Susanna Heley uncovers what the SRA handbook has to say about the new compliance officers

Role play

There has been much discussion about the draft SRA handbook published on 6 April 2011. Most have their own areas of particular interest; for example, the SRA has proclaimed that the new handbook will provide for more flexible regulation and require those seeking to set up alternative business structures to meet stringent criteria in order to gain approval. Compliance advisers have been looking for hidden nasties – those seemingly innocuous provisions which have the potential to jump out and bite you when you least expect it. I fall into the latter category.

One aspect of the handbook which is completely new and therefore inherently problematic is the requirement for every firm to appoint a COLP (compliance officer for legal practice) and a COFA (compliance officer for finance and administration).

These new acronyms are children of the Legal Services Act 2007. The Act requires that all ABSs have a HOLP and a HOFA (head of). In the context of ABS, this makes perfect sense. There is no requirement that the provision of legal services be the main, or even a substantial, element of the work of an ABS. So it is necessary for an individual to take responsibility for compliance with respect to legal services. The SRA thought this was a good idea and extended the concept to existing firms as well.

Suitability

The appointment of COLPs and COFAs is subject to approval by the SRA. They must be registered lawyers who have sufficient seniority to perform their role, and are subject to the suitability test (the same test which will be used for admission as a solicitor and approval of non-lawyer managers and owners). One potential hidden nasty in the suitability test is the ability of the SRA to take into account the honesty and integrity of third parties associated with the candidate where the SRA has reason to believe that the third party may influence the conduct of the candidate.

The suitability test essentially contains a list of matters which will or may prevent a candidate from being approved. The SRA may, however, take into account "any other relevant information". COLPs and COFAs will be particularly susceptible to a review of their past disciplinary records.

I would not advise seeking approval for a COFA with a poor history of compliance with the Accounts Rules, or with a record of bad personal financial management. Some firms may have little choice. Small firms and sole practitioners who have been pulled up on issues in the past may lack the wherewithal to appoint a COLP or COFA with a 'clean' record. In those circumstances, firms should take steps to demonstrate that past transgressions are behind them and compliance is now a priority.

The SRA must give timely warning to a firm if it proposes to refuse authorisation for a COLP or a COFA. Until the system beds in, we don't know how common such refusal might be and I suggest having a back-up plan or deputy COLP/COFA in place when seeking approval for the first time, particularly if there is anything, no matter how minor, which falls to be disclosed in the application.

Heavy burden

COLPs and COFAs have three key responsibilities: to take all reasonable steps to ensure compliance within their firm; to keep a record of non-compliances in their respective jurisdictions, to be made available to the SRA on request; and to report material non-compliance to the SRA as soon as reasonably practicable.

This is a sensible move away from the initial proposal that all non-compliances, however minor, should be reported to the SRA. The new rule places an uncomfortable responsibility on the COLP and the COFA. Although the SRA is keen to emphasise that the existence of the COLP and COFA roles does not diminish personal responsibility for compliance, these duties are directed at the COLP and the COFA. It is a heavy burden to bear.

The good news is that you can only be a COLP or a COFA while you consent. If you don't want to take the role or continue in the role, you don't have to. If a firm finds itself without a COLP or a COFA unexpectedly, it must apply within seven days to the SRA for temporary emergency recognition (TER) for a replacement. Here lurks a potentially disastrous hidden nasty. If you could reasonably have commenced your application for approval for a new COLP or COFA before you ended up without one, you cannot get TER. Which means the firm can't lawfully continue in practice until a replacement is approved by the SRA.

Another potential trap is the SRA's ability to impose conditions on the firm as the price for approval of the COLP or COFA. The ability arises at the time of approval or at any time thereafter.

COLP and COFA concerns

I have my reservations about COLPs and COFAs. Many big firms have long recognised the benefit of having a compliance department and I can see where the SRA is coming from. I struggle to see how the introduction of the COLP and COFA role will assist sole practitioners or even two to four-partner firms. Those firms which are complying at the moment will simply face additional red tape and positions of the partners will be formalised; those firms which are deliberately not complying will continue to flout the rules unless stopped and those firms which are inadvertently not complying won't magically be cured of their ignorance of the rules by appointing a COLP and a COFA.

What is more concerning – the protestations in the rules notwithstanding – is that people may consider that all of the responsibility for compliance lies with the COLP and the COFA and they may disregard their own duties.

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