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Dear Sirs

Re: Response of the CLLS Professional Rules and Regulation Committee to the SRA Consultation on Handbook Amendments relating to International Practice

Introduction

1 The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate memberships including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

2 The CLLS responds to a variety of consultations of importance to its members through its specialist committees. This response to your 14 December 2012 consultation paper on "Handbook Amendments Relating to International Practice" (the "Consultation Paper") has been prepared by the CLLS Professional Rules and Regulation Committee (see list of members attached).

Background

3 Very many of the CLLS membership have extensive overseas, international and/or cross-border or multi-jurisdictional practices providing legal services outside England and Wales and the manner in which the SRA proposes to regulate such practices is of great interest to them. Discussion between the CLLS and many of its members with the SRA, both in the lead-up to the introduction of Outcomes Focused Regulation and subsequently, including in response to the SRA's Green Paper on international regulation published in November 2011, have led to expectations that Handbook changes would be introduced which addressed acknowledged deficiencies in and

concerns with the current provisions relating to the regulation of international and overseas practice. To recap, broadly, we believe that these concerns can be grouped into the following categories:

(a) First, it is inappropriate for the same regulatory standards/outcomes/behaviours which apply to domestic practice to apply to the international practice of individual solicitors and authorised persons – we have always considered that a more proportionate risk-based approach is needed to justify the application of regulation by the SRA outside England and Wales. Of particular concern to CLLS members operating overseas has always been how to deal with inconsistencies between the SRA's requirements and the rules of applicable local regimes, perhaps most importantly for determining which conflicts rules apply to new business acceptance.

(b) Secondly, there are a number of inconsistencies and anomalies in the impact of the current rules on firms and individuals working for them within their differing organisational structures. These are often difficult to explain and can cause competitiveness concerns, when comparing the position of purely local firms operating in those markets outside England and Wales, or even when comparing different legal structures of the CLLS's members. The differing requirements which apply to branches and to "connected practices" of authorised persons and to individual solicitors practising overseas through such branches or authorised persons, as well as the regulatory status of non-member partners within an authorised person, have been particular concerns which we had hoped that the "group approach" outlined in the Green Paper would help to resolve.

(c) Thirdly, we currently have a difficult monitoring, reporting and supervision regime applicable to overseas practice which, in some cases, will duplicate or cause conflict with the reporting and supervision regimes of overseas regulators and, in other cases, will inappropriately require new and more onerous monitoring and reporting by compliance officers of matters which we believe the SRA is unlikely to be interested in considering. We had hoped that, following the review leading to the amendments proposed by the Consultation Paper, the jurisdictional scope of the duties of the compliance officers would be proportionately limited, bearing in mind the real practical obstacles which many firms' compliance officers will have.

(d) Fourthly, with respect to foreign practices and offices not *de facto* or *de jure* managed or controlled by a regulated entity, we have been concerned that the SRA could or would extend its regulatory reach into these offices and practices directly, through an expansive interpretation of "connected practices", or indirectly, through regulation of individual solicitors practising outside England and Wales.

4 The SRA's proposed changes to the Handbook set out in the Consultation Paper attempt to address many of these concerns but, in our view, did so with only limited success. In our view, the matrix of regulatory standards/outcomes/behaviours which the Consultation Paper is suggesting should apply to the overseas practice of authorised persons and individual solicitors seems to us to be too complex, has gaps and (overall) goes further than a proportionate risk-based approach would require. The rejection of the "group approach" proposed in the Green Paper, in our view, will perpetuate many inconsistencies and may lead to "regulatory arbitrage" in establishing legal structures. Moreover, many of the difficulties with the monitoring, reporting and supervision regime

will remain, even if in many cases it will be addressing a "cut-down" version of the Handbook applicable to part, but not all, of a firm's overseas practice.

5 A working group of members of the CLLS's Professional Rules and Regulation Committee together with other representatives of major international firms have been engaging with the SRA to discuss our response to their consultation on International Practice and seek to persuade them to take account of our concerns. Significant progress has been made in those discussions. As a result we understand the SRA are expecting to make revisions to their proposals which take account of our major concerns and which the CLLS's working group expect to be able to support. These will include a modified set of overseas principles (with helpful overseas-related notes to guide compliance with those principles), a new definition of "overseas practice" which ensures that there will be a form of group-wide regulation that is "blind" to firm structures for overseas branches, firms or entities that are *de facto* or *de jure* controlled by a regulated entity (with the possibility for "non-controlled" entities to opt in) and, most importantly, clarity that the overseas principles only require monitoring and reporting at a very high level of material issues (in terms of the seriousness or systemic nature of problems arising).

6 Our comments in response to the Consultation Paper are set out below in three parts. Part One addresses in more detail our concerns with the Consultation Paper in relation to the main issues referred to above. Part Two then comments on each paragraph of the Consultation Paper in more detail. Part Three then summarises progress we believe has been made in discussions with the SRA towards meeting our concerns which we support.

Part One: Principal Comments

What regulatory "standards" (whether they are expressed as Principles, Outcomes, Indicative Behaviours or otherwise) should apply to overseas and international practice?

7 The new Chapter 13 proposed in the Consultation Paper sets out the requirements to apply in the regulation of the provision of legal services by solicitors, firms and other SRA regulated persons outside England and Wales. In short, leaving aside "application" issues, i.e. questions about who these standards should be applied to, in performing what sorts of services, which we will separately address below, this proposes requirements for overseas practice based on compliance with the Principles in the SRA's Handbook (without requiring compliance with the outcomes set out in other chapters of the Code of Conduct, other than Chapter 10 (to the fullest extent possible without breaching local law or regulations)). Chapter 13 proposes three additional regulatory requirements as outcomes for overseas practice:

- O (13.3) as an override, to apply even where compliance with the Principles might breach local law or regulations, you must behave in a way which is "proper and appropriate" for a person authorised by the SRA to provide legal services;
- O (13.4) you have to ensure clients are aware of certain information (including who regulates the services provided and how confidentiality will be maintained); and

- O (13.5) you do not cause, contribute to or facilitate a failure to comply by persons practising in England and Wales.

8 The Consultation Paper also proposes the addition of a new outcome in Chapter 7 of the Code of Conduct requiring that you identify, monitor and manage risks to your compliance with the Handbook which may arise in connection with your overseas offices and "connected practices" (very broadly defined).

9 We are concerned that these proposals are over complex, unworkable in substantial respects and potentially intrusive of and conflicting with regulatory and ethical obligations applicable in foreign jurisdictions and, as a result, lead to some confusion on a number of issues from a supervision, reporting and compliance perspective (as illustrated by points below).

10 Our preference, to meet the concerns about protection of the "solicitor brand" in the context of overseas practice and to ensure that an appropriate minimum standard of conduct is applied, even in jurisdictions that have undeveloped regulation of legal services locally, would be simply to provide, by way of a new overarching general principle, applicable to overseas practice, requiring authorised persons and their "connected practices" (to the extent managed and controlled by an authorised person) to comply with local laws and regulations applicable to their business and to manage their business, provide services to their clients and behave in a way which does not cause any reputational damage to the profession of solicitors. That approach would avoid many of the issues about detailed application of the Principles to overseas practice, the SRA's supervision of non-solicitors whether practising within an authorised person or a "connected practice" and supervision of solicitors practising overseas outside an authorised person or their "connected practice".

11 One of our main concerns is that by applying the same Principles which apply domestically to overseas practice it will be an inevitable consequence that standards of conduct expected of individuals and authorised persons practising in England and Wales, as amplified by compliance with outcomes and indicative behaviours in the Code, will be imputed to overseas practice. On a practical level, for example, how do you determine what sort of conduct would breach Principle 4 (on "best interests") other than by reference to the outcomes and behaviours described in Chapters 3 and 4 of the Code?

12 The Principles are considered to be "high level" yet they give rise to all sorts of practical compliance issues (most of which are of most relevance when considering related outcomes affecting domestic practice) that are likely to cause concern relating to overseas practice. For example, is every confidential client email misdirected by accident to a third party a breach of Principle 4? Is every criminal offence committed by an employee (e.g. a driving offence in Paris?) a breach of Principle 6 or 7? Will the SRA's view of what is a "proper standard of service" for purposes of Principle 5 be the same for a solicitor practising in England and Wales as for, say, an authorised person's branch providing French legal advice in Paris? The lead-in to Chapter 13 expressly acknowledges that in many circumstances the outcomes set out in other chapters of the Code "will be indicative of the standard of behaviour expected". Is compliance with Principle 9 (encouraging equality of opportunity and respect for diversity) in businesses managed outside England and Wales where local cultural norms may be very different really a proper regulatory concern for the SRA?

13 In our view, an approach more proportionate to the perceived risks to the consumer/client on the conduct of overseas practice, when those consumers/ clients will already have protections arising under applicable law and local regulations, would be to focus not on the full scope of the Principles (and an equivalent standard of behaviour to what is expected by the Code of Conduct in domestic practice), against which breaches would need to be monitored and reported and the SRA would be expected to perform a supervision role, but on a new higher level reputation-based over-arching principle to regulate proper and appropriate behaviour overseas.

14 We appreciate, however, that the SRA's proposals set out in the Consultation Paper have been developed after consultation, considering responses to the Green Paper and otherwise (see paragraph 9 describing support for this approach, paragraph 14 for why the alternatives have been rejected) and that it may therefore be difficult, at this stage, to take an entirely different approach, hence we have engaged in discussions with the SRA as summarised in Part 3 to produce modifications to a broader Principles-based framework which we can support and in addition we have provided detailed comments on the amendments being proposed.

Dealing with anomalies and inconsistencies

15 We are concerned that the approach summarised in paragraph 12 (iii) of the Consultation Paper does not deal adequately with the issue of importance to international firms concerning anomalies and inconsistencies and may lead to some firms being driven to establish different legal structures to minimise regulatory impact on their businesses.

16 It is not clear what kind of information will be sought from overseas offices of an authorised person or from a connected practice, but in addition to the practical difficulties of maintaining compliance with reporting obligations in these situations (particularly acute for connected practices not controlled by an authorised person), there could well be issues arising under attorney-client privilege and client confidentiality obligations under the laws and professional rules applicable in other jurisdictions that might not, depending on the circumstances and types of specific information being sought, permit disclosure.

17 The approach marks a significant change from the proposals set out in the Green Paper relating to regulation of firms on a "group basis", irrespective of legal structures. In short, if we have understood the proposals correctly, it seems to be proposed in the Consultation Paper that the new Chapter 13 regime relating to overseas practice (in summary, requiring compliance with (i) the SRA's Principles, (ii) a "proper and appropriate behaviour" test, (iii) a client disclosure test and (iv) full Chapter 10 reporting requirements) will apply to the overseas branches of SRA regulated entities and individual E&W solicitors (in whatever entities or businesses they may be practising). But these requirements will not apply to legal entities that are not themselves SRA-regulated entities (even if they are controlled in practice or by legal structure) by such entities and trade under the same name or brand as the SRA-regulated entities.

18 The only requirement which will apply to those "connected practices" (as opposed to any individual solicitors practising through them) will be the new Chapter 7 requirements for the firm to manage risks to compliance across the whole business including very broadly defined "connected practices". However, since the substantive compliance standards applicable to those "connected practices", at least those who do not include E&W solicitors practising as such on their behalf, will not include the Chapter 13

requirements, as a drafting matter there would seem to be no standards applicable to such practices which the SRA is regulating and therefore no "risks of non-compliance" with the SRA's arrangements that are applicable to those entities of themselves. Moreover, the definition of "connected practices" appears overbroad by extending far beyond offices and practices that are managed or controlled by an authorised person, thereby giving rise to concerns regarding indirect regulation by the SRA over foreign offices and practices that are not nor should be subject to SRA regulation.

19 We are concerned that this approach will lead to some unfortunate (and illogical) inconsistencies within global law firms or those with multiple offices structured in a variety of ways and will result in divergence with management practice in many of those firms and potentially result in difficulties in the regulation of SRA-regulated entities. Take the real example of one of the CLLS members operating in Madrid through a separately constituted non-SRA regulated entity whose partners are non-members of its recognised body and, therefore, not "managers" for regulatory purposes, contrasted to the same firm's business in Paris which operates as a branch of its recognised body whose partners are members of its LLP and hence regulated by the SRA as "managers". Both offices are managed, from a risk and compliance perspective, in the same way and yet the proposed new regime would treat them quite differently.

20 There will also be inconsistency in the treatment of individual solicitors practising within a non-SRA regulated entity (such as, in this example, the firm's Madrid office) where an individual solicitor would have to comply with the Principles and other Chapter 13 requirements but the entity for whom he or she works and which provides services to clients would not. This will in practice mean that the work carried out by that entity involving the solicitor will need to be in compliance with the Principles and other Chapter 13 requirements (as well as local regulatory requirements) but that work that does not involve an E&W solicitor will not. This has the potential, among other things, to confuse even the most sophisticated clients on a matter handled solely by the firm's Madrid office. It will become even more confusing to clients on those matters, which are very common in global firms with international practices and client bases, which involve lawyers working from several offices together on the same matter. It may be irrelevant to the client and to the law firm whether the lawyer who provides some advice on the matter happens to be based, say, in the firm's office in Madrid, or London or Paris. Yet for different regulatory standards to apply to that advice (e.g. to determine which conflicts rules need to be observed before taking on the engagement or involving lawyers in particular offices) would not seem to make much sense.

21 The Consultation Paper explains that the reason for reversing the proposed "group basis" of regulation put forward in the Green Paper is a result of concerns expressed by firms operating within "Verein structures". We assume their concerns arise because within such network arrangements the SRA-regulated entity or its managers have very limited legal or practical control over other parts of the firm's international network. So, to require non-SRA regulated (non-controlled) entities and the foreign lawyers practising through them to comply with the SRA's standards for overseas practice may seem unreasonable and disproportionate to the risks being addressed.

22 In our view, the current proposals go too far the other way. We think that if the SRA believes it needs to apply its own (albeit reduced impact) Chapter 13 based standards to the practices of firms with overseas branches, even if there are no E&W solicitors involved within those practices, in order to protect the regulation of the solicitors brand internationally and ensure an appropriate minimum standard of behaviour in jurisdictions

where no substantive local regulation of legal services applies, then the same justification must surely apply to businesses which, whilst being legally structured as separate entities, are *de facto* or *de jure* managed and controlled by SRA regulated bodies and regarded by clients and others in their markets, as part of the same legal business, usually with a shared brand, as other entities regulated by the SRA. In sum, where a global firm is managed or controlled by an authorised person, the legal structure of that firm should not drive regulatory requirements, which ought to be neutral as to structure and avoid complexity, practical obstacles to compliance and undue inconsistencies with local professional privilege and ethical obligations.

23 Firms which operate with a shared brand across the world, even if they adopt network arrangements (such as those known as "Verein structures"), will typically impose on their network members, through contractual arrangements, important brand protections and controls. For those to include minimal regulatory compliance standards, at least for those businesses that are regarded, commercially, as being "UK-headquartered" or whose E&W solicitor partners comprise a significant proportion (to avoid disproportionate extra-territorial regulation of what are in substance overseas managed and regulated businesses) would seem to many of our members to be appropriate. Provided that the regulatory standards which are applied across those businesses are sensible and proportionate – see comments above – many of our members do not understand why those who operate through Verein style network arrangement structures, should have any difficulty agreeing to regulation on this sort of "group basis". But if they were excluded from the scope of Chapter 13, on the basis of lack of *de facto* or *de jure* control, and many of our members believe they should be, that would be preferable to the proposal in the Consultation Paper which is in our view too restrictive and serves only to perpetuate anomalies.

24 Our concerns about perpetuating anomalies and inconsistencies is not just because consistency and simplification is desirable per se and will make it easier for clients to understand the regime that applies to the firms they instruct. It is also because of fears about there being an uneven playing field which leads to some firms having competitive advantages over others, from a regulatory perspective, dependent on the legal structures which they may choose to establish (usually for other business, liability management, local regulatory or tax reasons).

25 This concern is illustrated, in particular, with respect to choice of law rules regarding conflicts of interest. Professional rules applicable to lawyers in a number of jurisdictions, such as in many states in the USA, permit clients to waive conflicts in some circumstances where waiver is not permitted under the Code. It would place firms operating in those jurisdictions in a potentially competitive disadvantage if they were unable to act when local rules would otherwise permit. Especially when dealing with sophisticated clients, the firm and client ought to be free to agree on a choice of law applicable in that jurisdiction.

26 Complications also could frequently arise for solicitors who are dual qualified or qualified in several jurisdictions but are not practising as solicitors in E&W. Consider, for example, a lawyer who is qualified as a solicitor in E&W and also is a member of the New York Bar. If she is located and practising in New York City and regularly practises New York law while maintaining an active practising certificate in E&W, it is not at all clear why English conflicts rules ought to apply to her New York engagements, as opposed to New York rules. Reasonable choice of law principles would point towards New York conflicts

rules applying in that situation or, at a minimum she ought to be free to agree with her clients to apply New York rules to the exclusion of other rules.

Onerous monitoring and reporting requirements

27 This concern is, of course, linked heavily to the other main issues discussed above, especially the first relating to appropriate and proportionate regulatory standards applying overseas. If the Chapter 13 requirements, and the additional management requirements proposed for Chapter 7, are limited to apply only to regulate offices and practices managed or controlled by an authorised person and are capable of being monitored at a high level and reports in respect of non-material breaches occurring in overseas practice will not be required, then the burdens of extending the applicability of the COLP regime to overseas practice should be manageable and acceptable.

28 Our concern, however, is that the current approach requiring compliance with the SRA's Principles and other Chapter 13 requirements, including the reporting obligations in Chapter 10, will require many international firms to introduce new management and governance arrangements in order to assure compliance. For some, there will be material additional costs incurred in doing so.

29 Moreover, the inconsistencies and anomalies in the applicability of the Chapter 13 requirements to different parts of the firm's overseas business – branch versus subsidiary or separate local partnership, solicitor versus non-solicitor, member versus non-member partners – will create additional complexity and confusion in managing, monitoring and reporting obligations within complex international firm structures. This is true both where a global firm is managed or controlled by an authorised person and, especially, where a global firm is managed or controlled outside E&W, in which case it may as a practical matter be unworkable to institute monitoring, reporting and compliance systems as contemplated by the "connected practice" regime described in the consultation. At this point the consultation does not set out the detail of what may be required. We counsel caution, accordingly, regarding what requirements are workable from a practical standpoint across offices in a global setting and the complications that may arise under local rules regarding privilege and client confidentiality restrictions.

30 Part Two of this response provides comments on individual issues in each paragraph of the Consultation Paper where we have them.

Part Two: Detailed comments on each paragraph of the Consultation Paper

31 **Paras 1 – 8:** No comments.

32 **Para 9:** Our comments in relation to the "group approach" put forward in the Consultation Paper are set out above. We strongly disagree with the comment that "Verein structures" are "designed precisely to prevent the kind of cross-jurisdictional regulation" that was being proposed and, indeed, continues to be proposed in respect of overseas branches. Cross-contamination from a liability perspective may well be at the heart of many "Verein style" structures but some of our members are offended at the suggestion that such structures are put in place to avoid cross-jurisdictional regulation. We should also reiterate that the CLLS in response to the Green paper did not see adoption of the Principles as a simplistic solution – it raises many complexities discussed in our response to the Green Paper and again in this response.

33 **Para 10:** We agree.

34 **Para 11:** The SRA's conclusions seem sensible, subject to our comments elsewhere about the "group approach" and our surprise that there is no conclusion about the need to find a way to avoid some of the inconsistencies and anomalies that would be created by moving away from the "group approach".

35 **Para 12 (i):** See above for our views about our preference for a new overarching principle for overseas practice. If the Principles based approach is followed, we think it is important to be clearer that the standards they impose relating to overseas practice are indeed "standalone" and that the outcomes and behaviours set out as applicable to domestic practice will not be relevant, in effect, to expand the Principles by the "back door". The lead-in to Chapter 13, as now drafted, in fact says quite the opposite.

36 **Para 12 (ii):** See comments below.

37 **Para 12 (iii):** See comments above.

38 **Para 12 (iv) and (v):** This approach is sensible. However, it needs to take account of the complexities of modern cross-border practice involving multi-jurisdictional teams across different offices (and entities) where the client has a single engagement with the law firm that is, in practice, "jurisdiction/office-neutral". Moreover, many clients of the global law firms are themselves "trans-national" and advice on the same matter may be delivered to those clients in several jurisdictions by lawyers who are based in a variety of offices themselves. Regulation of that sort of international practice by reference to the "home office" of particular individuals may raise its own difficulties.

39 **Para 13:** Noted.

40 **Para 14:** We disagree. See comments above. We feel strongly that the approach being proposed is not proportionate to the risks being addressed and that a more limited over-arching principle applicable to overseas practice to address the regulatory concern would be more appropriate

41 **Para 15:** We agree with that approach in the context of application of the Principles to overseas practice.

42 **Paras 16 and 17:** Our view on O(13.3) is that whilst it may look unobjectionable of itself, if as paragraph 16 indicates the intention is to override local legal requirements if they are inconsistent with the SRA's expectations then that could be problematic and it could, by the "back door", operate as a prohibition on establishing an overseas practice in certain jurisdictions. Is that what is intended? If there needs to be such an override, we are concerned that a "proper and appropriate" test is not at all helpful. The risk is that the reference to "proper and appropriate" means nothing without the full detail of the SRA Handbook and consequently that detail is reversed into O(13.3) again by the "back door". Consequently, we are concerned that use of a "proper and appropriate" test may not achieve what is intended. In any event, since it is likely to be interpreted differently by firms to take account of cultural differences in different jurisdictions and if it is interpreted subjectively by the SRA that will just create undesirable uncertainty. Linkage to the "public trust" principle would in our view be preferable so that, in effect, only Principle 6 is not capable of being overridden by O(13.2).

43 **Para 18:** On IB (13.1) in some countries it is not simply local laws or regulations which cause difficulties encouraging respect for equality and diversity but local cultural standards and accepted norms. Unless cultural issues are reflected in IB (13.1) the SRA may be seen to be dictating these standards inconsistent with locally accepted practices

which potentially could put SRA-regulated entities (but not their "connected practices", it seems, on the current proposals) at a competitive disadvantage compared to local businesses or those regulated elsewhere. Is that intended and appropriate? Many of our members consider that to be an unreasonable extra-territorial regulation of an issue that should be dealt with as a business issue.

44 **Para 19:** O(13.4) should not cause too many difficulties (but see more detailed thoughts below) if, as is suggested, it is read with IB (13.8) essentially disapplying it for internationally sophisticated or local clients. It would be clearer, as a drafting matter, however, if the sophisticated client exception was referred to in O(13.4) itself rather that as an exception to a negative behaviour. There are, of course, complexities in determining which regulatory regime applies to a multi-jurisdictional cross-border matter, say, involving ten offices (not at all rare in the global law firm practices) and it would be a huge additional administrative burden to have to address O(13.4) when dealing with sophisticated clients. As to the detail of O(13.4), what is meant by "client protections" (we think it is too vague); surely only details of compulsory insurance need to be provided (the rest is commercially sensitive) and isn't the reference to confidentiality protections unnecessary (this information is not currently provided in England and Wales, and it would be hard to know where to start/stop if required to describe all relevant policies/procedures which protect it)?

45 **Para 20 (i):** IB (13.3) re insurance will not be a concern for global firms and others operating global PI insurance programmes. The question is really whether those primarily domestic firms who establish an overseas branch should be required to do any more than comply with local PI requirements where applicable and, if so, whether the terms of IB(13.3.) really achieve this.

46 **Para 20 (ii):** The position on conflicts (IB(13.2)) is confused. We feel strongly that this needs to be clarified either by more clearly drafted indicative behaviours or in guidance. It is a crucial area of concern for firms operating in multiple jurisdictions who need to understand what obligations apply to their overseas businesses practising local law, in competition with local and non-SRA regulated firms, and is therefore of utmost importance to CLLS members. There should be more clarity if the intention is that only the local conflicts rules apply, in applying the "best interests" Principle 4. The question then arises what rules should apply in less sophisticated markets if the local jurisdiction does not have any relevant conflicts rules. Should it just be accepted local practices that need to be followed? Or does the "best interests" principle potentially require a more onerous standard (e.g. implying a duty of loyalty it could be argued would prevent a firm litigating against a current client without its consent)? And should the position differ depending on whether an overseas-based English solicitor is involved on the matter? Or if a UK based client is involved? We think not in both cases, on balance. This is an area where we are concerned that simply requiring compliance with Principle 4 without the elaboration of the detailed outcomes that include accepted exceptions in the Code potentially could be problematic and where further guidance is needed. As a drafting matter the language of IB (13.2) is also unhelpful. It uses the defined term "client conflict" (noting inconsistently that this in fact encompasses "significant risks" of conflict) and therefore would seem literally to be more restrictive than in the "domestic" Code where exceptions to client conflict situations are permitted (in the form of the "substantially common interest" and "competing for the same objective" exceptions in O(3.6) and (3.7)). This is an area where we are particularly concerned to ensure that the SRA's overseas regulation does not put SRA regulated businesses at a competitive

disadvantage to local firms or other international firms (e.g. US firms) who are not regulated by the SRA.

47 **Para 21:** We have no problem with O(13.5), other than to suggest that it should be qualified by materiality (both in terms of the failure itself and the contribution towards it). We are concerned, however, that O(13.6) could cause difficulty in relation to reporting requirements relating to overseas practice and how these requirements may inter-relate with any local regulatory reporting requirements (or perhaps even the lack of them), when dealing with local practices and overseas regulated lawyers. The impact of O(13.6) is to require compliance with O(10.3) and O(10.4) concerning reporting serious failure to comply with Principles or Outcomes and reporting serious misconduct by any authorised firm or its employees or managers (also reflected in the COLP reporting requirements in the Authorisation Rules). Albeit relating to the reduced impact of the new chapter 13-based regime, this will still provide significant reporting obligations to the SRA relating to practices that are primarily regulated overseas and will, therefore, still require UK based COLP compliance monitoring and reporting relating to overseas practices. However, as structured in these proposals, that reporting will only apply in relation to SRA-regulated entities and individuals. So in our example above, serious misconduct in a firm's branch office in Paris would need to be promptly reported but the same conduct by a lawyer employed by a controlled subsidiary entity in Madrid (unless by a solicitor and escalated to "head office") would not.

48 **Para 22:** We have no problem with the proposed structure for implementing proposed amendments, i.e. by introducing a new chapter of the Code of Conduct in the Handbook putting together the conduct provisions when "practising overseas" and adding new provisions in chapter 7 applicable to those involved in overseas practice (essentially relating to business management) although we consider the proposed new outcome 7.11 would more appropriately be an Indicative Behaviour relating to O(7.3) – see paragraph 63 below. The main pieces missing from the Consultation Paper to complete the picture on what is proposed are:

(d) what changes are needed to other chapters of the Code to exclude "overseas practice" but, we presume, in some way deal with other aspects of "international practice" (e.g. fly-in-fly-out advice into other jurisdictions) and

(e) what changes are needed to the Authorisation Rules to clarify how compliance and reporting obligations are modified in relation to overseas practice if at all.

49 **Paras 23, 24 and 25:** We prefer the simplicity of the first option, removing the applicability of the Notes. They do not add much anyway and in practice, in difficult cases, the "domestic" notes may be helpful by analogy. It will be important to frame the standalone nature of the Principles appropriately in the lead in to Chapter 13.

50 **Paras 26 – 29:** We have some concerns with the "two-tiered" approach for dealing with SRA-regulated entities and their branches on the one hand and "connected practices" on the other because of the illogical results that will flow from this in terms of conduct and reporting obligations as described above. No additional comments on paras 27 to 29 which seem sensible to us.

51 **Para 30:** We have a number of concerns with the proposed definition of "connected practices". The third and fourth limbs are imprecise and will catch (we think unintentionally) a large number of joint venture or alliance type arrangements with independent third party firms in other jurisdictions. For example, our members have

alliances which involve parts of their business in other jurisdictions being managed jointly with other firms and/or which are subject to a degree of joint operational control. We would be happy to discuss with the SRA appropriate changes to the drafting so that this definition, if it remains, is proportionately limited. Whether there needs to be a separate definition of "connected practice" if an appropriate definition of "overseas practice" is introduced, as referred to in Part Three below, is something many of our members seriously question.

52 **Para 31:** Noted.

53 **Paras 32 – 36:** There are other modes of providing services on multi-jurisdictional matters not obviously covered by these modes. The most obvious of these are (a) where an overseas lawyer operating within a branch or connected practice of an SRA-regulated entity provides advice to a client in the UK usually in conjunction with advice provided by lawyers in other jurisdictions, including in the UK, on the same matter and (b) where a combined team of solicitors and overseas lawyers, who may be based in a variety of different locations and entities, provide integrated legal services to a client who may itself be based in several jurisdictions. In some of these scenarios the concept of location of the "establishment" of the practice will often appear outdated and it may appear odd to a client, if they thought about it, that the conduct obligations of our lawyers (e.g. if all are solicitors) or practising entities differ because of the "home base" of the individual lawyer or the entity to which we internally "attach" him or her (e.g. contrasting Madrid and Paris in our example above).

54 **Para 37:** We agree.

55 **Paras 38 and 39:** See comments above.

56 **Paras 40 and 41:** There is also the issue we have raised previously with the SRA that is relevant to many international firms who have partners who are not members of their LLP but who have equivalent status and responsibilities internally. They are not "managers" for SRA purposes wherever they may be based and this causes anomalies in defining internal responsibilities for firm-wide compliance in global law firms. We welcome greater clarity on this as suggested by paragraph 40. A new outcome as suggested in the first alternative in paragraph 40 would seem preferable to clarify the position and address the issue of non-member partners.

57 **Paras 42, 43 and 44:** Noted.

58 **Paras 45 – 49:** In principle, we agree this is a gap that needs covering. However, for reasons described above in relation to paragraph 32 we query if this approach over-simplifies the types of cross-border work carried out in multi-jurisdictional teams on complex cross-border matters.

59 **Para 50:** Noted.

60 **Para 51:** Amendments to the Authorisation Rules should also be addressed to clarify the jurisdictional reach of the reporting obligations consistent with any amendments to chapter 10 of the Code. It is also not clear how the proposals would apply to in-house lawyers who, if they are solicitors, may be SRA regulated personally but who do not work for SRA regulated entities This needs further consideration, and consultation with the in-house community.

61 **Para 52:** Our working group would be very happy to discuss drafting comments or proposed amendments further.

Part Three: Progress towards a solution

62 Following detailed discussions at two lengthy meetings with the SRA attended by members of the CLLS Professional Rules and Regulation Committee's working group, we believe progress has been made in clarifying how best to achieve the SRA's objectives for regulating overseas practice, which is leading to revisions that members of the working group are inclined to support, as they meet our concerns. The working group has provided comments on how Chapter 13 of the Code of Conduct could usefully be restructured and are expecting to see, and comment further on, an updated version which takes account of comments made at our last meeting. The key features of this new Chapter 13 which we expect the SRA now to propose are as follows:

(i) There will be a definition of "overseas practice" to which the provisions of the new Chapter 13 will apply in relation to individual solicitors and SRA authorised bodies. It will apply to all branches, separate firms or entities which they *de facto* or *de jure* control. Entities outside the control of an SRA authorised body (e.g. firms in a verein structure or which are foreign "parents" with UK "subsidiaries") can voluntarily opt in to SRA overseas regulation if it suits them, with the SRA's agreement. The SRA has made it clear in our discussions that there is no intent to define "connected practices" or to construe its regulation of individual solicitors regularly practising abroad so as to extend application of the Principles, directly or indirectly, to foreign practices and offices that are not managed or controlled by an authorised body.

(ii) The new chapter will describe the standards which the overseas practice of E&W solicitors or SRA authorised bodies will be expected to meet. These are designed to be consistent with the standards required of solicitors and authorised bodies practising in England and Wales but modified to take account of local requirements and operating conditions.

(iii) These obligations will be to comply with a set of Overseas Principles that are appropriately modified from the domestic Principles and importantly amplified by a set of notes to the Overseas Principles which explains how they should be applied in the overseas practice context.

(iv) The Overseas Principles need not be complied with if to do so would result in a conflict with applicable law and professional regulation in the jurisdictions in which a solicitor or firm is practising overseas. So, if they comply with local law and regulation they will not breach these principles. There will just be one override to that, relating to the "primacy" of a new Principle 6 that provides that you must not (even if local law would otherwise require it) do anything which will or be likely to bring into disrepute yourself, any authorised firm in England and Wales of which you are a part or, by association, the legal profession in and of England and Wales.

(v) On the sensitive issue of application of Conflicts and Confidentiality requirements overseas, there will be a note which clarifies that the Overseas Principle requiring a solicitor or firm to act in the best interests of their client simply requires them to follow the local regulatory requirements of the jurisdiction in which they are practising overseas. If no such requirements exist,

the SRA have confirmed they will expect them to determine what the best interests principle requires in the particular circumstances, no doubt taking into account client expectations and accepted best practice where applicable. This will replace the proposed IB (13.2) in the Consultation Paper.

(vi) On monitoring and reporting, the SRA have confirmed that the new Chapter will clarify that only material and systemic breaches will need to be monitored and reported in respect of overseas practice. The SRA agrees that proportionate regulation requires a focus only on serious concerns and are keen to find a definition of materiality in this context which achieves this objective.

63 In the context of these discussions, we doubt whether it will be necessary to introduce a new outcome 7.11 applicable to "connected practices" if instead perhaps a new indicative behaviour were added to expand on the impact of O(7.3) in the context of the obligations arising on authorised persons and their "overseas practice" as will be defined. If the SRA still wishes to introduce the concept of "connected practice" in the context of chapter 7 we consider it should be much more narrowly defined than in the Consultation Paper, as we have discussed with the SRA.

Yours sincerely

Alasdair Douglas
Chair, CLLS

THE CITY OF LONDON LAW SOCIETY
PROFESSIONAL RULES AND REGULATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Chris Perrin (Clifford Chance LLP) (Chair)

Tracey Butcher (Mayer Brown International LLP)

Roger Butterworth (Bird & Bird LLP)

Raymond Cohen (Linklaters LLP)

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Jonathan Kembery (Freshfields Bruckhaus Deringer LLP)

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