

Regulation and the CML Handbook

The Law Society of Scotland Financial Compliance Department Inspections

The Law Society's Financial Compliance Department inspections are a key part of the Society's regulatory regime and are designed to promote good practice across the profession as well as to ensure that we, as an organisation, comply in our duty to protect the public interest. This document provides information about our inspection process in relation to the Society's Accounts Rules and CML Handbook compliance.

The Financial Compliance team carries out inspections of all Scottish legal practices operating in Scotland. The team operates a risk-based approach to inspections, with one of the factors being the length of time since the practice was last inspected.

An inspection will usually involve an examination of a sample of the practice's files. Financial Compliance team members prepare reports following an inspection, which are then sent to you.

If a breach of the instructions contained within CML Handbook is identified during an inspection this will normally be included in the report which you receive.

It is important to be aware that a failure to follow the lender's instructions as contained within the CML Handbook is considered a breach of the Account Rules (B6.5.1(c) of the Practice Rules 2011 and prior to 1 November 2011, Rule 6(1)(c) of the Solicitors (Scotland) Account etc Rules 2001).

As this type of failure can increase the likelihood of a claim on the Guarantee Fund, adherence to CML Handbook instructions remains an important consideration for both the Financial Compliance Department and the Society's Guarantee Fund Sub Committee.

Financial Compliance inspections focus on six paragraphs of the CML Handbook which are most likely to result in a claim on the Master Policy / Guarantee Fund. These are:-

- 5.1.1 – Seller owned for 6 months
- 5.8 – First Ranking Standard Security
- 5.9 – Other Loans
- 6.4.4 – Incentives – Cash back
- Incentives – Non-cash Incentive
- 6.4.5 – Control of Purchase Price

We also look for compliance with:-

- 2.3 - Communicating with the lender
- 5.2 - Conflict of interests
- 5.11.3 - Inhibitions and Insolvencies – gratuitous alienation
- 6.6 - Properties let at settlement
- 10.4 - Return of Settlement Funds

While other breaches of the CML Handbook instructions may be noted in an inspection report, it would be rare for these breaches to be referred to the Guarantee Fund Sub

Committee as they are unlikely to be an indicator of mortgage fraud or claim on the Guarantee Fund.

Consequences of failure to comply with CML Handbook instructions

There has been a notable increase in the number of cases where solicitors have failed to follow their clients' instructions as provided by the CML Handbook – although there has been no specific change to the financial compliance inspection regime to start targeting CML Handbook breaches. We can only speculate at this stage on whether this increase is due to the cases involving CML failures having heightened visibility due to the relatively recent reduction in volume of conveyancing files or due to the level of mortgage fraud having increased in response to the more stringent lender criteria adopted by the lenders during the recession.

Our members should be assured that an isolated example of a solicitor failing to follow an instruction contained within the CML Handbook is very unlikely to be referred to the Guarantee Fund Sub Committee.

However, where there has been a persistent or systematic failure to follow an instruction contained within the CML Handbook, or where the circumstances suggest that some of the parties involved in the transaction may be participating in mortgage fraud, the matter is generally referred to the Guarantee Fund Sub Committee for further examination.

You should also be assured that not all failures to follow lender instructions which are referred to the Guarantee Fund Sub Committee, result in the matter being submitted as a complaint to the Scottish Legal Complaints Commission (SLCC).

For example, while an isolated breach of Paragraph 5.9 caused by parents lending the balance of a purchase price would not usually be referred to the Guarantee Fund Sub Committee, a series of this type of breach would be. It is unlikely that the Guarantee Fund Sub Committee would take the matter further unless there was an indication that the lack of reporting was intentional.

However all practitioners must remember that a failure to follow the lender's instructions contained within the CML Handbook is a breach of Rule B6.5 (1) (c) of the Practice Rules 2011 and in certain cases, could result in suspension of a solicitor's Practising Certificate.

Multiple breaches of the CML Handbook which suggest that the solicitor has turned a blind eye to mortgage fraud or actively participated in mortgage fraud, may lead to the solicitor being suspended under S.40 of the Solicitors (Scotland) Act 1980. This is used in very rare circumstances.

In summary, only instances of gross non-compliance with the lender's instructions or an indicator of mortgage fraud before CML Handbook breaches would be referred to the SLCC as a complaint.

Post Guarantee Fund Sub Committee

If a complaint is accepted by the SLCC, it will be referred to the Law Society's Complaints Investigation Team (CIT). CIT will examine the evidence collated and prepare a report having obtained detailed responses to the complaint from the solicitor. This report sets out the evidence and contains recommendations on the merits of the complaint. Once the parties have had an opportunity to comment it is placed before the Professional Conduct Committee (PCC).

The PCC has various options available to them in disposal of the complaint. They can decide:-

- i.) that the matter be referred for prosecution before the Scottish Solicitors Discipline Tribunal, which is independent of the Society;
- ii.) conclude that the actions of the solicitor amount to unsatisfactory professional conduct (in this event it can impose a fine, compensation or further training in a specific area);
- iii.) conclude that the Rule breach or action of the solicitor does not amount to a conduct violation in the circumstances and decide to take no further action.

If the matter is to proceed to the SSdT, the Society will appoint a Fiscal to prosecute. A solicitor due to appear before the SSdT may wish to represent his or herself or appoint a representative.

It should be kept in mind that not every breach of the Accounts Rules amounts to misconduct, but care should be taken to ensure compliance with CML Handbook instructions and avoid potential risk of conduct issues arising.

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