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Lockton Solicitors

Guide to Breach Reporting

(England & Wales)

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Introduction

The firm's COLP and COFA are required to record regulatory failures and to make these records available to the SRA on request.

Rule 7.7 of the SRA Code of Conduct for Solicitors, REL's and RFL's (**COCS**) requires that "You ensure that a prompt report is made to the SRA, or another approved regulator, as appropriate, of any serious breach of their regulatory arrangements by any person regulated by them (including you) of which you are aware".

Rule 3.9 of the SRA Code of Conduct for Firms (**COCF**) places the above identical obligation on Firms.

Rule 9.1 of the COCF states if you are a COLP you must take all reasonable steps to:

- a. ensure compliance with the terms & conditions of your firm's authorisation
- b. ensure compliance by your firm and its managers, employees, or interest holders with the SRA's regulatory arrangements which apply to them
- c. ensure that your firm's managers and interest holders and those they employ or contract with do not cause or substantially contribute to a breach of the SRA's regulatory arrangements

- d. ensure that a prompt report is made to the SRA of any facts or matters that you reasonably believe are capable of amounting to a serious breach of the terms and conditions of your firm's authorisation, or the SRA's regulatory arrangements which apply to your firm, managers or employees, save in relation to the matters which are the responsibility of the COFA.

Rule 9.2 of the COCF states if you are a COFA you must take all reasonable steps to:

- e. ensure that your firm and its managers and employees comply with any obligations imposed upon them under the SRA Accounts Rules
- f. ensure that a prompt report is made to the SRA of any facts or matters that you reasonably believe are capable of amounting to a serious breach of the SRA Accounts Rules which apply to them.

Identification and Reporting

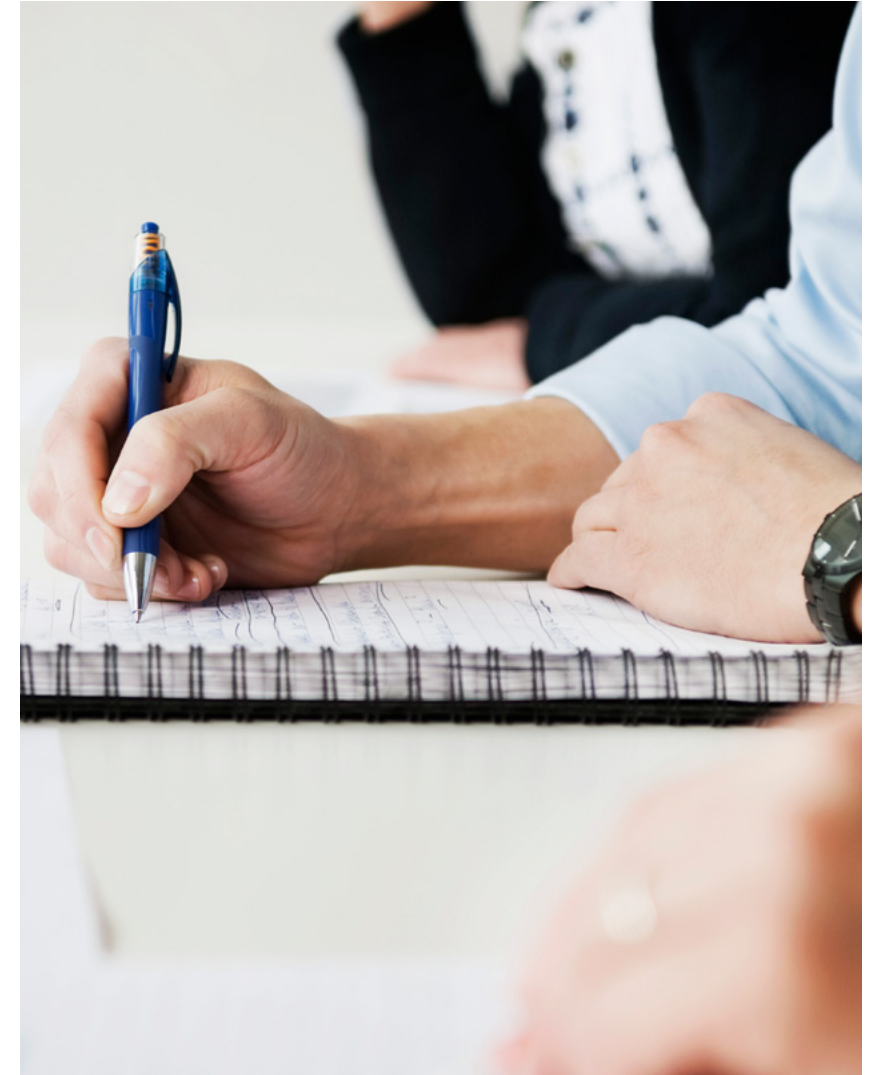
Identification and Reporting of breaches to the COLP/COFA?

A question asked by many staff is “What is a breach?” A breach can be defined as a failure to adhere to any applicable law, rules, and regulations that apply to a law firm. It is very important that breaches or any facts or matters capable of amounting to a serious breach are identified from all the issues or incidents that are reported or brought to the attention of the COLP/COFA.

The reason for this is the recent change in the SRA rules. Under the new SRA rules there is a requirement for a COLP & COFA to make a report to the SRA of not only a serious breach but any facts or matters that are capable of amounting to a serious breach. Therefore, an actual breach does not need to have happened for a report to have to be made to the SRA.

To enable a COLP & COFA to adhere to their obligations under the SRA rules it is vital that all issues, incidents and breaches are reported and brought to the attention of the COLP/COFA so that they can be analysed and a decision made as to whether they need to be reported to the SRA.

For a COLP & COFA to be able to identify individual or collective matters or facts that have occurred which are capable of amounting to a serious breach they need to be made aware of all incidents and issues that occur no matter how small and insignificant they may appear to be.

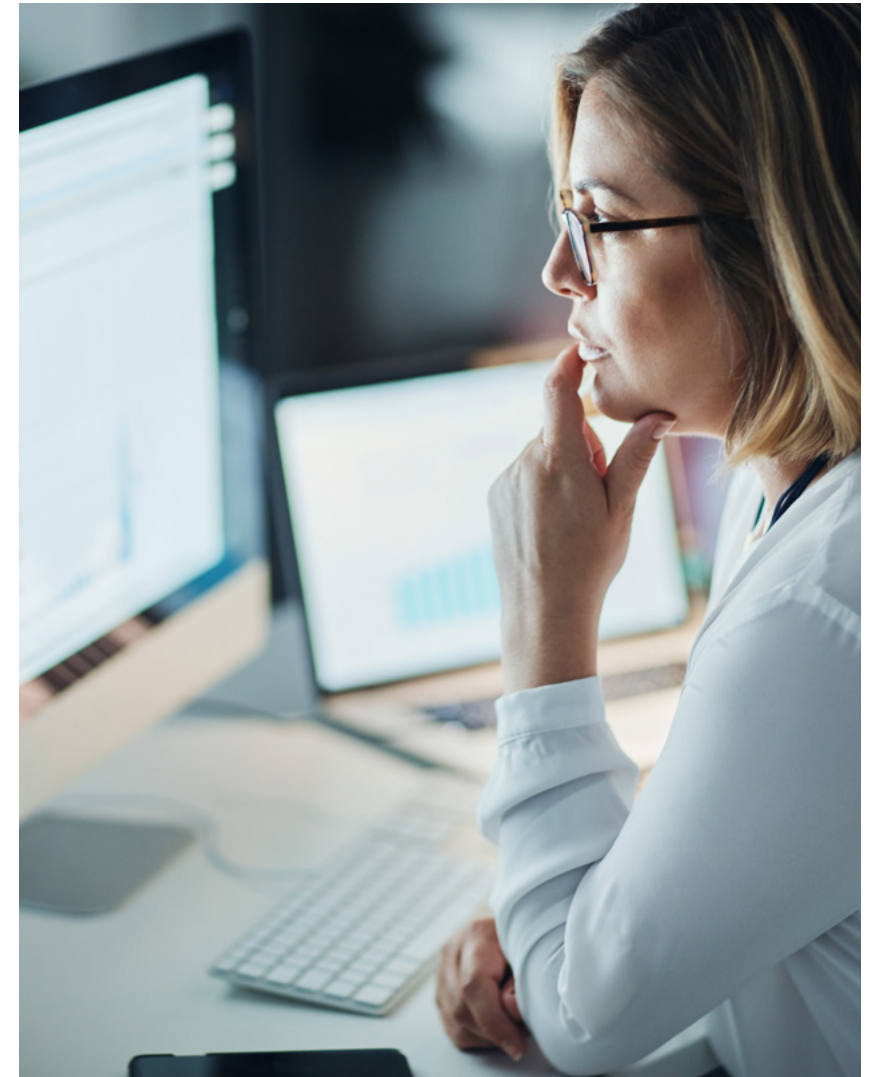


To assist the COLP & COFA in identifying individual or collective matters or facts which are capable of amounting to a serious breach we recommend that firms have an incident reporting policy so that all failures and issues (no matter how small and insignificant they seem) are reported and recorded in a central incident log. Please see the Lockton portal for a guide and checklist on Incident Reporting.

Once incidents have been reported it is recommended that a root cause analysis is carried out to identify the category of the incident (e.g. Complaint, Claim, Breach or Incident), the consequences of the incident and the steps/action that need to be taken. Please see the Lockton portal for the guide & checklist on Root Cause Analysis.

If an incident is categorised as a breach then it would also need to be logged in the breach register and a decision made by the COLP or COFA (depending on the type of breach) as to whether a report needs to be made to the SRA. The decision process and the reasons for making the decision should also be recorded. By reporting all incidents, categorising them and recording them a COLP/COFA will be able to identify any patterns or trends as well as any matters or facts which either individually or collectively are capable of amounting to a serious breach and are therefore reportable to the SRA.

To ensure that all breaches are reported by staff it is also important that all staff are aware of what a breach is, to whom any breach should be reported, the time frame in which a breach needs to be reported and the processes and procedures that need to be followed when they become aware of a breach.



Responsibilities of the Firm's COLP and COFA

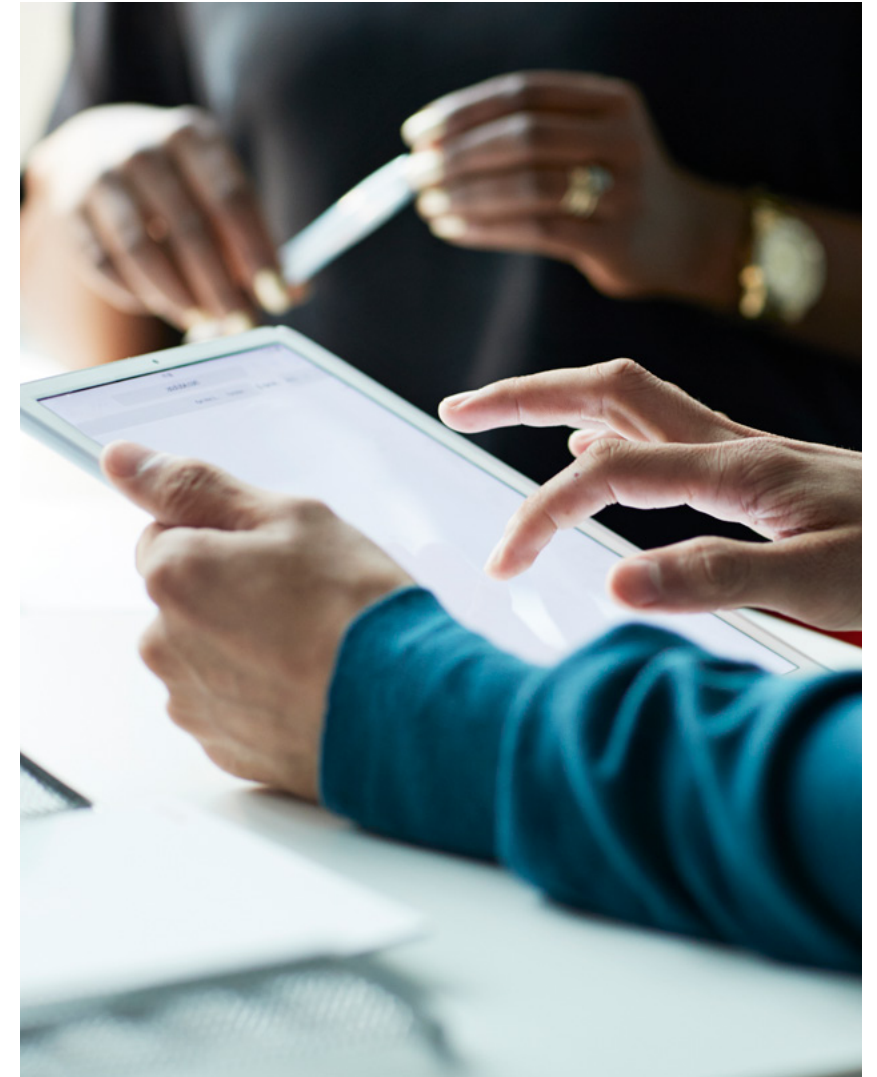
It is the Firm's Compliance Officers responsibility to record all failures of regulatory non-compliance in a Breach Register and to report all serious breaches or facts and matters capable of amounting to a serious breach.

A Breach Register is a document which records all regulatory failures that have been reported or come to the attention of the COLP/COFA. Please see the Lockton portal for a template Breach Register.

The Firm's COLP is required to take all reasonable steps to ensure that the Firm complies with its regulatory arrangements and must report all serious breaches to the SRA.

The Firm's COFA is responsible for recording any breaches of the SRA Accounts Rules and for reporting all serious breaches to the SRA.

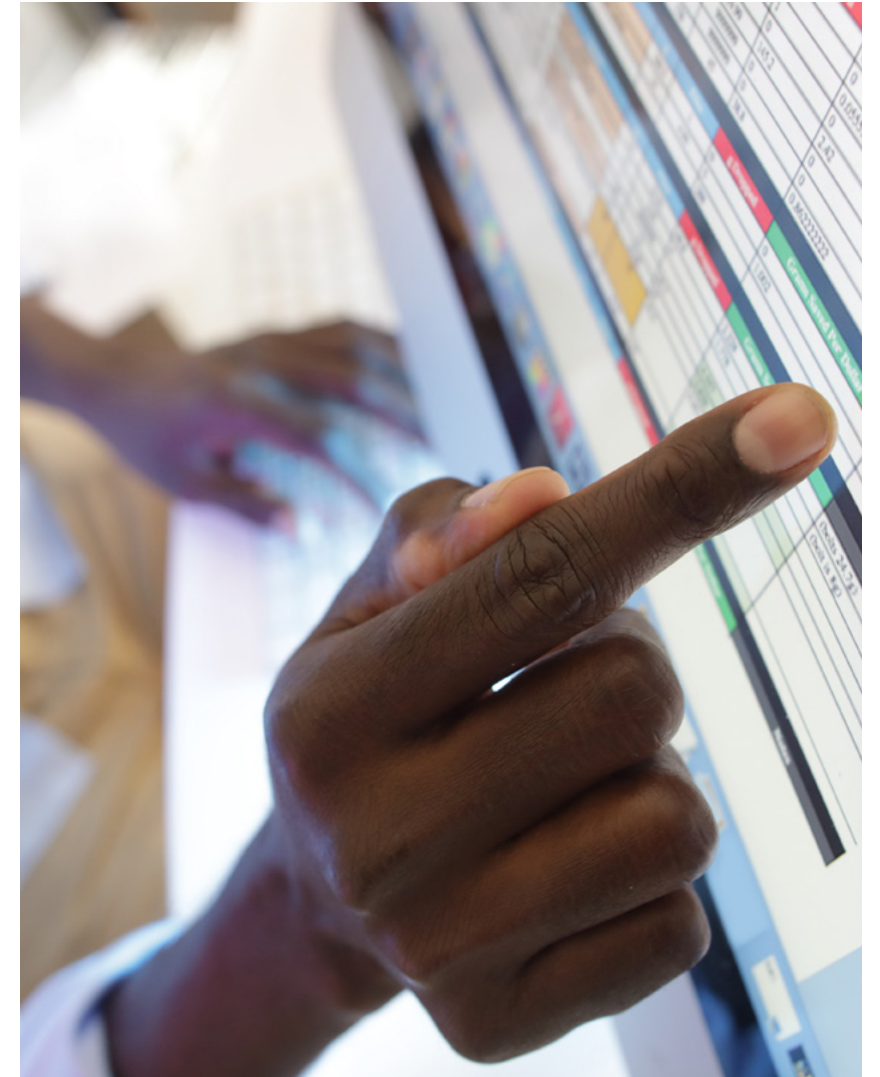
Under the new Codes there is now a distinction between the responsibilities of the Compliance Officers and the managers of the Firm. The COLP & COFA are responsible for systems and for recording and reporting compliance failings/breaches and it is the managers of the Firm who can be responsible for specific breaches. Paragraph 8.1 of COCF states that the managers are responsible for compliance with the COCF by the Firm and Rule 1.2 of the SRA Accounts Rules states that the managers are jointly and severally responsible for compliance with the Accounts Rules by the Firm, its managers and its employees.



What breaches are reportable to the SRA?

Under the previous 2011 SRA Handbook, COLPs and COFAs were required to report breaches of the rules by the Firm or its staff which they deemed to be “material”. The current SRA Codes of Conduct refer to the reporting of breaches which are “serious” or facts/matters capable of amounting to a “serious” breach. Whilst there is no practical difference between a “material” breach or a “serious” breach the reporting requirements for COLPs and COFAs do appear to have been increased as:

- COLPs and COFAs are now obliged to promptly report facts or matters which they reasonably believe are capable of amounting to a serious breach by the Firm (they do not need to determine whether it is serious).
- COLPs and COFAs are now obliged to report facts and matters whether relating to the Firm or not which warrant an investigation as to whether a serious breach has occurred.
- COLPs and COFAs are now obliged to report facts or matters whether relating to the Firm or not which should be brought to the SRA’s attention so that it can consider exercising its’ regulatory powers, for example, knowledge of other entities or a person’s dealings which could lead to an intervention or a decision not to approve a Compliance Officer.



One of the main issues that COLPs and COFAs face on a regular basis is whether an issue, factor or matter should be reported to the SRA. Guidance is available in the SRA Codes of Conduct and the SRA Enforcement Strategy - the introduction to each Code of Conduct states that a failure or breach may be serious either in isolation or because it comprises a persistent or concerning pattern of behaviour. The SRA has also stated that “A mere breach is not in itself reportable, and it must be “serious””.

The SRA Enforcement strategy is a useful guide to assist when considering whether a matter or issue needs to be reported and the SRA indicates “if you are unsure about whether to make a report you should err on the side of caution and do so”. The SRA also have a Professional Ethics helpline which can assist in helping you decide whether a report needs to be made.

Whilst the SRA does not provide a definition of what constitutes a “serious” breach, its enforcement strategy sets out factors which affect the SRA’s view of seriousness and which a COLP/COFA should consider and take into account when making a decision as to whether a report needs to be made to the SRA. These factors are as follows:

- a. Past Behaviour
- b. Future Risk – including expressions of apology & remorse and whether the conduct has been repeated
- c. The Firm’s systems in place and environment in which the events took place
- d. The responsibility/control the individual had over the matters in question
- e. The nature of the breach and scale
- f. Competence of the fee-earner
- g. The detriment or risk of detriment to clients
- h. The impact/harm on the Firm, its clients and third parties
- i. Vulnerability of the client
- j. Role, experience, and seniority of fee-earner

It is also helpful for a Firm's COLP/COFA to consider and review the SRA warning notices when deciding whether a breach is serious and/ or should be reported to the SRA. The SRA warning notices are issued by the SRA on its website from time to time and they give an indication of issues and breaches that the SRA perceive as being serious. These warning notices also contain examples of the type of conduct which is permitted and the type of conduct which is not.

When a COLP/COFA is deciding whether or not a matter or a breach needs to be reported a note of their decision should be made together with details of the reasons, related issues and factors that were taken into account when making the decision. Any internal investigations or evidence as to how the issue or breach occurred should also be kept and provided to the SRA if necessary. Before disclosing any evidence or documentation the COLP/COFA should consider whether there are any confidentiality, data protection or legal professional privilege issues that prevent the documentation from being disclosed.

You should also ensure that consideration is given as to whether the breach needs to be reported to your PI insurers or any other regulatory body such as the National Crime Agency or the Information Commissioner's Office.



Time frame for reporting to the SRA

The SRA rules state that any serious breaches or facts and matters capable of amounting to a serious breach must be reported to the SRA promptly.

Whilst the SRA does not specify in the rules what is meant by promptly, it has produced guidance on its website entitled “Reporting and Notification” (dated November 2019) which states “once you have decided that a report needs to be made to the SRA it should be made as soon as possible”.

The SRA also state in its guidance that even if you become aware of an issue which has not been reported or the information or relevant events occurred in the past and it has just come to your attention, then a report should still be made to the SRA as soon as possible. Failure and delays to make reports to the SRA promptly can lead to further failure and loss and there is a risk that the SRA could take regulatory action for not giving the information required in a timely manner.

In instances where you are reporting an issue or information to the SRA and there has been a delay, then we would recommend that you provide them with a detailed explanation as to why there has been a delay in the matter being reported. The SRA guidance states that where there is a credible reason for a failure to make an early report to the SRA or where the SRA consider a report should have been made but a decision was made not to report the matter (after a careful analysis of the facts available at that time), then it is highly unlikely that regulatory action will be taken.

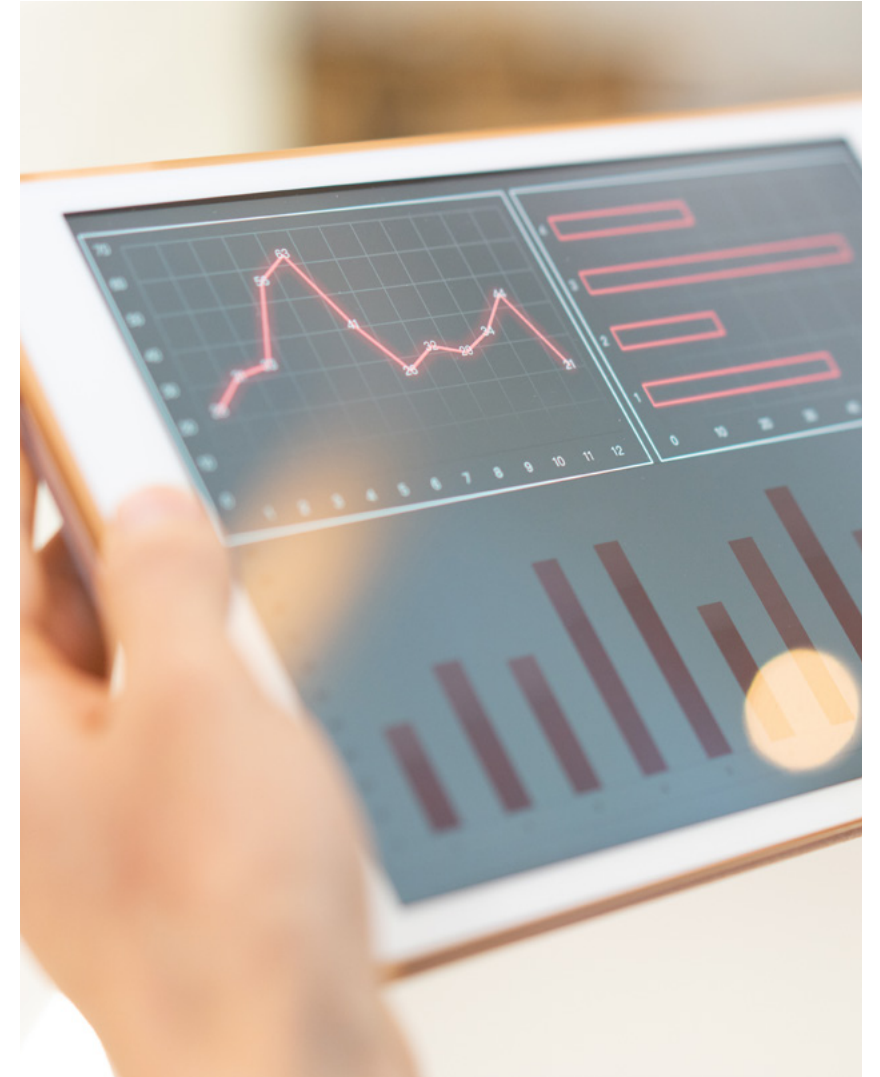


Monitoring Compliance and Review

It is very important that a Breach Register is regularly reviewed and monitored by the person responsible for its preparation and maintenance of the Risk Register. The person responsible for this is usually the COLP.

A Breach Register is a vital tool in helping a Firm monitor, manage, and record its breaches. It is very important that it is accurate and regularly maintained and updated as access to the Breach Register can be requested by the SRA.

The Register and information contained within it should be regularly reviewed and analysed so that lessons can be learnt from the breaches and any necessary steps taken to improve the Firm's processes and procedures and level of service provided to clients. Please see the Lockton portal for the guide and checklist on Root Cause Analysis.



Training

All staff should be provided with training on breaches. This training should include examples of breaches, who a breach should be reported to, why it is important for breaches to be reported as soon as staff become aware of one, the consequences for the Firm if breaches are not reported promptly and who staff should contact if they have any queries regarding a breach or potential breach.

Training should be carried out initially to all staff and then at least on an annual basis. Training should also be provided to all new staff as part of their induction training.



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