

## **Section 241 Agencies and Referrals**

*(Applicable from 1 January 2011 to 31 December 2012)*

**241.1** *When referring or receiving referred work or when establishing agency arrangements, which are in effect permanent arrangements for making referrals, professional accountants in public practice\* are required to assess threats to compliance with the fundamental principles and to apply safeguards. A referral covers a formal request made in the course of a professional relationship for advice on the selection of a potential professional adviser and may also cover an informal request, regardless of whether there is an existing relationship.*

*Attention is drawn to additional requirements in respect of referral fee arrangements, in section 240.*

### **Duty of Care**

**241.2** *In making a referral, a duty of care may arise. The extent of a duty of care varies according to the circumstances, including whether the exchange or provision of information was solicited or not. A greater duty of care will arise for matters which are reasonably expected to be within a professional accountant in public practice's\* knowledge or where a fee is charged. A professional accountant in public practice\* needs to look at this from the client's or enquirer's point of view and what their expectations would be of what a professional accountant in public practice\* would be expected to know:*

- *Where a referral fee is received, or where the service referred is in a professional or finance – related sphere, the client (or enquirer) can reasonably presume knowledge by the professional accountant in public practice\*. Any limitation of knowledge would clearly need to be explained.*
- *Where the enquiry relates to a service outside the normal sphere of expertise of an accountant and no referral fee is contemplated, then it is reasonable to presume that the enquiry is being made in a personal capacity, unless circumstances suggest otherwise. It is still advisable to express any limitations of knowledge and to clarify, in case of doubt, that any opinion is based on personal experience rather than in a professional capacity.*

**241.3** *When making a referral, disclosure of relevant knowledge limitations shall be considered. Professional accountants in public practice\* shall consider whether it would be in their interest for such knowledge limitations to be disclosed in writing, according to the circumstances. Factors that a professional accountant in public practice\* shall consider when making such a decision include:*

- *The nature of the professional relationship with the enquirer (an existing client, someone who could reasonably be considered to be making the enquiry as a prospective client or a casual enquiry).*
- *The context in which the enquiry is made. Is it professional or personal, casual or formal?*
- *The nature of the personal relationship. Does the enquirer know the professional accountant in public practice\* is a Chartered Accountant and are they consulting them as a respected professional?*
- *The scope of enquiry and whether a referral fee is contemplated, as considered in section 240.*
- *The enquirer's expectations.*

- 241.4** *A referral arises typically, when the professional accountant in public practice\* does not have the expertise and/or resource in house to undertake the potential engagement. It follows that the professional accountant in public practice\* will not necessarily know enough to be able to completely assess whether the third party is the optimum choice or not. This is an inevitable limitation in most referrals, and what the referral is based on will vary. However, the professional accountant in public practice\* shall consider the fitness for purpose of the third party to address the client's needs.*
- 241.5** *In making that consideration, the professional accountant in public practice\*:*
- *Can take account of the professional or regulatory status of the prospective referee;*
  - *Is not normally expected to have to make additional enquiries about the prospective referee and can make the assessment based on what is already known.*
- 241.6** *A referral shall not normally be made to a third party even with a disclaimer, when, taking into account known factors, the professional accountant in public practice\* knows of a better alternative. If the client or enquirer insists on being referred to a particular third party and the professional accountant in public practice\* believes there is a better alternative, the reference may be made but the client or enquirer shall be made aware of the professional accountant in public practice's\* concerns. Where the referral relates to an end product or service, rather than an intermediary, and the professional accountant in public practice\* knows there are other alternatives but does not know if they are better, this shall be explained.*
- 241.7** *If there is a relationship with the third party, for example a family connection or an automatic referral arrangement, there are clear self-interest or familiarity threats and the connection shall be disclosed. This is particularly important where a professional accountant in public practice\* is considering recommending the products of another supplier with which there is an agency, and/or a principal\* or employee of the professional accountant in public practice's\* firm\* is a principal\* or officer\* of the other supplier. If in substance there is a one-to-one relationship between the professional accountant in public practice\* and the third party (for example, the professional accountant in public practice\* is the only accountant in the area and the third party is the only solicitor), which implies automatic referral, this shall also be disclosed.*
- 241.8** *In summary, professional accountants in public practice\* shall:*
- *Consider any factors they are aware of that would indicate the proposed third party is not fit for purpose in terms of the potential engagement. The professional accountant in public practice\* shall take into account what a reasonable person might expect a Chartered Accountant to know;*
  - *Make clients (or enquirers), that are proposed to be referred, aware of limitations in knowledge;*
  - *Disclose any referral arrangement;*
  - *Ensure that any contractual arrangement does not override the needs of an individual client.*

### **Establishing Agencies**

- 241.9** *The guidance which follows is intended to assist professional accountants in public practice\* in their arrangements with other suppliers of services and products.*
- 241.10** *This section addresses agreements that in effect provide for permanent arrangements for referrals. The issues are considered to be similar to those above*

for referrals in general except that an agency contract will usually bind the agent in terms of whom it can refer to for particular types of work. When professional accountants in public practice\* are considering the establishment of an agency, the terms of the agency contract (actual or implied) shall not require exclusive referral of all clients regardless of suitability. For example, professional accountants in public practice\* shall not be party to an agency by which they are constrained to channel all funds received by it for investment into a single bank/building society. Such a clause would make important safeguards inoperable.

- 241.11** Before accepting appointment as auditor of another entity of which they are an agent, professional accountants in public practice\* shall consider whether the agency constitutes a material business relationship. See section 290, 'Independence – audit and review engagements.'
- 241.12** Professional accountants in public practice\* shall not, because of the self-interest threat, enter into any financial arrangements with another supplier either personally or through their firm\* which would prejudice the objectivity of themselves or their firm\*.
- 241.13** Before accepting or continuing an agency with another supplier, professional accountants in public practice\* shall satisfy themselves that their ability to discharge their professional obligations to their clients is not compromised.
- 241.14** A professional accountant in public practice\* shall not in any circumstances conduct its practice in such a manner as to give the impression that the professional accountant\* is a principal rather than an agent. This would include considering signs on premises and any other outward signs or literature used. This would relate in particular to agencies with entities such as banks and building societies, where confusion as to status can arise (see also 'The names and letterheads of practising firms' at [www.icaew.com/regulations](http://www.icaew.com/regulations)).
- 241.15** Firms\* in the Republic of Ireland must be authorised under the Investment Intermediaries Act, 1995 to hold an agency with a building society and that arrangement shall relate solely to deposit taking and not for example relate to products of a particular insurance company or unit trust organisation for which the building society is an appointed representative. Firms\* holding building society agencies must ensure that their agency agreement contains no obligation which would cause, or would be perceived to cause, them to breach the provisions of either the Act or the Institute of Chartered Accountants in Ireland's Investment Business Regulations and Guidance. Firms\* cannot hold agencies with banks.

### **Investment Business Agencies and Introductions**

- 241.16** When considering referrals of investment business ('introductions') or the establishment of investment business agencies, professional accountants in public practice\* shall apply the general principles and requirements set out in the previous Sections. However, they will also need to consider:
- Whether the introduction or agency is permitted by regulation; and
  - Whether the status of the third party investment business provider is compatible with the requirement to give objective advice.

### **Regulated activities under the Financial Services and Markets Act 2000 (United Kingdom)**

- 241.17** In order to make a decision about whether an introduction is a regulated activity, the professional accountant in public practice\* must look at how the introduction is made and also what type of investment the client is considering (such as life assurance and pensions, unit trusts, shares, mortgages or general insurance). A regulated introduction can only be made under the terms of the Act by a firm\* which

is licensed by ICAEW as a Designated Professional Body ('DPB') (a licensed firm\*) or a firm\* which is authorised by the Financial Services Authority ('authorised'). Unauthorised / unlicensed firms\* are restricted in that they can only make introductions for general financial advice where no specific type of investment is referred to, or for a restricted range of investments, such as shares and unit trusts. Such introductions can only be made to those authorised firms\* who can give independent advice. However, unauthorised / unlicensed firms\* can provide information to a client about a third party provided no recommendation is made.

- 241.18** Further guidance on the difference between a regulated introduction and the provision of information in respect of insurance business, and the regulatory consequences thereof, is set out in Schedule 6 to Part 3 of the DPB Handbook, available at [www.icaew.com/dpb](http://www.icaew.com/dpb).
- 241.19** Having established that an introduction can be made in compliance with regulatory requirements, professional accountants in public practice\* shall bear in mind the need to provide their clients with objective advice, in compliance with these ethical standards.
- 241.20** Professional accountants in public practice\* can become appointed representatives of another authorised firm\*. When selecting which authorised firm\* to become an appointed representative of, professional accountants in public practice\* shall again bear in mind the need to provide their clients with objective advice.

Regulated Activities under the Investment Intermediaries Act, 1995 (Republic of Ireland)

- 241.21** Professional accountants in public practice\* may only make an introduction or refer clients to another authorised firm\* if they are themselves authorised to conduct investment business under the Investment Intermediaries Act 1995 and where required hold an appropriate letter of appointment.
- 241.22** Professional accountants in public practice\* when selecting an authorised firm\* shall bear in mind the need to provide their clients with objective advice.

Status of Investment Business Providers

- 241.23** Authorised firms\* can fall into the following categories:\*

<b>Type of firm*</b>	<b>What the firm* can recommend</b>	<b>Can there generally be introductions to this type of firm*?</b>
<i>Independent</i>	<i>Recommend products from the whole market and offer clients the ability to pay by fee. Only these firms* can describe themselves as independent financial advisers. The client may be able to elect for the adviser to be paid by commission</i>	<i>Yes (241.24 below)</i>
<i>Whole of market (UK only)</i>	<i>Recommend products from the whole market but do not offer clients the ability to pay by fee. The firm* is remunerated by commission.</i>	<i>Yes (241.25 below)</i>

<i>Multi-tied (Multi-agency in Rol)</i>	<i>Recommend the products of more than one product provider with whom the firm* has agreements, but recommends on less than the whole market.</i>	<i>Depends on scope of choice (241.26 below)</i>
<i>Tied</i>	<i>Recommend the products of one product provider.</i>	<i>No (241.27 below)</i>

- 241.24** *An introduction to an independent firm\* would be likely to meet the requirement to give objective advice but professional accountants\* in public practice are reminded of the general requirements above.*
- 241.25** *Professional accountants in public practice\* may also regard ‘whole of market’ authorised firms\* as equivalent to independent firms\* as the method by which the authorised firm\* is remunerated (which is the difference between independent and whole of market) is not relevant for the purposes of compliance with this statement.*
- 241.26** *Professional accountants in public practice\* may in some situations be able to introduce to multi-tied firms\* and still comply with the ethical requirements (however, see paragraphs 241.16–241.18 above as to whether the introduction can only be made by a DPB licensed firm\* or an FSA authorised firm\*, if it is a ‘regulated’ activity). Clearly the principal threat is that clients might not be offered the most appropriate choice. The professional accountant in public practice\* shall assess the client’s requirements and whether the multi-tied firm\* places business with the product providers who account for a large majority of the relevant market or offer the sector of the market which is most suitable for the client’s needs. However, members\* must ensure that in making such an assessment, they are not effectively making their own recommendation unless they are able to do so under the terms of a licence or authorisation. The professional accountant in public practice\* may decide that this does not restrict the client’s access to the range of product providers to an extent where there is any potential detriment. The professional accountant in public practice\* shall make the client aware of restrictions in the range of investments offered by the firm\* to which the client is being referred.*
- 241.27** *An introduction to a tied firm\* restricts the client’s ability to obtain independent advice and would therefore not be objective.*
- 241.28** *Similar considerations to those noted above apply to whether a professional accountant in public practice\* shall become an appointed representative under the Financial Services and Markets Act 2000. Thus, for example, a professional firm\* cannot become an appointed representative for regulated investment business, of a tied firm\* as the agency agreement would probably oblige the firm\* to make referrals to the principal in all circumstances and the firm\* would be unable to provide objective advice.*