

Update

COLPability? – key issues for Compliance Officers for Legal Practice

The new roles of Compliance Officer for Legal Practice (COLP) and Compliance Officer for Finance and Administration (COFA) have been the subject of much debate, and in the case of the COLP some significant concern, in the legal field.

In particular, worries have been voiced that the COLP may face potential personal liabilities, and could be asked to perform a role which may be at odds with his or her own firm's interests.

Nominations for the COLP role were to be provided to the SRA by 31 March 2012 with the role commencing on 31 October 2012. However, the SRA has now extended the deadline and it is not currently possible to submit your nomination even if you are ahead of the pack. The SRA has indicated that the long-awaited nomination form will go live in the next six weeks. This article focuses on the COLP role, what we consider those stepping into the position should be aware of, and what we think can be done to mitigate any risk.

COLP's duties

A COLP's obligations (contained in the SRA Authorisation Rules 2011) include:

- Ensuring compliance with the terms and conditions of the authorised body's authorisation (except for obligations under the SRA Accounts Rules which would fall to the COFA)

- Ensuring compliance with the statutory obligations of the firm, its managers, employees or interest holders in relation to the firm carrying on its authorised activities, and

- Recording any failure to comply, making the records available to the SRA on request and as soon as reasonably practicable reporting to the SRA material failures. Non-material failures should be reported to the SRA in the annual information report. A failure may be material on its own or as part of a pattern of non-compliance

Difficult issues that arise for the COLP

There are a number of difficulties and questions that the duties of the COLP will raise. The guidance contained in the Authorisation Rules makes clear that the COLP role does not absolve firms and their managers from responsibility for compliance, and in addition the SRA has been at pains to make clear that the COLP will not be targeted with the blame for firm's failings. Nonetheless exactly what the SRA will expect of the COLP is an

unknown quantity, and the fact that the SRA may sanction the firm itself for compliance failures as well as the COLP may provide cold comfort to the individual COLP. Some of the key issues are:

- The COLP's role may involve taking steps unfavourable to the firm. For example, if a breach of the rules is discovered that the firm is able to quickly put right without any loss to, or impact on, clients, the COLP may nonetheless take the view he or she is obligated to report this immediately to the SRA, leading to potential adverse consequences¹. Similarly, partners or members of the firm may feel aggrieved if the COLP takes the decision to make a report which ultimately proves unnecessary
- It will be for the COLP to take a view as to what constitutes a material breach that must be reported to the SRA right away, and there is little guidance. The guidance to the Authorisation Rules simply states that the COLP must take account of various factors such as the risk of detriment to clients, risk of any loss of confidence in the firm or provision of legal services, scale of the issue and the overall impact on the firm, its clients and third parties
- Similarly, the COLP is required to take "reasonable steps" to ensure compliance, and what will be considered reasonable is unclear
- The COLP's obligation to ensure compliance with statutory obligations is drafted widely. The COLP is also responsible for ensuring compliance with the new Code of Conduct, which is itself new and the SRA's approach to enforcement of it untested

It can be readily appreciated that there is the potential for a COLP to take a view on matters which his or her partners / members believe is "over-cautious", and exposes the firm to the unwelcome attention of its regulator. Inevitably COLPs will need to tread a careful line between discharging their obligations to the SRA and looking after the proper interests of their firm.

What should firms and the potential COLP do now?

- Consider who the appropriate individual within the firm to hold the role of COLP should be². It will need to be someone with the necessary time to devote to the role and we suggest someone who is rigorous, pragmatic and robust enough to deal with challenges from the firm. The SRA have indicated that they would prefer if it was not the managing partner (although this remains up to individual firms). We would suggest that it would not be appropriate for the individual dealing with the firm's professional indemnity insurance arrangements and claims to hold the role as they will no doubt have spent

time cultivating an atmosphere in which individuals feel comfortable approaching them with issues which might need to be notified promptly to insurers or lead to claims

- The individual who accepts the role might wish to enter into a written agreement with the firm setting out a number of key matters which could include:
 - The duties that the individual is agreeing to undertake
 - The right of the individual to an indemnity from the firm for any personal liability that might be incurred (although it is unlikely that all potential liability that could arise would be covered)
 - The right of the COLP to take legal advice at the firm's expense in relation to his or her duties, and who the "client" will be in relation to such advice
 - An obligation on the firm to allow the COLP sufficient time to perform the role and to provide necessary resources (although the latter is enshrined in the Rules)
 - Arrangements for planned and unplanned absence of the COLP, and provisions in relation to the removal of the COLP from the role (whether at the instigation of the firm, or where the COLP wants to resign the role)
- The firm may wish to consider taking out management liability insurance that would specifically cover the role of COLP
- The potential COLP should be planning what steps to take now that will allow him or her to perform the role from October. Points of action for a firm and its potential COLP before October include:
 - Developing or updating a compliance plan³
 - Setting up systems to allow the COLP to have access to all necessary business information and client files
 - Arranging systems that allow the COLP to ensure compliance: such as a means of file reviews being carried out; ensuring regulatory requirements are met such as in relation to professional indemnity; receiving reports from those responsible for areas such as data protection and money laundering; and ensuring the arrangements to keep the firm's risk and compliance policies up to date are appropriate and staff receive appropriate training on the areas
 - Establishing a means of recording failures to comply, which should include a means by which the COLP can identify whether there are any patterns which mean that breaches may be considered material and so should be reported straight away

¹ The guidance in the Authorisation Rules makes clear that remedying breaches does not obviate the need for the COLP to report where appropriate.

² The COLP must be a lawyer and must be a manager or employee of a firm who is of sufficient seniority to fulfil the role and whose designation is approved by the SRA (see Authorisation Rule 8.5(b)). The SRA released advice on recruiting COLPs and COFAs on 14 March 2012 including advance notice of some of the key information that will be required available here: <http://www.sra.org.uk/sra/news/press/colps-cofas-nominations-advice.page>

³ See Guidance note (iii) to Authorisation Rule 8

- Establishing a reporting system so that partners and employees report breaches to the COLP, as well as providing necessary training to staff on the new regime including for example on what should be reported to the COLP and the importance of reporting
- Deciding on any tasks that should be delegated with clear reporting lines back to the COLP

Summary

Although the positives of the COLP role can be appreciated, in for example providing a closer liaison point for the SRA with the firm, the role raises a number of important issues that those undertaking it need to consider carefully. Preparation is required sooner rather than later in order to be ready for the October deadline.

Clyde & Co LLP are experienced in dealing with both regulatory and employment/partnership related issues for law firms. We are able to advise and assist on the issues arising from the COLP role, and also in relation to the drafting of agreements between a firm and its COLP. If this would be of interest to you, please do not hesitate to contact Richard Harrison or Chris Holme in the first instance.

Further information

If you would like further information on any issue raised in this update please contact:

Richard Harrison

E: richard.harrison@clydeco.com

Chris Holme

E: chris.holme@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000

F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.
© Clyde & Co LLP 2012