

Insolvency Code of Ethics Consultation Explanatory Note

Background

The Joint Insolvency Committee has identified ethics as an area which has drawn concern from many stakeholders in insolvency. Ethics is central to creating trust in the profession and thus a working group comprising representatives from a variety of insolvency stakeholders including HM Revenue and Customs, Max Recovery and representatives from the Recognised Professional Bodies (the RPBs) was created to consider whether amendments were needed in this area.

The working group has already recommended changes which have been implemented. These include changes to SIP 1 to give greater prominence to creditors that insolvency practitioners operate under a Code of Ethics and the requirement for insolvency practitioners to report other insolvency practitioners who fail to comply with legislation and whose actions discredit the profession.

The working group has also considered concerns expressed about whether certain identified behaviours would be contrary to the Insolvency Code of Ethics (the Code). An exercise carried out across the RPBs identified that the behaviours were covered by one or more of the 5 fundamental principles but that it would be beneficial to revise aspects of the Code of Ethics to strengthen and clarify its application.

Each of the RPBs, except for the Insolvency Practitioners Association (IPA), regulate a wider body of members than insolvency practitioners. The Code of Ethics adopted by ACCA, ICAEW, ICAS and CAI is based on the Code of Ethics for Professional Accountants of the International Ethics Standards Board for Accountants (IESBA). IPs licensed by the IPA may also be qualified accountants and therefore subject to the IESBA code in their wider practice.

IESBA are in the process of carrying out a comprehensive review of the structure and drafting of the IESBA Code of Ethics for Professional Accountants aiming to enhance its understandability and usability, thereby facilitating its adoption, effective implementation, consistent application, and enforcement. Further details on this work are available on the [IESBA website](#).

It is anticipated that a restructured IESBA Code will be finalised for approval by the end of 2017. Following approval, this is likely to result in the Code of Ethics adopted by the UK accountancy bodies being revised in line with the IESBA Code.

The working group has considered whether any possible changes to the Code should be made alongside revisions which can be expected to be required to ensure a consistent approach and format following the completion of the IESBA project. It is currently anticipated that any revised Code of Ethics would not become effective for the UK accountancy bodies until mid-2019.

The working group concluded that given this is still a significant time away and that there is no certainty around this timescale that it may be more beneficial to carry out an interim refresh of the Code and to seek views on fundamental areas of concern at this stage.

Approach

In constructing a revised draft Code the following approach has been adopted:

- The language adopted is more active than passive. This aims to provide greater clarity over requirements.
- The statutory objectives for RPBs introduced by the Small Business Enterprise and Employment Act 2015 includes a requirement for authorising bodies to act in a way which promotes the public interest. It has been clarified that the Code forms part of a framework which RPBs use to meet this objective.
- Sections on Transparency and Professional Competence and Due Care previously contained in Part 2 (Specific application of the Code) were considered to be more appropriately located in Part 1 as they were of more general application.

- The Code sets out a framework under which threats to the fundamental principles can be identified, evaluated and responded to. The revised draft includes new paragraphs on how to resolve an ethical conflict.
- Some of the language and terms have been updated to reflect changes made in recent years to the IESBA Code of Ethics to ensure that the Code does not conflict with the wider Code of Ethics adopted by the accountancy RPBs.
- Updating the Code to reflect environmental changes under which IPs operate. Since the Code was introduced the number of IPs who are employees rather than principals in firms has increased. Such IPs have less influence over the operation and strategy of the firm.
- It is also intended that the Code should be supplemented by additional guidance to assist IPs consideration of how the Code should be applied to specific situations. This will also allow a more timely response to developing practices and behaviours identified.

Further areas for consideration

Commercial practice has moved substantially since the Code was first introduced. Business structures and non-traditional routes to market have developed. Activities leading to insolvency appointments, particularly in the personal/consumer debt insolvency arena, bear little recognition to the landscape when the Code was introduced. In particular, the use of advertising, websites, lead generators or purchasing of data has brought a new complexity to this area.

Similarly, the services offered by firms or groups in which IPs operate are far greater than the accountancy or legal practice in which IPs have traditionally been associated with.

Part 2 of the Code sets out how the Code should be applied in relation to specific matters. Consideration has been given to whether the Code remains applicable in respect of these areas and in particular Section C (Obtaining specialist advice and services), Section D (Fees and other types of remuneration) and Section E (Obtaining insolvency appointments).

These sections have been identified as being of key concern given developments in commercial practice since the Code was last reviewed. It is felt that this area is of such fundamental importance that specific consultation on stakeholder views should be undertaken prior to deciding on whether the Code should be revised in these areas.

The consultation seeks views on whether, and if so how, the Code should be amended in these areas.

Obtaining specialist advice and services (Part 2 Section C) / Fees and other types of remuneration (Part 2 Section D)

The Code currently provides that:

- accepting referral fees or commissions is a significant threat to the fundamental principles
- (notwithstanding the threat) referral fees or commissions can be accepted if to the benefit of the insolvent estate
- where referral fees or commissions are to be accepted, they should be disclosed to creditors in advance, or if received prior to accepting an appointment the amounts previously received disclosed to creditors
- referral fees or commissions should not be accepted for the benefit of the IP or the practice

The Code's application in relation to fees and other remuneration has arguably not kept pace with changing business structures and services now being offered. The Code does not specifically deal with, for example, the referral of work to other companies within a group which may not generate a referral fee or commission but may improve turnover and profit in that company and which ultimately may provide a benefit to the IP or the beneficial owners of the practice.

Questions which have arisen during discussions include:

- if referral fees/commissions are a significant threat to the fundamental principles, should there be differentiation and acceptance where there is a benefit to the estate?
- Should there just be a complete prohibition on acceptance of referral fees/commission?

- Should there be stronger prohibitions or conditions about referrals to associated businesses whether directly or indirectly in relation to the insolvency appointment?

Questions 8 to 13 and 17 and 18 seek your views in this area.

Obtaining insolvency appointments (Part 2 Section E)

One of the founding principles set out in Section E is that due to the special nature of insolvency appointments, the payment or offer of any commission for or the furnishing of any valuable consideration towards the introduction of insolvency appointments is inappropriate.

The Code states that insolvency appointments have a 'special nature' and thus there is a need to protect abuse in obtaining appointments where they are perhaps not appropriate.

Views have been expressed that due to the commoditisation of certain insolvency processes (particularly those used to address consumer debt) that the 'special nature' is diminished or indeed that it is not at all clear what the special nature is.

Questions which have arisen during discussions include:

- Is it still the case that payment for insolvency introductions (where not prohibited in legislation) should be considered inappropriate when for example the Financial Conduct Authority handbook does not prohibit payment to lead generators by those providing debt advice or debt adjusting services?
- Given complexities around what is and what isn't payment for the introduction of an appointment, should these be permitted but with new requirements surrounding disclosure of the source and arrangements with the source of introductions?
- Does the prohibition influence other behaviour, for example, the payment of payments which are specifically permitted in statute or professional standards (such as Statement of Affairs fees or fact find fees) and which could be used to pay disguised referral fees?
- The Code provides an exception to the general rule by permitting payments to be made to employees as part of a remuneration package. Does employment status mitigate the risk and hence justify the exception?

Questions 14 to 16 and 17 and 18 seek your views in this area.