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Briefing Note December 2012

Just 16 working days to go – and counting!

Ten urgent things to plan before your COLP's and COFA's responsibilities go 'live' on 1 January 2013

In the run – up to the nomination and approval of COLPs and COFAs, the focus has been very much on **WHAT** the roles will involve. For example, up to now much of the commentary from the SRA and commentators has focused on the duties of COLPs and COFAs and the need to put in place 'compliance plans' and what such plans should contain.

That however is only one aspect of the task and only the beginning of the story for those who are prepared to undertake these difficult and onerous roles within their firms. The more difficult phase is now beginning – **HOW** in practice are COLPs and COFAs going to prepare for carrying out their roles on a daily basis in a way which both protects them and their firms?

Putting in place policies and procedures is necessary but those policies and procedures will be useless unless they are 'lived' on a daily basis by everyone in a law firm. That frequently used term in the Code of Conduct – '*systems and controls*' is referring to *effective* systems and controls which when implemented should ensure that all the mandatory Principles and outcomes in the SRA Handbook are achieved on a daily basis. That is the nature and requirement of outcomes focused regulation.

The challenge for COLPs and COFAs is going to be how they will be able to not only put in place such systems and controls but how they will be able to ensure that their systems and controls are in practice managed effectively to ensure compliance. That is likely to be a task which will not be achieved overnight but will take much hard work and application over a period of time.

If law firms and their COLPs and COFAs have not already done so, then they need to begin planning now the steps they must take to ensure they will be able, on an on - going basis, to satisfactorily fulfil their responsibilities. A project to be successful (and compliance in a law firm needs to be regarded as a priority project), must be well managed and that means it must be well planned from the outset. Standing back from the challenges and taking time to plan and prioritise steps to be taken is likely to bear most fruit. Measured and planned input will be required if output, in the form of effective compliance, is to be achieved on a consistent and long term basis. A roadmap needs to be drawn now otherwise COLPs and COFAs may well lose their way. It is the drawing of this roadmap which is the focus this Briefing Note.

1 Consider whether you have the 'right' person for the job

The SRA is currently conducting its 'approvals' process for COLPs and COFAs. It will be interesting to see how many nominated COLPs and COFAs are not approved and the reasons given for why approval is not given.

Make sure that you have chosen the 'right' persons to be the COLP and COFA and that they really understand what they will need to do in practice on a daily basis to ensure they are able to effectively and satisfactorily carry out their roles. If not, then your efforts to be compliant are unlikely to be successful and you will be at risk.

The SRA have said that

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

Bearing in mind those words from the SRA (and they will undoubtedly say the same about the COFA):

- Have you considered **whether** your COLP and COFA will really be able to satisfactorily fulfil their roles in order to protect your firm?
- Have you chosen the most appropriate person, in terms of knowledge, experience and ability, to carry out each of those roles?
- Do they have for example, an in - depth working knowledge of the SRA Handbook?
- Does the COFA really have a sufficient working knowledge of the SRA Accounts Rules?
- And, **how** will they from the outset be able to ensure they can meet their responsibilities?
- Will your COLP and COFA have sufficient time to devote to the role?

Your COLP and COFA will need a plan to ensure that they will be 'on top of' their jobs as COLP and COFA. I use the word 'jobs' because these roles need to be seen as part of the 'day job' of every person who undertakes such a role – these roles are not something to be performed in the odd spare minute during the working day between client matters.

2 Provide the COLP and COFA with sufficient resource

Assess whether the COLP and COFA will be provided with sufficient resource to enable them to effectively carry out their roles.

Start by looking at what they will each need to do to carry out their roles in a way which will protect your firm, and assess for example:

- How much time each will need to devote to the role?
- Will each role in your firm require the input of more than one person, meaning that a team will need to put together around the COLP and COFA?
- If so, what should your team look like? Teams provide support and enable tasks to be delegated and there is much to be said for the notion that

Together
Each
Achieves
More

- If your COLP or COFA does not have sufficient expertise, will you need and be prepared to buy-in professional risk and compliance expertise on either an in- house or on 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, Data Protection Act, Bribery Act, Equality and Diversity, financial management and risk assessment. Are your COLP and COFA ‘on top of’ all those requirements?
- Does your firm have a budget to enable your COLP and COFA to carry out their roles?

Carry out a cost / benefit analysis to establish the *most resource effective method* for your firm to enable the COLP and COFA to effectively perform their roles and to protect the firm.

3 Ensure your COLP and COFA have full access to information

Managing ‘knowledge’ of risk is a necessary part of managing risk. Will your COLP and COFA be provided with access to all information required to enable them to fully discharge their responsibilities?

Or will there be any ‘no go’ areas, particularly if a COLP or COFA is not an equity partner? Will full access to each partner’s / each group’s / each office’s files be provided in order to carry out regular file reviews, or will some be ‘off limits’?

Unless access to required information is made fully available, then the COLP and COFA will not be able to identify and assess risks to your firm and, as a consequence will not be able to satisfactorily carry out their roles.

4 Identify your risks as a matter of urgency

Principle 8 from the SRA Handbook states that:

*'You must run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and **risk management** principles'*

If a firm cannot identify and measure its risks, then it will not be able to manage them

Your COLP and COFA have taken on the responsibility to manage risk in your firm. Do they know all the risks to which your firm is subject?

For example, here are some risks which all law firms need to manage:



At the heart of successfully managing risk is having the ability to manage the knowledge of those risks.

Where does the knowledge of your risks reside in your firm?

Is that knowledge accessible to all who need it?

Here are some thoughts on how to go about identifying risks in your firm:

- Carry out regular **file reviews**

Random file reviews in each part of your firm will identify risk areas. For example, file reviews will show whether your procedures are being adhered to in relation to –

- Client / matter inception
- Client and matter risk assessment
- Anti Money Laundering
- Conflict checking
- Engagement letters
- Accounts Rules breaches

- Use '**brainstorming**'

Carry out brainstorming sessions in each group in your firm to identify every compliance risk area. For example, test all the Outcomes in the Code of Conduct to establish

- Whether each outcome is being fully achieved
- Are there gaps in your achieving outcomes?
- What will be required to fully achieve all outcomes?
- How should we prioritise our efforts?

- Analyse your **claims** register

What does your claims record tell you about how well you are training and supervising your lawyers?

Do claims indicate you are not sufficiently assessing client and matter risk?

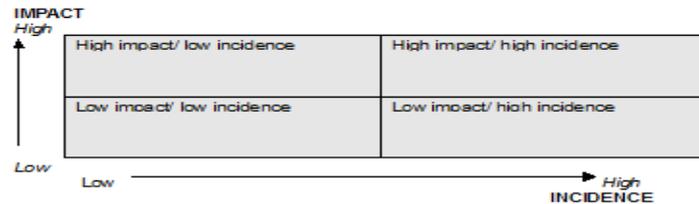
- Learn from past **complaints**

What does your complaints register tell you about how well you manage client care?

Do complaints indicate you are not sufficiently managing your communications with your clients e.g. in relation to costs information?

Having identified your firm's risks, your COLP and COFA should then assess those risks and prioritised the steps they will take to manage them. The 'risk map' below can be a helpful way to do this. Which risk areas in your firm will need to be prioritised?

Compliance Risk Mapping



5 Review your existing procedures and controls in respect of the prioritised risk areas you have identified

Are your current procedures in your prioritised risk areas adequate or do they need upgrading to ensure you are compliant?

Typical 'higher risk' compliance areas where procedures may need to be reviewed are likely to include:

- Matter inception
- Risk assessment
- Anti - Money Laundering
- Conflict checking
- Engagement letters
- Costs information
- Complaints avoidance and handling
- Equality and diversity
- Supervision and training
- Confidentiality and data protection
- Accounts rules

6 Plan how your COLP and COFA will effectively *monitor and manage compliance* on an on – going basis

Not only is your firm required to already have in place appropriate systems and controls to achieve and comply with all Principles, rules and outcomes and other requirements of the Handbook (Outcome O(7.2) of the SRA Code of Conduct) but importantly (and this is the more difficult part), Outcome O(7.3) of the SRA Code of Conduct requires firms “to identify, **monitor and manage risks** to the achievement of all outcomes, rules, Principles and other requirements in the Handbook and take steps to address issues identified”.

Have your COLP and COFA planned how they will monitor what is actually happening in your firm to enable them to know whether on an on – going basis your firm will at all times be compliant?

Here are a few suggested steps which firms may consider taking:

- Put in place a system of **positive confirmation of compliance** whereby each partner and other fee earners are required on a regular basis to confirm that each has followed certain specific procedures (for example, those procedures which a firm considers to be the most important to be followed in order to protect the firm) and if anyone cannot 'tick the box' as required, then that person is required to explain why he or she cannot do so. This is likely to generate the reporting of non- compliance so that your COLP and COFA can then consider how to deal with such non – compliance.
- If your firm does not already do so, implement a system of regular **file reviews** which should ideally be carried out by someone not from the same group in the firm. Again, regular file reviews will identify for your COLP and COFA the areas of non-compliance so that steps can be taken to try to ensure the same problems do not occur again.
- Build a **'no blame' culture** within your firm in order to encourage the people in your firm to disclose non – compliance if it occurs.
- Consider how you can best use your **IT systems** to record compliance with your procedures so that you are able to track exceptions and then take steps to make your procedures and controls more effective.

Adequate resourcing of risk and compliance management was earlier discussed and your COLP and COFA should in particular look closely at the most resource effective methods for them to regularly monitor whether and the extent to which your procedures are being followed.

7 Train your people to build their awareness of risk

It is not only the COLP and COFA who need to understand what is required of them by the SRA. Under entity regulation, everyone in a law firm is regulated. Have all your people received training on OFR and your procedures, and what they need to do to ensure that they and the firm are compliant?

One of the most effective ways a COLP and COFA can begin to ensure compliance is to run training programmes within their firm in respect of risk and compliance procedures. If the people in your firm (that is all people – fee earners and support staff) are aware of risks to your firm then they are more likely to be able to recognise a problem if it occurs and to then avoid the problem and / or report the problem to the appropriate person.

Appropriate training is of course in any event a good way to *demonstrate* that your firm is taking the necessary steps to ensure compliance. However, more than that, implementation of a programme of training can be very effective to make everyone in your firm aware of

- The risks to the firm and to each individual in the firm;
- The procedures the firm has put in place to manage those risks; and
- Why those procedures must be followed.

In addition, specific training can then be provided to individuals to help them to carry out certain procedures more effectively in order to protect your firm, for example in relation to conflict searching and anti – money laundering procedures.

8 Ensure your firm has secured internal buy-in for your COLP and COFA

The roles of the COLP and COFA will only be capable of being effectively carried out if all partners or other owners of a firm accept that they must be **'accountable'**

I use the following approach to accountability, which is taken from David Maister's "Predictive package"

'We have no room for those who put their own personal agenda ahead of the interests of the clients or the office'

Everyone in a firm must be prepared to follow procedures for 'best practice' if a firm is not to be 'at risk' from non-compliance. If a firm has anyone who says

"Compliance - that's a great idea ... for the rest of you!"

then such behavioural issues will need to be dealt with as a priority, otherwise your firm will be at risk.

How can the COLP or COFA secure accountability?

One way is to try to persuade partners that they should be compliant for this reason -

'The pursuit of excellence, with the aim of doing things better for the clients'

which is how the Director of Risk of a 'top ten' UK law firm explained why that firm manages its risks and compliance. However laudable that approach may be, currently in many firms it is unlikely to *'win hearts and minds'* of everyone.

Instead, it is likely that, as in many firms, a **'zero tolerance'** approach will need to be adopted, whereby there can be no exceptions to following procedures and that partners are told *"just do it"*. Otherwise everyone in your firm can be at risk.

Training as mentioned above can help to persuade those who do not see the need for risk management and compliance in your firm that procedures must be followed, particularly if training is combined with the implementation of a system requiring positive confirmation of compliance by all partners and fee earners and regular file reviews.

9 Review your firm's governance arrangements

If your firm has not already done so then it should urgently review its governance

arrangements along the following lines. For example:

- All partners to agree to comply with all Principles, outcomes and rules and other requirements of the Handbook and to fully support the COLP and COFA in the discharge of their responsibilities – with sanctions if they do not;
- Full access to be given to the COLP and COFA to all the firm's information necessary to enable the COLP and COFA to perform their roles;
- Indemnities to be provided to the COLP and COFA in relation to carrying out their proper responsibilities if this results in their incurring penalties, costs and expenses
- The COLP and COFA should have a right to take independent advice at a firm's expense for the resolution of disputes
- A 'whistle-blowing' policy should be incorporated into governance arrangements (this is mentioned as an Indicative behaviour in chapter 10 of the Code of Conduct)
- The firm should pay premiums on appropriate insurance policies to cover the liabilities of the COLP and COFA arising out of the proper discharge of their responsibilities

10 Review your firm's performance appraisal system

It will be vital to the success of your firm's compliance and risk management programme that the COLP and COFA perform their roles in an effective manner and to the required standards. They will need to regard the roles as part of their 'day jobs' and it should now be agreed with them how, before they take up their appointments, they are going to carry out their roles and the standards they are to meet. Performance by them in their roles as COLP and COFA should then form part of their appraisals.

In the same way, each individual in your firm should likewise be appraised on how well they have performed in relation to following compliance procedures. If appropriate training has been provided throughout your firm on procedures and how to follow them, then no one should have any excuses for not being compliant.

Indeed, some firms are beginning to use the mandatory requirement to achieve compliance under the SRA Handbook as a means to drive out 'bad behaviour' on the part of some partners when all other techniques have failed!

Good luck with your compliance in 2013.