



## Consultation on guidance on aspects of the ICAEW Code of Ethics:

Public interest responsibility of accountants, identifying and  
managing conflicts and determining the basis of charging fees

This consultation document is issued by the Institute of Chartered Accountants in England and Wales (ICAEW) and may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title is quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

For more information on this consultation please contact [ethicspolicy@icaew.com](mailto:ethicspolicy@icaew.com).

[icaew.com](http://icaew.com)

©ICAEW 2015

All rights reserved.

# Contents

<b>1. Background to consultation</b>	<b>2</b>
1.1 Introduction	2
1.2 The need for guidance	2
1.3 Additional guidance	3
1.4 Status of the guidance	5
<b>2. Request for comments</b>	<b>6</b>
2.1 Commenting on draft guidance	6
2.2 Consultation questions	6
<b>3. Draft guidance for members</b>	<b>7</b>
3.1 Public interest responsibility of accountants	7
Introduction	7
Responsibility of individual members	8
Other sources of advice and information	11
3.2 Identifying and managing conflicts	12
Introduction	12
Considering whether there is an actual or a potential conflict of interests	12
Consequences of managing a potential conflict of interest	14
3.3 Determining the basis of charging fees	18
Introduction	18
General considerations	18
Contingent fees	19
Documentation	21

# 1. Background to consultation

## 1.1 Introduction

The purpose of this section is to set out the background to this consultation on ICAEW draft guidance for members (the draft guidance) on aspects of the ICAEW Code of Ethics (the Code)<sup>1</sup> highlighted by the MG Rover disciplinary case.

## 1.2 The need for guidance

### The MG Rover disciplinary case

In 2005 the MG Rover car company ceased trading with debts of over £1bn. In view of the size of the company and the circumstances surrounding its collapse, the UK government commenced an investigation. The Financial Reporting Council (FRC) also commenced an investigation into the conduct of the company's accounting advisors and auditors.

In 2012 the FRC, exercising its right to take direct disciplinary action against members of ICAEW in cases where there appear to be important issues affecting the public interest, laid disciplinary complaints in respect of certain corporate finance engagements undertaken in 2000 and 2001. The complaints, based on the Code's predecessor called the Guide to Professional Ethics (GPE), involved failure to consider the public interest, failure to identify and act on conflicts of interest, and failure to safeguard against threats to objectivity, arising from the structure of the fees for the work.

The initial and appeal processes under the FRC's disciplinary scheme were completed in 2015. The discussions in the reports of the tribunals raised interpretational questions on some parts of the GPE as regards the public interest, conflicts of interest, and fees. These are the subject of the proposed guidance.

### The Code of Ethics

ICAEW's consideration of the issues raised by the MG Rover case and of the need, if any, for further guidance has been positioned in the context of the current version of the Code which replaced the GPE in 2006. The Code is derived from the International Ethics Standards Board for Accountants (IESBA) Code of Ethics, with additional material.

The ICAEW and IESBA Codes are based around a set of fundamental principles of ethical behaviour, which are:

- Integrity;
- Objectivity;
- Professional competence and due care;
- Confidentiality; and
- Professional behaviour.

This principles-based approach to ethical behaviour is designed to ensure that high standards of professional behaviour are applied in all circumstances, while allowing the flexibility to ensure that the public receives objective, competent and diligent professional service in respect of often complex financial matters.

---

<sup>1</sup> [www.icaew.com/ethics](http://www.icaew.com/ethics)

The replacement of the GPE with the Code did not result in any substantive change to the ethical obligations of ICAEW members. However, most parts of the GPE were repositioned and/or reworded at that time.

### 1.3 Additional guidance

The draft guidance in section 3 is prepared on the basis that the issues raised by the MG Rover case do not require changes to the Code, but that there are aspects of members' responsibilities relating to the public interest, conflicts of interest and fees, where guidance on the requirements of the Code could usefully be given for the avoidance of doubt.

ICAEW has accordingly issued for consultation three draft guidance notes for members developed by its Ethics Standards Committee. The formal position of ICAEW on the matters covered will be finalised after consideration of the responses to this consultation.

Set out below is an explanation of the approach adopted in each draft guidance note.

#### Public interest responsibility of accountants

References to the profession's and individual accountants' public interest responsibilities have been included within the Code and the GPE for many years. In the current version of the Code they are included in the Introduction section, principally in paragraph 100.1.

The responsibility of the accountancy profession as a whole to act in the public interest is manifested in a number of ways: technical and behavioural standards (including the Code); an infrastructure of training, development, monitoring and enforcement to help ensure those standards are applied; and programmes to advance thinking and develop guidance to further the profession's contribution to business and society. These processes evolve over time and, as a result, the profession is able to respond to changes in society's expectations.

The question addressed by the tribunals was whether the public interest responsibilities of the individual professional accountant amounted to something separate from adherence to the fundamental principles and related requirements of the GPE. The appeal tribunal took the approach that the public interest responsibility of an individual professional accountant is an obligation to act in accordance with the fundamental principles around which the GPE (and the Code) have always been structured<sup>2</sup>. The draft guidance takes the same approach.

That said, the report of the appeal tribunal did note that the appeal tribunal had found the GPE to be 'vague and unhelpful' when explaining the accountants' responsibilities in respect of the public interest. Hence the draft guidance to which this document relates.

The report considered, for the sake of argument, how a separate free-standing public interest obligation, were it to exist, might be applied to particular engagements. For instance:

'... Take as an hypothetical example a proposed takeover bid by a foreign company of a large UK manufacturer. Let us assume that there is a risk, even a known risk, that if the takeover is successful the predator will close down UK factories. The predator approaches UK lawyers and accountants

---

<sup>2</sup> For example at paragraphs 70 and 72 'Report of the Appeal Tribunal: Deloitte & Touche and Mr Maghsoud Einollahi' Financial Reporting Council 30 January 2015, <https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2015/January/Outcome-of-appeal-by-Deloitte-Touche-and-Mr-Maghso.aspx>

for advice and other work for the purpose of the takeover. The UK lawyers undoubtedly are free to accept the instructions provided the proposed takeover and the work involved are lawful, that their proposed instructions involve no dishonesty or want of integrity, and they are competent to carry out the engagement. The [GPE] requires the accountant to take account of the public interest before accepting the engagement, but the question is how and to what extent? How is the public interest to be ascertained? Is it in the maintenance of a free market? Should the accountants assess whether the threatened factories have a real expectancy of continuation under their current ownership? Should they assess the possibilities of a friendlier takeover? Should they consult the government of the day?’

The discussion concludes: ‘We regard the suggestion, if it be made, that the accountants are not free to accept the engagement without considering the vague question whether the takeover is in the public interest as absurd.’<sup>3</sup>

The draft guidance note in section 3.1 works on the basis that the Code and the requirements within it are set taking into account the accountancy profession’s responsibility in respect of the public interest. The individual public interest responsibility of a member is therefore to apply the fundamental principles and related requirements of the Code, in all their professional and business activities.

However, as befits a principles-based code, the draft guidance reminds members that they need to apply the spirit, and not just the letter, of the Code. This is largely manifested in the Code in the fifth fundamental principle, professional behaviour, which includes a requirement to avoid actions which would be likely to discredit the profession. The draft guidance note in section 3.1 discusses this key requirement and the consultation questions in section 2 also address it.

It follows that when ‘deciding whether to accept or continue with an engagement or appointment’<sup>4</sup> the responsibility of members is to consider whether they can carry out the engagement or appointment while at the same time applying the spirit and letter of the Code.

The draft guidance illustrates the need to adhere to the spirit as well as the letter of the Code with a discussion of the requirement in paragraph 110.2 of the Code, that members do not knowingly associate themselves with misleading information.

## Identifying and managing conflicts

The principal conflicts-related issue in the MG Rover case arose because there were different parties within the group being advised, with different interests in the outcome of the engagements being undertaken. A charge that it was not altogether clear who the client was and that therefore conflicts of interest had not been addressed was therefore upheld.

The requirements of the Code and the GPE to identify and safeguard against threats to ethical behaviour caused by conflicts of interest are well established and there was no suggestion in the reports of the initial tribunal or the appeal tribunal, that there was any lack of clarity in this area.

The case does illustrate the important point that potential conflicts can arise within what might generally be considered to be one client, or employer. The draft guidance does not seek to identify

---

<sup>3</sup> Both quotes from paragraph 82, *ibid.*

<sup>4</sup> From paragraph 100.1 of the Code

every circumstance that might arise that would result in a conflict, but highlights this point and gives some examples of other circumstances in which conflicts can arise.

### **Determining the basis of charging fees**

The appeal tribunal upheld a charge that safeguards had not been put in place to ensure that, in the particular circumstances of the case, the basis of the contingency fees charged would not affect objectivity. Again, the requirements of the Code and the GPE about contingency fee arrangements and objectivity are well established and there was no suggestion of any lack of clarity in this area. Nevertheless, the draft guidance takes the opportunity to remind members of this obligation.

The report of the appeal tribunal and the draft guidance confirms, for the avoidance of doubt, that the Code does not (and the GPE did not) require the amount of a fee to be justified: this is a commercial matter.

The Code does require the basis on which the fees are to be determined to be made clear (paragraph 240.2a in the Code) and the draft guidance discusses this requirement, raising a number of practical matters to consider.

## **1.4 Status of the guidance**

The guidance, when finalised, will not form part of the Code. The purpose of the guidance notes is to act as a reminder for members of particular aspects of current Code requirements.

The discussion of the public interest responsibilities of the profession and of individual members has potential international consequences in view of the link between the Code and the IESBA Code of Ethics. The draft guidance would not apply other than to ICAEW members but a summary of the feedback to this consultation will be made available to IESBA.

In the UK and Ireland the principal accountancy bodies all base their codes of ethics on that of IESBA. Accordingly, the references in their codes to the public interest, conflicts of interest and fees are similar. ICAEW has shared and discussed the draft guidance with the bodies that comprise the Consultative Committee of Accountancy Bodies (CCAB)<sup>5</sup> and will continue to discuss the finalisation of the guidance with them, following assessment of the responses to this consultation. The CCAB bodies are seeking to ensure that the final guidance provides a common basis for interpreting their codes.

---

<sup>5</sup> ACCA, CAI, CIPFA, ICAEW and ICAS

## 2. Request for comments

### 2.1 Commenting on the draft guidance

ICAEW invites comments from stakeholders on the draft guidance included in this consultation in section 3.

Comments are requested to be sent by email to [ethicspolicy@icaew.com](mailto:ethicspolicy@icaew.com) by 23 March 2016. All comments will be considered a matter of public record unless privacy is requested.

Comments are welcome on any aspect of the draft guidance but particular attention is drawn to the questions included in section 2.2 below.

Further copies of this consultation paper are available at [icaew.com/ethics](http://icaew.com/ethics).

### 2.2 Consultation questions

#### Public interest responsibility of accountants

- Q1** Do you agree with the interpretation given of the requirements in the Code that the individual member's public interest responsibility as regards ethical behaviour is to comply with the spirit as well as the letter the Code? If not, what do you consider the public interest responsibility of an individual member to be and how should this be defined?
- Q2** What, if any, additional safeguards or other actions should members practically take, over and above those suggested in the draft guidance:
- a) When in doubt as to whether an action would discredit the profession?
  - b) To avoid association with activities that are likely to bring the profession into disrepute?
  - c) When the public would be likely to be interested in the outcome of the service or activity?
- Q3** A number of illustrative examples of considerations that might apply are given in the draft guidance. Are these helpful? Are there additional examples that could usefully be included to illustrate the issues discussed, or other aspects of the draft guidance note in section 3.1 where additional discussion would be helpful?
- Q4** Notwithstanding its intention, do you think that the draft guidance note in section 3.1 is inconsistent with the Code's requirements for members? If so, in what way?
- Q5** No change in the wording of the current Code itself is envisaged as necessary to clarify the issues discussed in the draft guidance. Do you believe there should be amendments to clarify the current position, and if so, what changes would you propose?
- Q6** Looking forward to future evolution of the Code, do you think that there are issues in respect of the matters addressed by the draft guidance note in section 3.1 that the accountancy profession should consider when evaluating potential future changes? If so, what?

#### Identifying and managing conflicts

- Q7** Do you have any comments on the draft guidance in section 3.2?

#### Determining the basis of charging fees

- Q8** Do you have any comments on the draft guidance in section 3.3?

## 3. Draft guidance for members

### 3.1 Public interest responsibility of accountants

#### Introduction

##### Public interest responsibility of the accountancy profession

1. ICAEW's charter of incorporation refers to the public benefit as one of the reasons for the Institute to be brought into existence. The accountancy profession's responsibility to act in the public interest is manifested in: technical and behavioural standards; an infrastructure of training, development, monitoring and enforcement to help ensure those standards are applied; and programmes to advance thinking and develop guidance to further the profession's contribution to business and society. These processes evolve over time and, as a result, the profession is able to respond to changes in society's expectations.
2. The behavioural standards are manifested in a code of ethics, which recognises that professional work requires the application of extensive judgement based on expert and often complex knowledge. For it to continue to be for the benefit of the public for the profession to exist, it is important for the public to have confidence that that judgement is applied in a trustworthy manner that will not result in that trust being discredited.
3. ICAEW's Code of Ethics (the Code) is based on that of the International Ethics Standards Board for Accountants (IESBA). The Code<sup>1</sup>, in common with the IESBA Code recognises the accountancy profession's public interest responsibility, and is based around a set of fundamental principles of ethical behaviour. This is consistent with ICAEW's original charter of incorporation, which referred to the public benefit as the core rationale for ICAEW to be brought into existence. The fundamental principles are:
  - **Integrity** – straightforwardness and honesty, including non-association with misleading information;
  - **Objectivity** – ensuring bias, conflicts and undue influence do not override professional judgement;
  - **Professional competence and due care** – maintenance of knowledge and skill and acting diligently;
  - **Confidentiality** – non-disclosure of confidential information unless there is a legal or professional right or duty to do so; and
  - **Professional behaviour** – compliance with law and regulation, and avoidance of actions which discredit the profession.

ICAEW believes that a principles-based approach to ethical behaviour provides the optimum combination of ensuring high standards of professional behaviour in all circumstances, while allowing the flexibility to ensure that the public receives objective, competent and diligent professional services in respect of often complex financial matters.

4. The profession's wider public interest responsibility is also taken into account by ICAEW and IESBA in setting the detailed requirements of the Code. Thus, for example, the Code includes requirements to override confidentiality in certain circumstances, ensure transparency where necessary and consider reasonable and informed public perception, based on knowledge at

---

<sup>1</sup> <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-a>

the time. The application of the fundamental principles is kept under review to ensure that it continues to be grounded in society's reasonable expectations of the profession's roles and responsibilities. The principles and requirements are supplemented by professional standards and guidance (specific to the service in question) that help to ensure members deliver objective professional advice and outputs which relevant stakeholders can rely on.

5. This guidance highlights matters for individual members to consider in order to apply the profession's public interest commitment that the Code is designed to meet. The guidance does not set out additional requirements and is not part of the Code or other regulation applying to members.

## Responsibility of individual members

6. Within the preamble that introduces the requirements of the Code, the Code states that professional accountants 'shall take into consideration the public interest and reasonable and informed public perception in deciding whether to accept or continue with an engagement'. It summarises the discussion on the public interest with 'Therefore, a professional accountant's responsibility is not exclusively to satisfy the needs of an individual client or employer. In acting in the public interest, a professional accountant shall observe and comply with this Code'<sup>2</sup>.
7. Given that the Code itself is set to take into account the profession's responsibility in respect of the public interest, members will discharge their individual public interest responsibility if they comply with the five fundamental principles and other detailed requirements that are in the Code<sup>3</sup>. That said, the fundamental principles are widely drawn: no professional operates in an ethical vacuum and the obligation to bear in mind the profession's public interest purpose can be characterised as an obligation to apply the Code's requirements in more than a token fashion.

## Discredit

8. The first four fundamental principles set out discrete and definable ethical obligations. The fifth fundamental principle, professional behaviour, encompasses an obligation<sup>4</sup> that members shall avoid actions that discredit the profession.
9. Actions bringing discredit include those which a reasonable and informed third party would conclude adversely affect the reputation of the profession. The Code makes it clear that the assessment of a member's compliance with this fundamental principle (and indeed any of the fundamental principles) must be made on the basis of the facts and information available to the member at the time of the action or omission in question. Members cannot anticipate how cultural, political or ethical norms may change subsequently and a member's actions or omissions can only be judged by reference to information available at the time.
10. It is very difficult to translate this general 'discredit' obligation into a precise rule or norm but if an accountant were to act in accordance with the fundamental principles in relation to a

---

<sup>2</sup> s100.1 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-a>

<sup>3</sup> s100.5 *ibid*

<sup>4</sup> s150.1 *ibid*

lawful transaction which comes to be regarded as against the public interest, that would not in itself, absent very unusual circumstances, amount to an act of misconduct.

11. Where a professional service can be provided while complying with the first four fundamental principles of the Code, therefore, in most cases it would be reasonable for members to conclude that the professional service provided is not against the public interest. Indeed, it would not be in the public interest for members to set themselves up to make broad political or philosophical judgements when deciding whether to accept engagements. The Financial Reporting Council's appeal tribunal in respect of the MG Rover disciplinary case considered this by way of an example in which an obligation to have regard to the public interest could compel an accountant to form a judgement as to whether enhanced profit for a business is a greater public good than increased employment levels. It concluded that it would be inappropriate for there to be such an obligation<sup>5</sup>. Similarly, the discredit obligation does not mean that members cannot act for clients whose legal activities are of a controversial nature with the general public, eg, tobacco or animal research. There is a clear public interest that such businesses, as long as they remain lawful, should have access to accountancy services.
12. That said, where there continues to be doubt as to whether providing a service or being associated with a client activity is likely to result in discredit, or any other breach of the fundamental principles, members may wish to undertake additional consultation of, for example, the ethics partner if there is one, another partner, ICAEW, or external sources (subject to maintaining appropriate confidentiality). The core duties are the same regardless of the service. However, where there is significant public interest in or reliance on the outputs (eg, reports, advice and opinions) of the member's work, the principles of objectivity and professional competence and due care are particularly relevant. In such cases, the member should consider whether appropriate procedures have been put in place.
13. Any threat would need to be assessed on an ongoing basis, as circumstances may change during the engagement or activity.

### **Association with misleading acts or information**

14. Services provided by members, whether to clients or employers, are frequently related to the provision or assurance of information. Core to the issue of discredit, therefore, is the extent to which information that members provide or assure can be considered reliable.
15. The fundamental principle of integrity in the Code includes a requirement for members not to knowingly be associated with misleading information<sup>6</sup>. This is therefore considered further below.
16. It is in the public interest for people seeking professional advice to be able to obtain advice as to how they may go about their affairs within the law. However, members need to consider the context in which it is expected that reliance will be placed on that advice. Members cannot require their clients to act in the public interest but can take responsibility for their own actions. The fundamental principles of integrity and professional behaviour in

---

<sup>5</sup> Paragraph 82, 'Report of the Appeal Tribunal: Deloitte & Touche and Mr Maghsoud Einollahi' Financial Reporting Council 30 January 2015, <https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2015/January/Outcome-of-appeal-by-Deloitte-Touche-and-Mr-Maghso.aspx>

<sup>6</sup> s110.2 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-a>

particular mean that members must not knowingly associate themselves directly or indirectly (and association can be subtle) with misleading acts or information. It would be contrary to the public interest for members to do so. Deliberate or reckless deception is often proscribed by law in any event and active assistance in a criminal activity is itself a crime.

17. Members are not generally<sup>7</sup> expected pro-actively to seek out intent by a client to mislead third parties, whether unlawfully or otherwise. The test is whether members come across evidence in the course of their work from which they can reasonably foresee that the overall result of the client's activities will be improperly to mislead third parties in respect of the matters to which the engagement relates. This does not of course mean that the member has an obligation to verify the absolute accuracy of every statement with which he or she is associated. Members will frequently prepare reports which may be attached to documents in which, for instance the client makes optimistic, but difficult to verify, statements about the prospects of the company. It is a matter of judgement whether a document is, at one end of the spectrum, mere puffery, or, at the other, is deceptive. The member's assessment of such matters can only be based on evidence available at the time but needs to be undertaken when taking on, and throughout, the engagement.
18. The member's involvement would lend an element of credibility to the information, regardless of whether an opinion is provided. Depending on the circumstances, it may be possible to correct the misleading impression through additional disclosure, or achieve disassociation by way of disclaimer. However, ultimately, disengagement may be necessary. Informing the third party of the deception could be contrary to the fundamental principle of confidentiality (although if of a significant scale, disclosure to appropriate authorities could be justified in the public interest)<sup>8</sup>.
19. Where such situations involve actual or potential conflicts of interest, the Code requirements<sup>9</sup> and supplementary guidance on identifying and managing conflicts of interest will be relevant.

## Examples

20. A number of illustrative examples of situations in which considerations of association and discredit may become relevant are set out below:
  - a) **Restricted financial engagements** – A member is engaged by an energy company to assist in finding a buyer for an asset with a significant environmental restoration liability attached to it. The engagement includes reporting on certain financial information, but specifically not on the liability. However, in the absence of disclaimers, the member's very involvement could be seen to be lending credibility to all of the information provided, whether reported on or not. In assessing whether the engagement can be accepted, the member would need to consider whether the scope of it was designed deliberately narrowly to give a false impression. Would the net effect of the information disclosed be to mislead the intended audience? It should be noted that members cannot be held responsible for subsequent usage of the information by third parties in different ways to that originally intended. As noted above, members need not seek out intent to mislead, but must take into account information of which they have become aware.

<sup>7</sup> Specific requirements on, for example, detecting fraud, are included in standards applicable to audit work.

<sup>8</sup> s140 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-a>

<sup>9</sup> s220 and s221 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-200-230> for members in practice and s310 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-c> for members in business

- b) **Tax avoidance** – As noted above, it is in the public interest for people seeking professional advice to be able to obtain that advice, as to how they may go about affairs within the law: the profession’s responsibility to the public interest does not mean members never advising someone how to save tax. However, the fundamental principles require members to comply with the law and ensure that they are not associated with misleading information. This is particularly important in respect of arrangements where the tax treatment depends on the motivation behind the arrangement. In this situation the safeguard is full disclosure of any proposed arrangements and rationale to the tax authorities in a manner that allows the authorities to make a properly informed judgement. Guidance on Professional Conduct in Relation to Taxation<sup>10</sup> is available for members, which covers responsibilities in this area.
- c) **Accounts preparation** – It is not uncommon practice for members in practice to prepare sets of financial statements on behalf of clients and file them at Companies House, bearing the name of the firm of chartered accountants, even if there is no assurance opinion or compilation report given. As the financial statements would clearly be seen to be relating to the work of the member, this would add an element of credibility through association and the member would need to consider whether that credibility is unwarranted.
- d) **Insolvency** – Insolvency is an area of practice where the law (which will always prevail over the requirements of the Code) often specifies particular actions in particular situations. Where, for example, the member would determine in other situations that disclosure to all creditors is necessary to comply with ethical requirements, the law specifies in this situation that the member can obtain permission for an action from the court – which is in essence acting as the reasonable and informed third party on behalf of the creditors.

## Documentation

- 21. Where there are considerations to be made, members are encouraged to document the reasoning and other evidence which supports the evaluation of threats and safeguards. The act of documenting can help with thinking through the issues and the documentation helps to preserve the consideration applied. That said, the Code does not generally require documentation of considerations, except in respect of certain audit-related matters. A lack of documentation does not necessarily create a threat to compliance with the fundamental principles, or mean that a relevant consideration or action has not happened. Not documenting the steps which have been taken cannot therefore in itself amount to misconduct.

## Other sources of advice and information

- 22. The Code’s ethical conflict resolution framework<sup>11</sup> provides a useful framework for consideration of ethical challenges.

---

<sup>10</sup><http://www.icaew.com/~media/corporate/files/members/regulations%20standards%20and%20guidance/tax/taxguide%200115%20tech%200215%20pcrt.ashx>

<sup>11</sup> Appendix to Part A of the Code, <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-a>

## 3.2 Identifying and managing conflicts

### Introduction

1. The Code of Ethics (the Code), is based on that of the International Ethics Standards Board for Accountants (IESBA). The Code<sup>17</sup>, in common with the IESBA Code, does not prohibit members from undertaking engagements or activities for clients or employers whose interests conflict with those of the member, or where different client interests conflict, provided that certain safeguards are able to be, and are, applied and, usually, informed consent obtained. However, on occasion, the threats to objectivity due to conflicts of interest may be of such significance that adequate safeguards cannot be established. In such cases the member will not be able to act for one or more of the parties.
2. This guidance highlights matters for members to consider in order to help apply aspects of the Code in various circumstances. In particular, it considers identification of relevant conflicts and, where appropriate, obtaining informed consent and applying appropriate safeguards. It does not set additional requirements and is not part of the Code or other regulation applying to members.
3. Although this guidance relates primarily to conflicts between different client interests and is therefore most relevant to members in practice, similar principles apply to conflict situations for members in business and those involving conflicts between the member and the client or employer.

### Considering whether there is an actual or a potential conflict of interests

4. It will often be evident when a potential conflict of interest with or between clients might exist.
5. Examples of situations involving potential conflicts between the interests of the member and the client include: providing strategic advice to a client on its competitive position while having a business interest with a major competitor; and advising a client on the acquisition of a business which the member is also interested in acquiring.
6. Examples of situations involving potential conflicts between clients include: advising two clients at the same time who are competing to acquire the same company, where the advice might be relevant to the parties' competitive position; and preparing valuations of assets for the vendor and potential purchasers.

#### Who is the client?

7. In some instances, actual or potential conflicts may not always be evident, often because of a lack of clarity as to who the client actually is, or because there is more than one, potentially conflicting, interest existing within what on the face of it is one client. It may be for example, that:

---

<sup>17</sup> s220 and s221 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-200-230> for members in practice and s310 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-c> for members in business

- there are different constituencies within a group, with different stakeholders. A member might for instance receive instructions from the chief executive of a company in relation to matters also affecting the interests of the company's subsidiary which has different stakeholders. Where there are such multiple interests the member needs to be careful to ensure that it is clear (throughout the engagement) to which party or parties the member's duty is owed;
  - the instructions are being received from an individual who represents a different stakeholder with a different set of interests from the client;
  - the individual who is instructing the member has personal interests that differ from the client organisation that he or she appears to represent.
8. In general terms, the member will be entitled to rely upon instructions from anyone with ostensible authority to represent the client. If the member reaches the clear view that the person giving the instructions is not acting in the interests of the member's client, the member should not carry out those instructions. If declining the instruction presents a quandary for the member, because he or she values the relationship with the person issuing the instructions, that may create a conflict between the interest of the member in retaining the relationship and the interests of the underlying client.

### **Conflicts within clients**

9. Members should consider whether the people engaging them, instructing them and relying on their work are different. Members need to take particular care to ensure the client is properly defined if the interests of those instructing the member (and others who can influence the conduct of the engagement) are not aligned with those of the client and/or other relevant stakeholders. Questions to be addressed include:
- Do those making the decisions have a fiduciary responsibility for other stakeholders? A fiduciary relationship is a legal duty based upon the investment of trust in another to act in another party's interest. A director of a company might owe such a duty to the companies of which he or she is a director and also to the companies' pension schemes. He or she would not generally owe a fiduciary duty to competitors, creditors or the companies' employees.
  - How are relevant stakeholders' interests protected? This is an especially important consideration when one or more groups of stakeholders are large in number and/or wide in range or scope and therefore it is not realistically possible to deal with them directly.
  - Are some of the stakeholders also directors or represented by directors? Are the directors properly exercising their fiduciary responsibilities, notwithstanding other roles and considerations?
10. Where there are potentially different parties for whom members could or should be acting, members should make it clear (in particular in the engagement letter, where relevant) who they actually are acting for and potentially who they are not acting for.

### **Conflicts with clients or employers**

11. Members, particularly including those in business, will also need to assess whether there is a self-interest conflict. Their own financial, family or other personal interests may conflict with

those of the client or the employer, or they may result in a preference for one party over another in the sort of multi-stakeholder engagement considered in paragraph 7 above. The test is whether the member can give and be reasonably seen to give objective advice or service.

### Timing and basis of assessment

12. The assessment as to whether there are diverging interests (whether as a result of multiple stakeholder interests or self-interest), with its knock-on effects on the need for safeguards, will be based on known facts and circumstances available at the time<sup>18</sup>. However, circumstances change. For example, a member may be assisting a client with acquiring a business and then be invited to carry out due diligence on the target. Accordingly the assessment needs to be undertaken not only at the beginning, but also throughout the engagement.

### Consequences of managing a potential conflict of interest

13. The Code's relevant provisions are primarily in section 220<sup>19</sup>. Corporate finance engagements are particularly prone to potential conflicts of interest, where the advice is relevant to different parties' competing interests. Additional requirements for such engagements, though based on the general premise explained in section 220, are included in section 221<sup>20</sup>.
14. The Code does not prohibit members from acting in situations in which there are conflicts, but where such conflicts generate potential threats to, particularly, objectivity, the Code does require safeguards to be applied. These will generally involve informed consent where conflicts have been identified, as well as specific safeguards against objectivity threats.

### Informed consent

15. A significant proportion of the complaints to ICAEW in this area relate not to a concern that the member should not have acted, but that, where a conflict has been identified, at least one of the relevant parties was not asked whether he or she agreed to the member acting for both parties.
16. The general need for consent was reinforced in the UK by a 1998 legal case: *Prince Jefri Bolkiah v KPMG*. In essence, this held that where a professional is acting for two clients in respect of interests which are in conflict, this can only be undertaken when there is informed consent of both clients<sup>21</sup>.
17. As a general rule, therefore, the identification of a conflict should always be followed by seeking consent. The only good reason to continue to act in such circumstances without seeking consent is where there are client confidentiality issues specific to the engagement. Examples of engagements where such circumstances may arise include work in respect of a

---

<sup>18</sup> Including, where the professional firm is a member of a network, relationships that the member has 'reason to believe may exist' in the network.

<sup>19</sup> <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-200-230>

<sup>20</sup> *ibid.*

<sup>21</sup> <http://www.icaew.com/-/media/corporate/files/technical/technical%20releases/legal%20and%20regulatory/tech%2006%2014b1%20conflicts%20of%20interest%20and%20confidentiality.ashx>

hostile takeover, and some forensic situations. Safeguards would still need to be applied in such situations (see paragraphs 24-26 below).

18. It is unlikely that there would be a valid reason for not obtaining consent in situations where the conflict is between the client's interests and the member's own interests.
19. Where consent has been sought and has not been given, the member cannot engage to act for both parties.
20. There is no formal definition of informed consent, but the situation may be considered similar to the concept of 'informed management' included in the FRC Ethical Standards for auditors. In essence, being 'informed' means:
  - having a decision maker with ostensible authority, who is sufficiently free from conflicts of interest to be able to represent relevant stakeholders, and able to appreciate the context of the consent; and
  - in circumstances where there is a genuine choice, providing the decision maker with enough information to be able to take a reasonable decision.
21. The client needs to be able to decide whether allowing a member to act notwithstanding conflicting interests, or also to act for the other party, would or would not impact on the member's integrity and objectivity, such that consent should be withheld. That decision should be based not on the detail of the work for the other party (where relevant), beyond a general understanding of the nature of it, but on what the member is going to do to safeguard against the threat to integrity and objectivity (see below).
22. If the client will not give consent without knowing more than the member can reveal, then there will not be consent and the work cannot be undertaken. The opportunity to act for parties whose interests conflict with each other or the member, is not a reason for breaching the fundamental principle of confidentiality.
23. On occasion the act of enquiring into whether or not a conflict of interest may exist, may itself run the risk of breaching confidentiality. For example, potential transactions involving listed entities where there is the risk of disclosure of inside information, or confidential transactions (or proposed transactions) where the act of enquiry could tip off a third party about the existence of the transaction (or proposed transaction). Members should take great care when making such enquiries not to breach confidentiality.

## **Applying safeguards**

24. Where there is a threat that needs to be addressed, appropriate safeguards need to be applied as well as obtaining informed consent. Articulating the safeguards should be part of the information provided to obtain informed consent. Examples of safeguards given in the Code can broadly be analysed into three types:
  - performance of work by different individuals/teams, and the setting up of information barriers between them;
  - review/approval by someone in the firm who is independent of the issue;
  - consultation/review with an appropriate third party.

25. All of these may be relevant in the context of conflicts of interest. Where the issue is a potential conflict between clients, information barriers are particularly important. The Code discusses conflicts safeguards, as does the verdict in the Prince Jefri case referred to above. The types of safeguard can be summarised as:

- the separation of the relevant departments/personnel, which will involve separate teams and may involve physical, electronic and other barriers to information flow; and
- an organisational structure to limit access to information. This might include, for example:
  - policies and procedures limiting access and emphasising the importance of not divulging confidential information;
  - procedures for dealing with situations where barriers should be crossed and for keeping records;
  - monitoring of the effectiveness of barriers and other safeguards; and
  - disciplinary sanctions where there has been a breach.

26. It is not necessarily the member's role to end the conflict between the parties, but to ensure that relevant stakeholders have suitable access to information and advice. The Code's discussion on corporate finance engagements adds an additional safeguard of advising the clients to seek additional independent advice<sup>22</sup>. This will be particularly relevant where it has not been possible to apply other safeguards comprehensively.

27. The nature of the role or engagement is likely to make a difference to the threats that need to be considered and/or the safeguards that might need to be applied. Set out below are a few examples of considerations that might apply in particular situations.

- a) **Pension funds** – A trustee of a company pension fund may also be an employee of the company. If the member is receiving instructions from a person in such a position (or indeed giving instructions while holding such a position), there needs to be consideration given to whether there is a conflict of loyalties, which would compromise the objectivity of those issuing the instructions. Safeguards might include confirming the instructions with others with authority, that are not in a potential conflict position, such as the other trustees.
- b) **Management Buyouts (MBOs)** – In such a situation, the same management personnel can often be acting for both sides, as potential acquirers and providers of information to and on behalf of the potential sellers. Potential conflicts can be safeguarded by making it clear to all parties who the client is and in what capacity the member is acting, and ensuring that the instructions clearly reflect the intentions of the client.
- c) **Acting for competing parties** – In this example, a member may be acting for two parties trying to acquire a third party, or for a client and another party trying to acquire it. Considerations similar to those in the MBO example above apply, as the member is acting for more than one party. There also needs to be careful consideration of confidentiality duties and effective safeguards, including separate teams and effective information barriers, and consent is likely to be needed.
- d) **Advice to companies with different relevant stakeholders** – A member could be acting for more than one company in a group, with different stakeholders in each, and be involved in an arrangement for transferring assets or liabilities between these entities

---

<sup>22</sup> s221.16 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-200-230>

at amounts which may not be at fair value. Safeguards in this situation would be likely to include clarifying who is and is not being acted for, confirming the instructions with appropriate individuals without conflicts (for example a director who is not connected to the other party), and could include advising those charged with safeguarding the interests of the respective stakeholders (the directors of the various legal entities) to seek independent advice.

- e) **Insolvency** – Insolvency work is an example of an instance where the law and relevant standards specify whose interests should be considered. UK law states that creditor interests are paramount for any officer in a business in an insolvent position. Potential conflict threats would therefore be considered only in the context of conflicts between the interest of the member and the creditors. Member interests may be direct or indirect. For an insolvency practitioner, there may be a perception of a conflict of interest, when for example, assets are sold via a pre-pack as creditors may not initially have sufficient information to judge whether their interests were best served by the sale.

## Documentation

28. Where there are considerations to be made, members are encouraged to document the reasoning and other evidence which supports the evaluation of threats and safeguards. The act of documenting can help with thinking through the issues and the documentation helps to preserve the consideration applied. In particular, where consent has been obtained orally, it is advisable to document that fact. That said, the Code does not generally require documentation of considerations, except in respect of certain audit-related matters. A lack of documentation does not necessarily create a threat to compliance with the fundamental principles, or mean that a relevant consideration or action has not happened. Not documenting the steps which have been taken cannot therefore in itself amount to misconduct.

### 3.3 Determining the basis of charging fees

#### Introduction

1. The Code of Ethics (the Code) is based on that of the International Ethics Standards Board for Accountants (IESBA). The Code<sup>1</sup>, in common with the IESBA Code, does not specify a particular method for determining fees but does caution that any threats to ethical behaviour resulting from the fee or method of charging, need to be assessed and safeguards applied.
2. Being paid a fee by a client will, by its very nature, create a potential threat to objectivity. This will normally be more than offset by the checks and balances of training, standards and reputation inherent in professionalism. However, where the terms of the fees are such that the threat to objectivity is significant, safeguards will need to be applied if the work is to be undertaken. This is particularly relevant where the fees are on a contingent basis, as the fee structure may heighten, or be perceived to heighten, the economic incentive to advise in a certain manner, to a point that it might threaten, or appear to threaten, professionalism.
3. In the case of audit and assurance engagements, additional independence requirements apply. These are not addressed by this guidance and members should refer to s290 of the Code<sup>2</sup> and the FRC's Ethical Standards on Auditor Independence<sup>3</sup>.
4. This guidance highlights matters for members to consider in order to help apply aspects of the Code in particular circumstances. The guidance does not set out additional requirements and is not part of the Code or other regulation applying to members.

#### General considerations

5. The Code requires that: 'The basis on which fees will be calculated shall be discussed [with the client] and explained .... Fees shall be determined by reference to:
  - The seniority and professional expertise of the persons necessarily engaged on the work;
  - The time expended by each;
  - The degree of risk and responsibility which the work entails;
  - The nature of the client's business, the complexity of its operation and the work to be performed;
  - The priority and importance of the work to the client;
  - Expenses properly incurred.'<sup>4</sup>
6. The categories noted in the Code are not intended to be used as a narrowly interpreted checklist: they are wide ranging and indicate that fees can be based on a variety of factors. 'Professional expertise' for example, might cover technical knowledge and ability, past experience of relevant issues, and/or intellectual property. 'Priority and importance of work to the client' could similarly cover a variety of issues, including value of the work to the client (and its outcome), urgency, and/or comparative fees charged or quoted by others.

---

<sup>1</sup> s240 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-240-280>

<sup>2</sup> <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-290>

<sup>3</sup> <https://frc.org.uk/Our-Work/Codes-Standards/Audit-and-assurance/Standards-and-guidance/Standards-and-guidance-for-auditors/Ethical-standards-for-auditors.aspx>

<sup>4</sup> s240.2a <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-240-280>

7. The amount of the fee to be agreed between members and their clients is a commercial matter between the parties involved. The fee must not be set in such a way that it would breach the fundamental requirements in the Code for ethical behaviour: objectivity is particularly important here. The statement in the Code does not mean that the member has to justify the amount and/or basis of calculation on the grounds that it is mechanically derived from one or more of the items in the list.
8. Threats to compliance with the fundamental principles should be considered particularly where fee arrangements are not straightforward. Examples of such arrangements are:
  - setting a contingent fee;
  - the fee being paid or ultimately borne by someone else.
9. Where the exact fee has not been agreed up front, it must be clear to the client on what basis fees will be rendered for the engagement in due course. Lack of understanding as to how fees have been calculated regularly contributes to a client or former client making a complaint to ICAEW about a member's conduct.
10. If the party paying or ultimately bearing the fee is not the same as the party receiving the advice or instructing the member, the member should consider the relationships with both parties. As well as practical issues such as whether there are tax consequences of the arrangement, there may be ethical considerations. There may be a heightened threat to objectivity as a result of bias towards the fee payer, or the party instructing the member.
11. If the fee arrangements are out of line with market practice or otherwise unusual, the basis of determining the fee may need to be discussed with, and explained to, both parties.
12. In any event it is sensible for the member to take steps to reduce the likelihood that the fee will be challenged subsequently. The existence of potential conflicts and the extent to which the client understands the implications of the basis described, are relevant in this context.
13. ICAEW's Ethics Advisory Service has produced a helpsheet for members which addresses a number of the practical aspects in providing clients with the fee basis and relevant analyses<sup>5</sup>.

## Contingent fees

14. Contingent fees are, in essence, fee arrangements where the amount of the fee is dependent on some aspect of the outcome of the engagement, rather than just the factors noted in paragraph 5 above<sup>6</sup>.
15. While being paid a fee by a client will by its very nature create a potential threat to objectivity, this will normally be offset by other professional considerations. However, contingent fees are prohibited for assurance engagements and in certain circumstances for non-assurance services provided to assurance clients, as they would create or be seen to create unacceptable threats to the independence needed for such engagements. This guidance does not address these

---

<sup>5</sup> [access to members only] <http://www.icaew.com/en/members/advisory-helplines-and-services/ethic-helplets/fee-breakdown-information>

<sup>6</sup> See definition of contingent fee at <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-abc-definitions?letter=c>

requirements, which are covered in detail in s290 and 291 of the Code<sup>7</sup> and the FRC's Ethical Standards on Auditor Independence ES4 and 5<sup>8</sup>. However it is worth noting that even for such engagements, it is not intended to prohibit an audit firm from charging a lower fee for a non-audit service where the transaction that was the subject of the engagement is later aborted and where the rationale for the lower fee is to take account of either the firm's reduced risk and responsibility involved or the fact that less work was undertaken than had initially been anticipated<sup>9</sup>.

16. In other areas, contingent fee arrangements may reflect general market practice and can be advantageous to clients: for example where a high risk transaction might not be contemplated by a client without a sharing of the risk.
17. In such circumstances, contingent fees will only be acceptable if the way in which the fee is set does not create threats to objectivity that cannot be safeguarded against: the economic incentive inherent in such arrangements to advise in a certain manner, to a point that outweighs professionalism, must be safeguarded against. It is vital that the fee arrangement does not result in the member being, or being seen to be, partial to one outcome rather than another. Members should therefore consider the extent to which the amount of the fee is dependent on an aspect of the outcome if:
  - there are other interests of the member that may result in self-interest threats potentially compromising objectivity; or
  - the engagement results in the member having a duty to multiple stakeholders and there are extraneous factors that might cause the member to favour one stakeholder over another.
18. The fee structure should be set to avoid creating or exacerbating significant conflicts which cannot be safeguarded against. The Code gives examples of a number of safeguards based on transparency and oversight<sup>10</sup>, including quality control policies and procedures and independent review of the work performed.
19. Disclosure to intended users of the work performed and the basis of remuneration will allow clarity and discussion of the potential need for safeguards. It is important, however, to appreciate that transparency is not a substitute for effective safeguards. Separate, more detailed guidance on threats and safeguards in conflict situations will be relevant.
20. It is important to keep the potential threat, and accordingly the need for safeguards, under review throughout the engagement as circumstances may change.

---

<sup>7</sup> 290.224 and 291.154 <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b>

<sup>8</sup> ES4 10 to 23, and ES5 95 and 131 <https://frc.org.uk/Our-Work/Codes-Standards/Audit-and-assurance/Standards-and-guidance/Standards-and-guidance-for-auditors/Ethical-standards-for-auditors.aspx>

<sup>9</sup> s240.4c <http://www.icaew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-240-280> and ES4 17 <https://frc.org.uk/Our-Work/Codes-Standards/Audit-and-assurance/Standards-and-guidance/Standards-and-guidance-for-auditors/Ethical-standards-for-auditors.aspx>

<sup>10</sup> s240.4 *ibid*.

## Documentation

21. The Code requires the fee arrangements (which may be an amount, or a basis for determining an amount) for all engagements to be confirmed in writing before the engagement commences<sup>11</sup>.
22. Where there are considerations to be made, members are encouraged to document the reasoning and other evidence which supports the evaluation of threats and safeguards. The act of documenting can help with thinking through the issues and the documentation helps to preserve the consideration applied. That said, the Code does not generally require documentation of considerations, except in respect of certain audit-related matters and the confirmation of the basis of charging fees referred to above. A lack of documentation does not necessarily create a threat to compliance with the fundamental principles, or mean that a relevant consideration or action has not happened. Not documenting the steps which have been taken cannot therefore in itself amount to misconduct.

---

<sup>11</sup> s240.2b *ibid*.

ICAEW is a world leading professional membership organisation that promotes, develops and supports over 144,000 chartered accountants worldwide. We provide qualifications and professional development, share our knowledge, insight and technical expertise, and protect the quality and integrity of the accountancy and finance profession.

As leaders in accountancy, finance and business our members have the knowledge, skills and commitment to maintain the highest professional standards and integrity. Together we contribute to the success of individuals, organisations, communities and economies around the world.

Because of us, people can do business with confidence.

We are a founder member of Chartered Accountants Worldwide and the Global Accounting Alliance.

[www.charteredaccountantsworldwide.com](http://www.charteredaccountantsworldwide.com)

[www.globalaccountingalliance.com](http://www.globalaccountingalliance.com)



ICAEW  
Chartered Accountants' Hall  
Moorgate Place London  
EC2R 6EA  
UK

T +44 (0)20 7920 8100  
[icaew.com/ethics](http://icaew.com/ethics)

 [linkedin.com – ICAEW](https://www.linkedin.com/company/icaew)  
 [twitter.com/icaew](https://twitter.com/icaew)  
 [facebook.com/icaew](https://www.facebook.com/icaew)