

## Guidance

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#### **Making payments from the compensation fund (Archived)**

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This guidance is for applications received before 25 November 2019. Guidance for [applications received between 25 November 2019 and 5 July 2021 \[https://consultations.sra.org.uk/solicitors/guidance/consumer-payments-compensation-fund/\]](#).

Guidance for [applications received after 5 July 2021 \[https://consultations.sra.org.uk/consumers/compensation-fund/resources/\]](#).

## **Introduction**

### **Purpose and status of this guidance**

We operate a fund for making grants to people whose money has:

- been stolen
- misappropriated
- has not been accounted for by a regulated person or those who have suffered a loss against which a regulated person should have been insured under our rules, but was not.

This is funded by contributions from individuals and firms we regulate. Our powers to do so are set out in legislation [1 \[#n1\]](#) and the SRA Compensation Fund Rules 2011 ("the Rules").

This document provides guidance on how we make decisions on applications for payments from our Compensation Fund.

This guidance should be read in the context of the Rules, [decision making at the SRA \[https://consultations.sra.org.uk/sra/decision-making/decision-making-sra/\]](#) and other guidance documents, listed at the end of this document. It is a living document and will be reviewed and updated as appropriate. It reflects our approach to our regulatory role, and any departure must be capable of justification on the individual facts of the case.

## General points about applications

The Compensation Fund is a discretionary fund, no-one is entitled to a payment from it. The following points apply generally to how we deal with applications:

- We expect applicants to be open and frank in their dealings with us, and to provide us with all relevant evidence in support of their application.
- We will carry out an investigation to collect relevant evidence to help us decide an application. In addition, we may have access to information which the applicant does not, for instance, the accounting records of the firm or a report from an [on site investigation](https://consultations.sra.org.uk/solicitors/guidance/investigations-on-site/) [https://consultations.sra.org.uk/solicitors/guidance/investigations-on-site/] carried out by our Forensic Investigation Team. If so, we may also use this evidence in reaching a decision.
- Rule 24 of the Rules allows us to waive some (but not all) of our rules. In doing so, we apply our [waivers decision making guidance](https://consultations.sra.org.uk/solicitors/guidance/granting-waiver/) [https://consultations.sra.org.uk/solicitors/guidance/granting-waiver/].

Read more information about [how to make a claim](https://consultations.sra.org.uk/consumers/problems/claim-papers/) [https://consultations.sra.org.uk/consumers/problems/claim-papers/], and how we can help applicants with the process and understand what they might be entitled to.

## Overview of decisions to make a payment

We consider two stages when deciding whether to make a payment. These are considered in detail later in this guidance, but in summary, the two stages are:

### Stage 1: Is there legal power to make a payment?

There are two elements to this. Firstly, is the application from someone eligible for a payment – this will depend on who the applicant is, as different rules apply if the applicant is a private individual, a business or a charity. Secondly, does the application relate to one of three circumstances: loss caused by dishonesty, hardship caused by a failure to account for money, or an uninsured loss (which should have been covered by professional indemnity insurance under our rules, but which was not). [These are described in more detail below](#) [#para42].

### Stage 2: Should we make a payment?

If an applicant is eligible and there is legal power to make a payment, then we will decide if we should use our discretion to make a payment in the circumstances of the case. This can include considering whether the application is within the prescribed time limit (and if not, whether the

time limit should be extended), whether the applicant contributed to their loss, and whether there are other ways for the applicant to recover the money lost. The factors we will consider at this stage are [set out in more detail below](#) [#para42].

## Do we have legal power to make a payment?

As stated above, the first thing that we consider on any application, is whether we have the legal power to make a payment. Establishing if a claim falls within one of the categories for making a payment can be very complex. For this reason we initially consider if an applicant is eligible.

### Is the applicant eligible?

Three groups of applicant (private individuals, businesses, charities/trusts) may be eligible to claim. In the case of businesses and charities/trusts, eligibility may depend on their turnover. We have set out in the table below the eligibility of each different applicant to claim under the three claim categories: dishonesty, failure to account and uninsured loss.

Some points to note:

- A private individual is someone dealing with a regulated person on a personal matter e.g. buying or selling their own house.
- The term “businesses” includes companies, sole traders, partnerships, unincorporated associations and mutual associations. It also includes individuals not dealing with the law firm on a personal matter, for instance, if they are buying an investment property.

<b>Claimant Type</b>	<b>Loss due to the dishonesty of a regulated person</b>	<b>Failure to account for money causing hardship</b>	<b>Loss which should have been insured</b>
Private Individual	Eligible	Eligible - will be assumed to suffer hardship	Eligible
Business with turnover MORE than £2m a year	Not eligible	Not eligible	Not eligible
Business with turnover LESS than £2m a year	Eligible	Eligible if able to show hardship	Eligible



Charity or trust with turnover MORE than £2m a year	Eligible if able to show hardship to its beneficiaries	Eligible if able to show hardship to its beneficiaries	Eligible
Charity or trust with turnover LESS than £2m a year	Eligible	Eligible if able to show hardship to its beneficiaries	Eligible

The applicant must provide evidence to prove that they are eligible. We may also ask for further evidence. For instance, we may ask a company for its annual accounts to see its turnover figure. If an applicant refuses to provide this evidence, we are very likely to reject their claim as we will not be able to establish that they are eligible for a payment.

If we are satisfied that an applicant is eligible, we can then go on to consider whether the application comes under one of the three claim categories where we can make payments.

## The three claim categories

### Loss as a result of dishonesty<sup>2</sup>[\[#n2\]](#)

For an application to fall within this category, we need to be satisfied on three elements:

- Evidence of dishonesty by an authorised individual or firm (or by their employee, manager or owner).
- The applicant suffered, or is likely to suffer, loss as a direct consequence of that dishonesty.
- The activity causing the loss was of a kind which is part of the usual course of a regulated person's legal business.

#### Is there dishonesty?

To decide whether there has been dishonesty, we apply the following test: did the regulated person act dishonestly by the ordinary standards of reasonable and honest people and did they know that by those standards they were acting dishonestly?

[Read further guidance on the test for dishonesty.](#)

[\[https://consultations.sra.org.uk/solicitors/guidance/general-dishonesty/\]](https://consultations.sra.org.uk/solicitors/guidance/general-dishonesty/)

We need to make a finding of dishonesty to be able to make a payment under this heading. The consequences of a finding of dishonesty against a regulated person are serious and may lead to disciplinary action against them. For this reason, we ensure we are fair by giving the regulated person a chance to comment on the application. These comments may provide insight into the person's state of knowledge in

relation to the second limb of the test for dishonesty, and will be taken into account in reaching a decision.

Typical examples of dishonesty include:

- excessive overcharging
- stealing money from a trust or an estate
- stealing the sale proceeds in a property transaction.

### **Did the dishonesty cause the loss?**

If we are satisfied that there has been dishonesty, we then consider whether the applicant's loss was caused directly by that dishonesty. Sometimes this is simple. For instance, where the firm's accounts show a client's money being improperly paid into a solicitor's private account, or where a solicitor has excessively overcharged and taken payment from money held for a client.

However, this may not always be the case and we may need to investigate further.

#### Example 1

A solicitor routinely took money from clients on account of his costs. However, our investigation found that often the work was not done. We brought proceedings against him before the Solicitors Disciplinary Tribunal, on the basis of several cases where clients had lost out and been lied to. He was found guilty of dishonesty and struck off.

We received an application for £3,000 which a company had paid on account of costs. No work had been done by the solicitor. The facts relating to the application were very similar to those which the SDT had found to be dishonest, although there was less documentation to support this application.

In light of the similarity in the cases and the SDT finding, we were able to decide on the balance of probabilities that the solicitor had acted dishonestly in this case a payment was made.

It is worth remembering that the evidence we require when we make our decisions is based on the balance of probabilities. Therefore, we do not need the same level of evidence that would be needed, for example, for a criminal prosecution based on dishonesty.

### **Failure to account causing hardship**<sup>3</sup> [\[#n3\]](#)

We need to be satisfied on three elements to make a payment under this category:



- A failure to account for money by an authorised individual or firm, (or by their employee, manager or owner).
- The applicant suffered or is likely to suffer hardship as a direct consequence of that failure to account.
- The activity causing the failure to account was of a kind which is part of the usual course of a regulated person's legal business.

### **Failure to account for money**

We need to establish that the regulated person has failed to account for money belonging to the applicant. This means showing that the money was being held on behalf of the applicant and that the person did not use it for the intended purpose. This can include, for example, not paying the money from a house sale to the seller, not paying to a medical expert the fee paid by the client for that purpose, or not paying to the client damages won in litigation.

The rules also expressly state [4](#) that where a client pays for work which is not completed, we can treat it as a failure to account. A common example of this is not dealing with Land Registry formalities after a property purchase.

We need evidence of the transaction being dealt with, that the regulated person held the money claimed, and that the applicant suffered a loss as a direct consequence of the regulated person failing to account to them.

### **Hardship**

The tables in the section on eligibility above show when it is necessary for an applicant to show hardship.

Where private individuals have dealt with the solicitor on a personal matter, we will assume that hardship will be suffered. [5](#) Therefore, they do not need to prove hardship.

However in the case of a business, we adopt a materiality test and assess hardship. We do this by considering evidence of the applicant's financial position. We look at their assets and liabilities, the proportion of their income/profit the loss represents and the impact a refusal to make a payment might have on them financially. For instance, would it affect their ability to continue operating by not being able to pay suppliers or employees? Would it cause them problems in meeting debt payments? We will consider all relevant evidence to assess if the applicant can show that hardship has been or will be suffered.

Where the applicant is a charity or a trust, we consider whether their beneficiaries will suffer hardship. For example, a homeless charity may be able show that without a payment from the Compensation Fund, their

ability to provide food and accommodation will be directly limited. This will be evidence of hardship to the beneficiaries of the charity.

The applicant must provide sufficient evidence to prove hardship. They may do this in any way they think appropriate, for example, evidence about the impact on their financial stability, ability to meet their charitable objectives or more. If an applicant refuses to provide this evidence, then we are very likely to reject the claim as we will not have the evidence needed to show hardship as required to make a payment under this category.

#### Example 2

A sole trader paid £800 on account of costs to a solicitor to deal with a licensing matter. We intervened into the firm. The solicitor had done some of the work needed, but it was not completed. The sole trader made a claim for return of the costs. There was no suggestion of dishonesty by the solicitor and so the only basis for the sole trader to make a claim was a failure to account causing hardship.

We treat uncompleted work which has been paid for as a failure to account, so that part of the test was met. But, the sole trader's accounts showed a very healthy profit and they could not show how hardship would be caused by the loss of £800. The claim was rejected on that basis.

#### **In the usual course of a regulated person's legal business**

Where a claim is based on a loss caused by dishonesty or by a failure to account causing hardship, the applicant also needs to show that the activity was of a kind which is part of the usual course of a regulated person's legal business.

In most cases, it will not be difficult to show this. However, the more a transaction differs from the types of usual legal services provided by firms we regulate (for example, giving legal advice or dealing with conveyancing, probate, litigation or matrimonial cases), the more likely it is that the activity is not usual legal business or any legal business at all. For licensed bodies (or Alternative Business Structures) our rules specifically provide that we will only cover losses caused in performance of the activities that we regulate, as opposed to other activities that the body may undertake. [6 \[#note6\]](#)

#### Example 3

A client paid £300,000 to a solicitor to hold in anticipation of a future property deal he said he was working on. However, nothing else happened for 2 months and the client then told the solicitor to pay the money to a third party. Only half of the money was paid. We intervened and found that there was no money in the client account. The client

made a claim on the Fund for the balance of the money. The claim was rejected after we had investigated as we found that the client was in fact a fraudster, who was intending to money launder the funds through the solicitor's client account. There was in this case never any actual transaction which would have formed the usual part of a regulated person's business.

#### Example 4

An applicant made payments to her solicitor to invest in art works via a company. The solicitor's involvement was only to facilitate the payment to the third party, no legal advice was given. The money was paid to the company but the applicant did not receive the art work. The whole deal was in fact a fraud. We rejected the applicant's claim on the Fund, as the solicitor was only providing banking facilities to the client and that is not part of the normal business of a regulated person.

#### **Uninsured losses**

The final claim category where we may be able to make a payment, is where a regulated person should have had professional indemnity insurance to cover a claim resulting from a loss, but did not. [7](#)

An example would be where a solicitor negligently failed to obtain a local search when advising on a house purchase and as a result of this failure the client's house was found to be worth much less due to a proposed new road bypass. The client tries to recover the money from the solicitor who reveals he is not insured and does not have the funds to compensate the client.

An applicant will need to show that:

- they have suffered a loss
- the loss was caused by something for which the authorised individual or firm (or their employee or manager) has civil liability
- the person should have been insured for the loss under our professional indemnity insurance requirements, but was not.

## **Should we make a payment?**

The Compensation Fund is a discretionary fund. Therefore, even if any of the categories for payment are satisfied, we still need to consider whether to make a payment in the particular case.

The key factors we consider when deciding how to exercise that discretion are set out in the Rules and explained below.

### **Is it a type of loss we will not cover (Rule 8)?**



This rule contains a number of situations where we will not make a payment. The most common ones that we encounter include:

- A loss caused by negligence by the regulated person. This is because the firm will have insurance against negligence so the applicant should be able to claim on the insurance. (If the firm does not have insurance then, as explained above, it may be possible to apply to the Fund).
- Personal and trading debts of the regulated person. We aim to protect people where a regulated person is dealing with a legal matter. Where a loss is for a debt which is outside of that, for instance for unpaid rent, or money owed to a supplier, we will not cover these.
- Interest the regulated person had agreed to pay their client is excluded.
- A loss which is caused by the dishonesty or failure to account, but is not part of the money lost (ie indirect loss).

#### Example 5

A client had agreed to buy a property for £100,000. He intended to renovate it and sell on for an expected profit of £40,000. The client paid £100,000 to a solicitor who stole the money. The client was then not able to buy the property. The client claimed £140,000. This was the £100,000 purchase price, plus the £40,000 potential profit. The Fund paid £100,000 to the client, as that was a direct loss caused by the solicitor's dishonesty. However, the claim for £40,000 was rejected as, while this resulted from the theft of the money, it was not part of the money stolen but rather an indirect loss.

### **Are other people also responsible for the loss (Rule 10)?**

Sometimes an applicant will have used other advisers as well as their lawyer. This could be, for instance, an accountant or surveyor. The Fund is intended to protect against loss caused by people we regulate doing work which we regulate. Therefore, if the applicant's loss (or some of it) was caused by another person, we will take that into account and we may reduce any payment or even refuse to make a payment if the loss was mainly caused by another adviser.

Where we license a company that has several different professionals working in it, we will only consider a payment for a loss relating to an activity we regulate. For example, where a solicitor and a surveyor are in partnership and a client is caused loss because of a fraudulent valuation by the surveyor, we will not consider an application for loss because we do not regulate that activity.

#### Example 6

A solicitor and an accountant are named as joint trustees on a family trust. Over a period of years, between them they take £20,000 in costs from the trust, although no work has been done.

The beneficiaries of the trust claim £20,000 from us. We establish that the solicitor and accountant shared the costs equally and that each should therefore be seen as equally responsible for the loss of the money. We make a payment of £10,000 relating to the solicitor's responsibility for the loss.

## **Was the application made within the time limit (Rule 11)?**

An applicant must send in their application within 12 months of becoming aware of their loss, or from when they should reasonably have become aware of it. We can allow a late application and will consider all the circumstances when deciding if we should still deal with the application even though the time limit has passed.

The applicant must provide a reasonable explanation of why they have delayed their application beyond the 12 month period. Reasonable explanations might include serious illness, or incapacity such that the applicant found it impossible to make an application within the timeframe.

### Example 7

A solicitor had not accounted to the applicant for £11,000 proceeds of a house sale. The applicant sent in her claim 2 years afterwards. She was elderly and had been ill. She also said she was distressed and did not know what to do. As soon as she was well enough, she took advice from the Citizens Advice Bureau who told her what to do and she made a claim straight away. We accepted her application.

## **Does the applicant have other ways of recovering the loss (Rule 13)?**

We may refuse, or reduce, a payment where the applicant can recover their money in another way. For example, by claiming against the indemnity insurer of the firm, taking legal action against the regulated person, reporting dishonest behaviour to the police or taking bankruptcy/insolvency proceedings.

We can require applicants to take action, but will only do so when we consider that such action is proportionate. When assessing this, we may take into account the following issues:

- Does the applicant have any insurance which may cover the loss?  
Increasingly, people have some protection in their household



insurance or they may have protection from their credit card provider if they have paid money by credit card .

- Could the regulated person's indemnity insurer cover any of the loss? For instance, we may know that an insurer is dealing with and making payments on claims from clients of an intervened firm where the firm delayed paying Stamp Duty Land Tax leading to penalties for the clients. If an applicant sent a claim to us based on similar facts, we would tell them of the insurance position and then expect them to make a claim on the insurance before we considered the claim.
- If there is no insurance or the regulated person's indemnity insurer refuses the claim (for example, because of dishonesty), we may consider the situation of the regulated person when deciding if it is proportionate to expect the applicant to first take legal action against them to recover their losses. For example, if the regulated person has moved abroad, or their whereabouts are unknown, then any potential action against them for recovery becomes more difficult and expensive and is not likely to be proportionate.
- Who is the applicant? For example, is it a private individual with little experience of legal matters, or a corporate client with solicitors acting for them? We may expect the represented corporate client to take more steps to recover the loss than the individual.
- What is the likely timescale for any alternative recovery action and what are the prospects of success? If any action is likely to be very lengthy, or has little prospect of success, we are not likely to require an applicant to take it.

We can in certain circumstances make a payment to the applicant for the costs of litigation to recover the loss if the costs are proportionate to the amount of the loss, or it was necessary to incur them for the purpose of the application.<sup>8</sup> We will usually consider such costs to have been necessary where, for example, we have specifically told the applicant that they must take such legal action before we will consider their claim.

### Example 8

A solicitor stole money from a number of clients and bought a number of properties with the money. We received two similar claims, one from an elderly person living in a care home with little experience of the legal process, the other from a successful business woman with considerable experience of legal matters and with solicitors acting for her.

We required the business woman to take steps to try to recover the money from the solicitor. They bought a claim through the courts and ultimately succeeded in recovering the money stolen.

We did not ask the elderly person to do the same and considered their claim without requiring any further steps.

## **Has the applicant contributed to their own loss (Rule 19)?**

If an applicant has contributed to their loss, we can reduce or reject their application. We will consider how far the applicant caused the loss themselves. Our decision will be specific to the facts of each case, but examples include:

- entering into investment dealings without proper investigation
- not pursuing a loss promptly and therefore missing a chance to recover the money
- the applicant's own behaviour was dishonest or reckless
- receiving a cheque from a firm, but failing to pay it into their bank before the cheque expired
- using a stamp duty land tax avoidance mitigation scheme, which the applicant knows is unlikely to work, or is unlawful.

## **Do we need to make a deduction from any grant to make sure the applicant is not in a better position as result (Rule 20)?**

We may decide to deduct from any grant the costs that would otherwise have been due to the regulated person on the basis that the applicant should not be placed in a better position as a result of the grant than they would otherwise have been. This might arise where the applicant has already recovered a portion of the funds or is likely to do so.

## **Emergency payments**

Although we try to deal with all applications as quickly as possible, it can take several weeks to gather and consider evidence before making a decision. Complicated cases can take much longer.

We do, however, have an emergency process to make payments more rapidly.<sup>9</sup> We can only do this where the payment is needed very urgently. Typically this may be needed on the day we intervene, and close down a law firm. When we intervene into a firm, we freeze all money the firm was holding. Until we complete a detailed analysis of the firm's accounts, that money cannot be used. There may be clients of the firm who need urgent access to the money held in the firm's accounts, for instance, to complete on a house purchase, or to pay off a debt.

Many of the points above still apply:

- An emergency payment can only be made to someone who is eligible for a payment from the fund. The criteria above for private individuals and businesses still apply.



- We still need to have legal power to make an emergency payment. Usually, it is clear that the money is in the frozen accounts and we will treat this as a failure to account.
- We will still need evidence of the transaction and proof of the solicitor receiving the money. We may well be able to obtain this ourselves if we are in the firm's office closing it down.

## Maximum payment

Rule 17 sets out a maximum payment limit of £2 million for any application. Rule 24 allows us to waive this rule.

### Example 9

A child suffered brain damage in a car accident caused by a drunk driver. As a result, the child needed permanent medical care. A solicitor acted for the family in litigation and settled the case for £2.7m. However, he informed the family that the case was settled for £350,000. He paid this to them and stole the rest of the money.

The family became aware of the theft and claimed £2.35m which exceeded the maximum payment. We waived the limit and paid the full sum claimed.

## Costs

We can consider paying costs to the applicant in three situations (as set out Rule 15):

### Costs of litigation

As set out above, we can in certain circumstances make a payment to the applicant for the costs of litigation, if the costs are proportionate to the amount of the loss, or it was necessary to incur them for the purpose of the application. [10](#)

### Costs of making the application to the Fund

Most applications are straightforward and do not need a professional, such as a legal adviser, to be involved. However, where we make a compensation payment, we can consider paying the costs of a professional adviser who helped with the application if such costs were incurred necessarily and exclusively in connection with the application. [11](#)  
[11](#) Again, we will look at each case individually and consider what is reasonable bearing in mind the complexity of the issues.

### Costs for completing legal work

An application may include the legal costs of putting right, or finishing off something that the regulated person should have done.<sup>12</sup> For instance, if the applicant paid the regulated person to do work which they failed to do, or failed to complete and the applicant has gone on to pay someone else to complete the work, we may consider reimbursing, or contributing to these additional costs. We will only pay such costs which are reasonable and if they were necessary to incur.

A common example is where an applicant had paid for a property purchase. This would include dealing with Stamp Duty Land Tax and Land Registry requirements. If these were not done, the applicant will need a new solicitor to finish the work and will therefore pay twice for this.

This is straightforward and routine work. We would not expect to see, for example, a partner spending several hours on work that can be done by a junior person fairly quickly.

Therefore, we provide guidance on the amount of costs we will pay in these circumstances.

[Read guidance on cost payments](#)

[\[https://consultations.sra.org.uk/solicitors/guidance/general-recovering-costs-payment-third-parties/\]](https://consultations.sra.org.uk/solicitors/guidance/general-recovering-costs-payment-third-parties/)

## Payments to regulated persons

We can make a payment from the Fund to a regulated person in some situations.<sup>13</sup> This will usually be by way of a loan, but we will look at the ability of the regulated person to repay the loan and the likelihood of them doing so. In very exceptional circumstances we may consider making a grant if, we are, for example, satisfied that the regulated person will not be able to repay any loan.

In making a loan or grant, we need to be satisfied that:

- the regulated person has suffered or is likely to suffer loss because of their liability to clients
- that loss has been caused by their current or former employee or manager/fellow manager. This means that a loss caused by a party outside the firm, for instance via a cyber crime attack, is not covered
- they are fit and proper to receive a grant, by which we mean that they have not received a benefit from any misappropriation or failure to account
- there is no other way they can make good the loss.

### Example 10

One of the partners in a two partner firm, steals most of the money in the client account and disappears. The applicant (the other partner) is

not involved in any way and is cooperating with us and the police. He has made a claim on the firm's insurance, but the insurer has not yet accepted liability. The partner is also trying to re-mortgage his own property to replace the money. However, a number of client matters need money urgently and any re-mortgage or insurance is not going to be available in time. He applies to the Fund for a loan. We consider the following:

- The test is satisfied as the theft was by the practitioner's partner and the applicant is liable for the loss. He has no other way to replace the money in time to prevent harm to the clients.
- The practitioner has acted properly in trying to deal with the situation. He was not involved in the theft and has not benefitted from it in any way.
- Any payment is likely to be repaid shortly either through the insurer or the re-mortgage.
- We agree to make a loan to the applicant. We agree interest with him and a monthly repayment. We secure the loan with a charge on his house.

## **Appeals against our decision**

If we decide not to make a payment, or if we pay less than was claimed, we will inform the applicant and send them a copy of the decision which will contain our reasons. The applicant can appeal against that decision. The applicant must send us their appeal in writing within 30 days.