to completing a firm's COLP and COFA nominations:

'Nominees ... will be asked to complete a declaration confirming that they have discussed with the firm any concerns or issues they have regarding their suitability as the firm's compliance officer, and they are satisfied they will be able to

Compliance officers

fully discharge their responsibilities as set out in rule 8.5(c) and 8.5(e) of the SRA Authorisation Rules.'

The SRA stated that its objectives for the nomination process included:

'to manage the risk that individuals appointed are not competent or ethical; to maximise the extent to which senior managers in firms and their nominee(s) actively engage in the importance of the exercise and think through their obligations under the regime; and to maximise the extent to which [the SRA's] checking of firms' judgment on this is confined to higher risk firms, and to minimise the extent to which [the SRA] spends time second guessing decisions by firms that are capable of exercising good judgment.'

From this it was clearly evident that the SRA would look hard at whether a firm had nominated the appropriate persons as the COLP and COFA, to ensure that they would be capable of effectively carrying out their roles. To do this a firm must ask, for example:

- whether its nominated COLP and COFA have sufficient time to devote to the roles; and
- whether the firm will provide the COLP and COFA with sufficient resources to enable them to effectively carry out the roles.

The resource problem

How to provide (and how to afford) the resources required to enable a COLP and a COFA to satisfactorily fulfil their roles is a key issue for the majority of firms. Nominated COLPs have, for example, been asked by the SRA, as part of the approvals process, to confirm they were satisfied that, given they also have fee-earning roles, they would have sufficient time and resources to allocate to the role, as well as being asked whether their fee-earning roles would reduce or whether they would be assisted by another individual with respect to compliance.

Are COLPs and COFAs expected to be guardians for the SRA, for their firms or for both?

Firms should, notwithstanding that their COLP and COFA may now have been approved, consider what each will need to do to carry out their role in a way which will protect the firm, and, in particular, to assess:

- How much time each will need to devote to the role?

- Will each role in the firm require the input of more than one person, meaning that a team will need to be put together around the COLP and COFA? If so, what should that team look like? For example, should the COLP and COFA each have a 'deputy' to ensure continuity of performance of responsibilities in the event of absence? Teams provide support and enable tasks to be delegated.
- If a COLP or COFA does not have sufficient expertise, will the firm need and be prepared to buy in professional risk and compliance expertise on either an inhouse or a consultancy basis? Expertise will be required, for example, in relation to a wide range of risk management and compliance requirements including anti-money laundering, the Data Protection Act, the Bribery Act, equality and diversity, financial management, and risk assessment. Are firms' COLPs and COFAs on top of all these requirements as well as being on top of all other aspects of risk and compliance which require to be managed?
- Does the firm have a budget to enable the COLP and the COFA to carry out their roles properly?

Firms should carry out a cost-benefit analysis to establish the *most resource-effective method* to enable their COLP and their COFA to perform their roles effectively and to protect the firm.

This will need to be an ongoing process for a firm so that it will at all times have appropriate and well-resourced people carrying out these roles in a way that will protect the firm in relation to its regulatory obligations and the risks to the practice. For these reasons, it will be sensible for a firm to include, as part of its appraisal processes, consideration of the adequacy of performance of their roles by the COLP and COFA with a view to improving their future performance and demonstrating to the SRA the effectiveness of the firm's systems and controls to ensure compliance.

These are not roles which can be satisfactorily performed in odd moments between clients' work or during evenings and weekends, and the initial nomination and approval process should by now have persuaded all law firms that their compliance officers' roles really do need to be taken very seriously as a fundamental part of managing risk and compliance. In particular, the roles must be seen as part of the 'day job' by those who have assumed the unquestionably onerous responsibilities of COLP and COFA, and, of necessity, their firms must provide them with the means to satisfactorily fulfil those responsibilities.

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