

PETER SCOTT CONSULTING

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Can you now demonstrate you are fully compliant?

Do you know what is required of you, as a firm and as a COLP and COFA, to fully discharge your regulatory responsibilities under OFR?

This is what Samantha Barras, Executive Director of the SRA said in December 2011

'What has changed is the explicit requirement for firms actively to engage with Principles and Outcomes, and avoid a tick-box approach. That is the role of the COLP in particular – to be responsible for taking reasonable steps to put in place systems and controls for good compliance in the firm. To be the focal point in the firm for thoughtful engagement with our regulatory regime'

And she continued –

'For those firms in the Relationship Management approach to supervision, we will expect to meet regularly with the COLP and for that person to be completely on top of risk and compliance in your firm ... A titular COLP will not be acceptable.'

Bearing in mind those words

- Have you considered **whether** your COLP and COFA will be able to satisfactorily fulfil their roles?
- And if so, **how** will they from the outset be able to ensure they can meet their responsibilities?

In particular, do you now have **systems and controls for good compliance** as referred to in that speech?

Outcome O(7.2) in the Code of Conduct requires firms to have appropriate systems and controls in place **to achieve and comply with** all Principles, rules and outcomes and other requirements of the Handbook; and

Outcome O(7.3) in the 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 if applicable and take steps to address issues identified.

What will COLPs and COFAs now need to do to ensure that they will be able to take all reasonable steps to enable their firms to achieve, inter alia, these outcomes? Here are some suggested steps which firms may consider taking from the outset.

1 Secure internal buy-in as a condition of taking on either of the roles

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!"

or

"You can't manage me.... I'm a big biller"

then such behavioural issues will need to be dealt with as a priority otherwise the 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 explains 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 currently, a '**zero tolerance**' approach will need to be adopted.

Firms should urgently review their governance arrangements and require from their partners assurances along the following lines, as a condition precedent to the COLP

and COFA accepting their roles. For example:

- All partners 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

2 Assess whether the COLP and COFA will be provided with sufficient

- independence of role
- access to information regarding risk, and
- resources

to enable them to effectively carry out their roles.

Independence of role

How independent will their roles be as COLP and COFA?

The Guidance Notes to Rule 15.1 Authorisation Rules state that

'As well as evidence about the candidate, the Suitability Test takes into account evidence about the honesty and integrity of a person that the candidate is related to, affiliated with or acts together with, whom the SRA has reason to believe that person may have an influence over the way in which the candidate will exercise their role.'

Independence of role is likely to be of particular importance for example, in relation to the reporting obligations of the COLP and COFA. This may be difficult or impossible in some

circumstances if the COLP or COFA is an employee or non-equity partner. Even if the COLP or COFA is an equity partner, it may be difficult for that person to achieve such independence of role. Likewise it may be difficult if a managing partner takes on either role, because the responsibility is to drive performance of the firm, which may conflict with the COLP or COFA role. Having said that, in many firms the managing partner is likely to be the only person capable of ensuring compliance procedures are followed.

Access to information

Will the COLP and COFA be provided with access to full information necessary to enable them to fully discharge their responsibilities?

In particular, will a COLP and COFA be provided with access to all information likely to impact on the management of compliance and other risks? For example:

- **What** are the firm's risks?
- **Where** does the knowledge of those risks reside?
- Will the COLP and COFA be able to **access** the knowledge relating to those risks?
- Does the firm have **systems** to monitor, review and upgrade that knowledge?

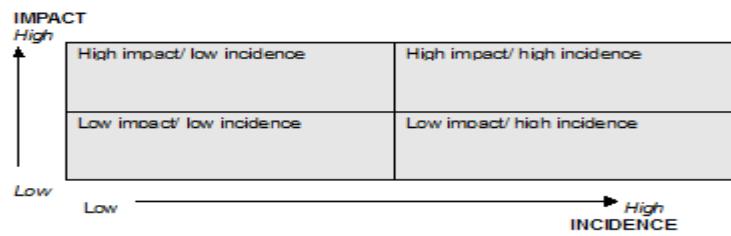
If a firm cannot measure its risks, then it will not be able to manage them

Do you know all the risks to which your firm is subject in relation to its operations? For example:



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

Compliance Risk Mapping



Establish the resources the COLP and COFA will need to effectively carry out their roles

For example

- Do they have a budget?
- Will they use internal or external resources?
- Will part time partners or professionals be involved as part of their teams?
- Will paper records be kept or will an IT system be used for record keeping?
- If IT is to be used, will it be a bespoke or an 'off the peg' system?

In relation to establishing the resources a COLP and COFA will need, a firm should carry out a cost / benefit analysis to establish **the most resource effective** method to manage the responsibilities of the COLP and COFA to achieve compliance.

Having identified risks and ascertained the resources required, a firm should then be in a position to put in place a **prioritised compliance plan**, to cover the firm's risks. One approach which may be a useful way to achieve this is to consider each of the Principles in

the SRA Handbook and each of the outcomes in the Code of Conduct and ask for example, the following questions:

- Are we achieving this Principle / outcome?
- If not, then why not and where are the gaps?
- What will we need to do to fully achieve this Principle / outcome?
- How will we be able to demonstrate our achievement of each Principle / outcome?

The final question above is important because under OFR, it is not sufficient just to be compliant. Firms must be able to **demonstrate** achievement of the Principles and outcomes. That is the real challenge for law firms and their COLPs and COFAs.

Other areas on which COLPs and COFAs should focus

Here are a few suggestions:

- Compliance should be management driven with top level buy-in. Management must not only be seen to drive compliance but should also live it.
- A mind-set change will be required – managing compliance risk needs to be seen as everyone's job.
- Zero tolerance is likely to be required, with no exceptions – just do it.
- Training and education programmes can help to build awareness and manage change
- A 'no blame' culture should be built within a firm to encourage disclosure when problems occur