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(By post and email: international@sra.org.uk)

24 June 2013

Dear Sirs

Response of the CLLS Professional Rules and Regulation Committee to the SRA Consultation on New Overseas Rules

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 20 May 2013 consultation paper on "New Overseas Rules" (the "Consultation Paper") has been prepared by the CLLS Professional Rules and Regulation Committee (see list of members attached).

General comments

3 We support the proposal to include these "new rules" in a separate section of the Handbook. We would prefer, however, that the section was not called "Overseas Rules", partly because they do not seek to address all aspects of regulation of practices outside England and Wales (only those falling within the definition of "overseas practice") and partly because of some sensitivity within many international firms about using an old "colonial" term, "overseas" in the heading. Our suggestion would be instead to call this section of the Handbook the "SAR International Practice Rules". Consequential changes

to use of the term “Overseas Principles” and “Overseas Rules” should also be considered.

4 We consider that in forming the new section of the Handbook as “rules” it would be helpful to be clearer about the status of the provisions that are really explanatory notes, not substantive new obligations. We have suggested some drafting changes to achieve this.

5 Several members of our Committee have participated over the last few months in helpful discussion with members of the SRA responsible for drafting these new provisions. We have provided input to assist in clarifying the interim drafting that has been proposed as well to explain in more detail those matters on which our member firms have concerns. A number of significant changes were made to the drafting included in the Consultation Paper which we were not given the opportunity to comment on, or suggest improvements, in advance of the Consultation Paper being issued. However, we have subsequently discussed several of these points with the SRA and understand that they will propose further amendments to take into account our concerns. A few of these areas raise concerns for our member firms, as is addressed in the annotated mark-up enclosed with our comments and suggested drafting improvements, the most significant aspects of the most recent changes are as follows:

(a) A statement has been added under principle 5 that “You should inform clients by whom the legal services provided to them are regulated, what protections are in place for them and whether they have the benefit of professional indemnity insurance or other indemnity”. There is no carve out for sophisticated clients or others for whom this sort of disclosure will be unnecessary in the circumstances. To do this as part of our overseas practice around the world, when not required by local regulation, would be onerous, disproportionate to the regulatory risk and unworkable in practice for much of the work done by our member firms overseas even if it might be appropriate, say, for a high street practice with a branch office on the Costa del Sol working with unsophisticated consumers. On the other hand, if it is accepted, as our discussions with the SRA indicate it should be, for appropriate disclosures to sophisticated clients to be provided generically on a firm’s website or in their standard terms of business these concerns will be met. If this disclosure provision is retained we think it is very important that an appropriate addition is made to this note to clarify this will be the case.

(b) The latest draft has deleted the proviso/exceptions we had provided previously to the SRA, and we thought had been accepted, to limit the disclosure obligations both in the notes to principle 7 and in the reporting requirements now in Rule 3.2.3 where there are confidentiality or privilege problems in complying with the SRA’s reporting or disclosure requirements. From our latest discussions with the SRA we understand that, as an alternative, this issue will, to some extent, be addressed by amending rule 2.4. It should be clarified, in any event, that the SRA is not entitled to require the production of documents which would be legally privileged in the relevant jurisdiction or to require a firm to obtain its clients’ consent for the waiver of that privilege.

(c) The definition of overseas practice is still, in our view, more complex than it needs to be and many of our drafting suggestions on this have not been accepted. In particular, the wording at the end of the definition does not seem to work as intended (as we explained at a meeting with the SRA) and is confusing.

(d) We find the definition of "connected practice" confusing and we have suggested some alternative drafting to clarify what we understand to be the SRA's intention. At the very least, it would be very helpful if there could be some explanation in the Guidance about what sort of practices in our commonly adopted overseas structures are covered and what are not.

(e) The Guidance on when someone is treated as "established" outside England and Wales does not seem to go far enough; it would be very helpful to clarify how the SRA wants us to treat solicitors temporarily seconded to an overseas office for a "fire fighting" type stint for a few months as happens quite often.

6 Some of our members have also queried why it is desirable and proportionate to include additional new Outcomes and Indicative Behaviours relating to managing risks relating to "connected practices". Without doing so it would seem to be unnecessary to include a complex new definition of "connected practices". They query why it would not be desirable simply to rely on Overseas Principle 8, the "domestic" Principle 8 and Outcomes 7.3 and 7.4 in order to regulate how an authorised body identifies, monitors and manages the risks posed to its business, including financial risks relating to interdependence, posed by its relationships with related businesses overseas (both those that fall within the proposed definition of "connected practices" and others which do not). The particular difficulty which new Outcomes 7.11 and 7.12 create is that they might be taken as suggesting the SRA Principle 8 does not of itself require the London office of a US headquartered firm to have any regard to its financial inter-dependencies. For this reason alone, the SRA may wish to reconsider, whether now or after an appropriate familiarisation period, it makes sense to adopt/continue to include these Outcomes in the SRA Handbook. Others of our members have also queried, whilst accepting the proposed framework for managing risks posed by connected practices proposed in Annex 3, why it should be appropriate to exclude from these provisions the "parent" of a group of firms managed and controlled overseas (such as, for example, a U.S. headquartered firm). If managing financial interdependence risks to E&W regulated firms whose overseas parents may get into financial difficulties (sometimes now referred to colloquially as "Dewey risk") is a regulatory driver behind these new provisions then the proposed definition of "connected practices" would apparently exclude from their scope all the U.S. and other overseas controlled businesses which might be exposed to such risks and hence undermine one of these objectives. But, again, if the regulatory driver is to avoid what might be referred to as a "Dewey risk", this could be addressed by deletion entirely of the concept of connected practice (as well as proposed new O(7.12) and IB(7.4)), instead continuing to rely upon the existing outcome 7.4 in the domestic part of the Handbook.

7 On the reporting obligations in Rule 3, the formatting of this as a "rule" creates some uncertainty whether the definition of what is a "material" breach for reporting purposes relating to an overseas practice is really intended to be any different from a material breach of the "domestic" Principles applicable to practice in England and Wales. In particular, it is unclear whether the provisions of paragraphs 3.2.1 and 3.2.2 are intended to define exclusively what needs to be notified as a "material or systemic" breach or whether they are intended to specify additional obligations. What needs to be monitored and reported overseas is of course of crucial importance to our member firms and our discussions to-date with the SRA have suggested that a higher level of materiality would be required than when monitoring and reporting domestically. That approach is not so clearly stated in the new drafting. The SRA have, in our most recent

discussions, acknowledged this concern and agreed to reinsert text to clarify that a higher materiality threshold will apply than is the case for a “domestic” material breach which we would of course support.

Drafting comments

8 Our suggested mark-up, with annotated drafting comments embedded is enclosed. We would be happy to discuss further any aspects of our comments with the SRA.

Yours sincerely

Alasdair Douglas,
Chair, CLLS

THE CITY OF LONDON LAW SOCIETY
PROFESSIONAL RULES & 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)

Sarah de Gay (Slaughter and May)

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Heather McCallum (Allen and Overy LLP)

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