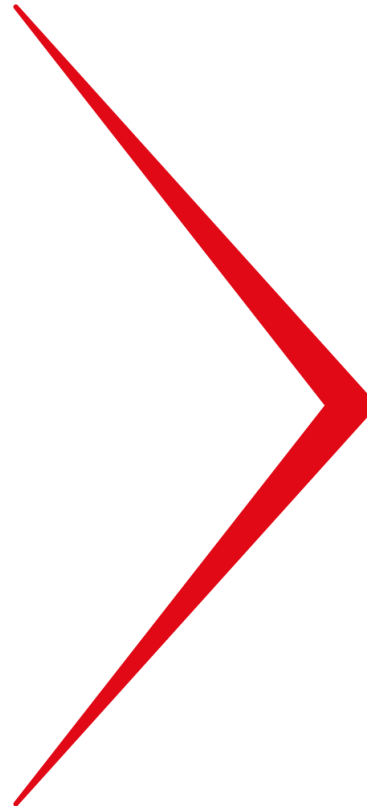




# *Changes to the insolvency code of ethics*

# *Background*





*The current position*

# *What will the new code look like?*

New structure

- Requirements 'R'
- Application material 'A'

# *For example (1)*

- **R X** The insolvency practitioner shall document:
  - The facts
  - Any communications with, and parties with whom the matters were discussed
  - The courses of action considered, the judgments made and the decisions that were taken
  - The safeguards applied to address the threats when applicable
  - How the matter was addressed
  - Where relevant, why it was appropriate to accept or continue the insolvency appointment .
- **Number AX** The records an insolvency practitioner maintains, in relation to the steps that they took and the conclusions that they reached, are expected to be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of their actions.

## *For example (2)*

**R X** Before accepting an insolvency appointment, an IP shall take reasonable steps to identify circumstances (including any relationships) that might create a conflict of interest, and therefore a threat to compliance with one or more of the fundamental principles. Such steps shall include identifying:

- (a) The nature of the relevant interests and relationships between all stakeholders; and
- (b) The nature, extent and timing of any prior work for the entity or connected entities and its implication for all stakeholders.

**Number A X** An effective conflict identification process assists an IP when taking reasonable steps to identify interests and relationships that might create an actual or potential conflict of interest, both before determining whether to accept an insolvency appointment and throughout the appointment. Such a process includes considering matters identified by external parties, for example for example directors of insolvent entities or insolvent individuals. The earlier an actual or potential conflict of interest is identified, the greater the likelihood of being able to address threats created by the conflict of interest.

# *What's not changing?*

- The five fundamental principals
- The framework approach of identifying and evaluating threats
- The reasonable and informed third party test
- The need to document your considerations BUT what you need to document has been expanded

# *So what's going to be different?*

- IPs shall be guided not merely by the terms but also by the spirit of the Code
- IPs need to have regard to the substance of transactions and relationships
- Wider examples of where there might be a significant professional or personal relationship
- The approach to safeguards
- Some new sections eg the IP as employee and NOCLAR



# *Examples where there may be a significant professional relationship*

where a significant relationship has existed with the entity or someone connected with it, or where an IP:

- has to deal with conflicting or competing interests between entities over whom they, or another IP in their firm, is appointed
- or another IP in their firm has previously acted as an insolvency office holder to a company with a common director, or common directors. Where the IP has been appointed officeholder to a number of insolvent companies with the same director or directors, there will be an increased risk of a conflict of interest arising.
- has, or others in their firm have, previously carried out one or more assignments for an entity and / or its wider group and they are appointed as an insolvency office holder to the entity or its connected entities.
- has, or others in their firm have, previously carried out one or more assignments for an entity's charge holders or stakeholders and the IP is appointed as an insolvency office holder to the entity or its connected entities.

# *Examples where there may be a significant professional relationship*

where an IP

- is appointed administrator by a floating charge holder, under a recent charge, and the assets are sold to a purchaser and the purchaser is connected to the floating charge holder.
- is appointed to act as supervisor of a debtor's IVA or trustee in a debtor's bankruptcy or sequestration, and has, or another IP in the same firm, has been appointed as an insolvency officeholder to a company of which the debtor is a director, or was a director in the past three years.
- is appointed to deal with an insolvent individual's affairs, and the IP, or another individual in their firm, was involved in bringing about the individual's insolvency. There may be an increased risk of a conflict of interest where the IP has a claim for outstanding costs.

# *Extension of potential relationships*

Potential relationships have also been extended to include:

- relationships with senior management
- persons of significant control of the entity
- funders, including PE houses

# *Changes to other sections – alignment with IESBA*

- Specialist advice and services
- Agencies and referrals
- Referral fees and commissions
- Inducements including gifts and hospitality

# *Changes to other sections – new sections*

- The IP as an employee
- Responding to non-compliance with laws and regulations (NOCLAR)
- Republic of Ireland examples

# *Specialist advice and services*

## **New provisions**

- When an IP intends to rely on the advice or work of another, from within the firm or by a third party, the IP shall evaluate whether such advice or work is warranted .
- Any advice or work contracted shall reflect best value and service for the work undertaken.

## **Current provisions**

- When an IP intends to rely on the advice or work of another, the IP should evaluate whether such reliance is warranted. The IP should consider factors such as reputation, expertise, resources available and applicable professional and ethical standards. Any payment to the third party should reflect the value of the work undertaken.

# *New requirements – Specialist advice and services*

## **Requirements**

- The IP shall review arrangements periodically to ensure that best value and service continue to be obtained in relation to each insolvency appointment.
- The IP shall document the reasons for choosing a particular service provider.
- Application material: Where the IP does not control decisions about the choice of the provider of specialist advice or service, to be able to comply with the requirements in this part the IP will need to obtain sufficient information to establish the nature of the relationship with the provider.

# *Agencies and referrals*

## **Requirement**

- The IP shall consider the fitness for purpose of the third party to whom a referral is proposed or an agency arrangement is being considered, to address the needs of the recipient of the service.

## **Application material**

- In making that consideration of fitness for purpose, the IP is expected to take account of the professional or regulatory status of the third party.



# *Referral fees and commissions (1)*

## **New provision**

- An insolvency practitioner, the firm or an associate shall not make or offer to make any payment or commission for the introduction of an insolvency appointment.

## **Current provision**

- The special nature of insolvency appointments makes the payment or offer of any commission for or the furnishing of any valuable consideration towards, the introduction of insolvency appointments inappropriate

# *Referral fees and commissions (2)*

## **New provisions**

- During an insolvency appointment, referral fees or commissions shall not be accepted by the insolvency practitioner, the firm or an associate unless they are paid into the insolvent estate. Any such payments shall be disclosed to creditors.

## **Current provisions**

- During an insolvency appointment, accepting referral fees or commissions represents a significant threat to objectivity. Such fees or commissions should not therefore be accepted other than where to do so is for the benefit of the insolvent estate.
- If such fees or commissions are accepted they should only be accepted for the benefit of the estate; not for the benefit of the IP or the practice.
- Further, where such fees or commissions are accepted an IP should consider making disclosure to creditors.

## *Referral fees and commissions (3)*

- Where the IP or firm obtains preferential contractual terms from suppliers of goods and services obtained for an insolvency appointment, for example volume or settlement discounts, the benefit shall be received in full by the insolvent estate.
- Where the IP does not control decisions about referral and commission arrangements, to comply with the requirements in this section the IP will need to obtain sufficient information to establish the nature and purpose of any payments made or received.

# *Inducements, including gifts and hospitality*

## **New provision**

- An IP shall not offer, or encourage others to offer, any inducement that is made, or which the IP considers a reasonable and informed third party would be likely to conclude is made, with the intent to improperly influence the behaviour of the recipient or of another.
- An IP shall not accept, or encourage others to accept, any inducement that the IP concludes is made, or considers a reasonable and informed third party would be likely to conclude is made, with the intent to improperly influence the behaviour of the recipient or of another.

## **Current provisions**

- An IP or a close or immediate family member, may be offered gifts and hospitality. In relation to an insolvency appointment, such an offer will give rise to threats to compliance with the fundamental principles. For example, self-interest threats may arise if a gift is accepted and intimidation threats may arise from the possibility of such offers being made public.

# *The IP as an employee*



Application material provides that:

- An insolvency practitioner might be an employee, contractor, partner, or director within the firm. The legal form of the relationship of the insolvency practitioner with their employer has no bearing on the ethical responsibilities placed on the insolvency practitioner .
- The insolvency practitioner who is an employee might have a reduced ability to control or influence matters within the firm which might affect the actions available as safeguards to address threats to compliance with the fundamental principles .

# *Examples of facts that might create a threat for the employed IP*

- Being eligible for a bonus related to achieving targets or profits
- Having inadequate resources for the performance of an insolvency appointment
- A lack of control over processes and internal governance
- Being threatened with dismissal or demotion over a disagreement about an insolvency appointment
- An individual attempting to influence the decision-making process of the insolvency practitioner

# *Actions that might be safeguards – pre-appointment*

- Appropriate provisions within any contract of employment or separate legal agreement with the employer acknowledging that the insolvency practitioner has a duty to comply with the Code of Ethics of their authorising body and that the insolvency practitioner shall be able to take all necessary steps they deem necessary to comply with the fundamental principles.
- Ensuring that policies and procedures are in place within the firm to prohibit individuals who are not members of the insolvency team from inappropriately influencing the conduct of an insolvency appointment.
- Ensuring that the firm has published policies and procedures to encourage and empower individuals within the firm to communicate to senior levels within the firm any issue relating to compliance with the fundamental principles that concern them.
- Obtaining sufficient information to obtain an understanding of the structure and ownership of the firm.

## *Actions that might be safeguards (2) – at a particular point in time*

- Reporting concerns to senior management within the firm.
- Seeking legal advice or advice from their authorising body.
- Reporting the concerns to their authorising body or the Complaints Gateway



# *The IP as employee*

## **And remember**

- Referral fees and commissions: Where the IP does not control decisions about referral and commission arrangements, to comply with the requirements in this section the IP will need to obtain sufficient information to establish the nature and purpose of any payments made or received.
- Specialist advice and services: Where the IP does not control decisions about the choice of the provider of specialist advice or service, to be able to comply with the requirements in this part the IP will need to obtain sufficient information to establish the nature of the relationship with the provider.

# *Changes in record keeping*

## **New provision**

- The IP shall document
- the facts
- any communications with, and parties with whom the matters were discussed
- the courses of action considered, the judgements made and the decisions that were taken
- the safeguards applied to address the threats when applicable
- how the matter was addressed
- where relevant, why it was appropriate to accept or continue the insolvency appointment.

## **Current position**

- It will always be for the IP to justify his actions. An IP will be expected to be able to demonstrate the steps that he took and the conclusions that he reached in identifying, evaluating and responding to any threats, both leading up to and during an insolvency appointment, by reference to written contemporaneous records.
- The records an IP maintains, in relation to the steps that he took and the conclusions that he reached, should be sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of his actions.

# *Responding to non-compliance with laws and regulations (NOCLAR) (1)*

## **Requirement**

In some jurisdictions, there are legal or regulatory provisions governing how IPs should address non-compliance or suspected non-compliance. These legal or regulatory provisions might differ from or go beyond the provisions in this section, for example, anti-money laundering legislation. When encountering such non-compliance or suspected non-compliance, the IP shall obtain an understanding of those legal or regulatory provisions and comply with them, including:

- (a) Any requirement to report the matter to an appropriate authority; and
- (b) Any prohibition on alerting the relevant party.

# ***NOCLAR (2)***

Examples of laws and regulations which this section addresses include those that deal with:

- Insolvency processes and procedures
- Fraud, corruption and bribery.
- Money laundering, terrorist financing and proceeds of crime.
- Securities markets and trading.
- Banking and other financial products and services.
- Data protection.
- Tax and pension liabilities and payments.
- Environmental protection.
- Public health and safety.

# ***NOCLAR (3) – Requirements that relate to the wider insolvency team***

- If, in the course of carrying out professional activities, a member of the insolvency team becomes aware of information concerning non-compliance or suspected non-compliance, the team member shall seek to obtain an understanding of the matter. This understanding shall include the nature of the non-compliance or suspected non-compliance and the circumstances in which it has occurred or might occur.
- If the team member identifies or suspects that non-compliance has occurred or might occur, the team shall, subject to paragraph X, inform an immediate superior to enable the superior to take appropriate action. If the team member's immediate superior appears to be involved in the matter, the team member shall inform the next higher level of authority within the employing organisation.
- In exceptional circumstances, the team member may determine that disclosure of the matter to an appropriate authority is an appropriate course of action. If the team member does so pursuant to paragraphs X and Y, that disclosure is permitted pursuant to paragraph of the Code. When making such disclosure, the team member shall act in good faith and exercise caution when making statements and assertions.

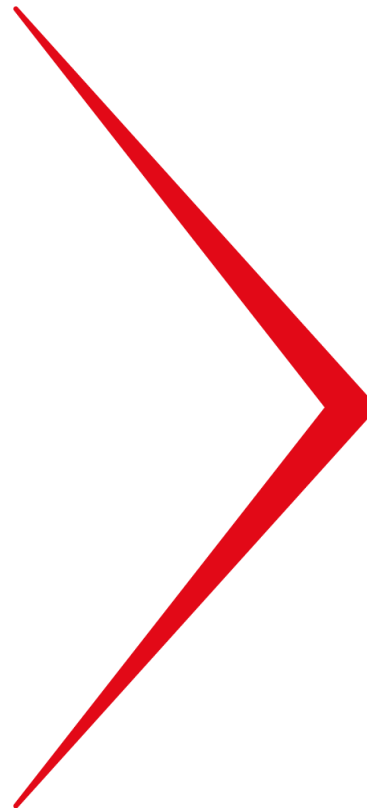
# *Application of the framework to specific situations*

- No change to the specific prohibitions BUT
- When considering specific situations, IPs should refer to the section on professional and personal relationships and changes in circumstances. As interests and relationships might change during an appointment, a significant professional relationship can arise as a result of an IP acting as an officeholder in a prior insolvency. An IP is expected to consider both pre-appointment engagements, and / or prior insolvency appointments when assessing whether they have a significant professional relationship. IPs are also expected to document their considerations and conclusions when assessing specific situations.

# *Republic of Ireland examples*

- Only applies to members of ICAEW, ACCA, ICAS and CAI who hold a practising certificate
- Some amended definitions
- Specific prohibitions

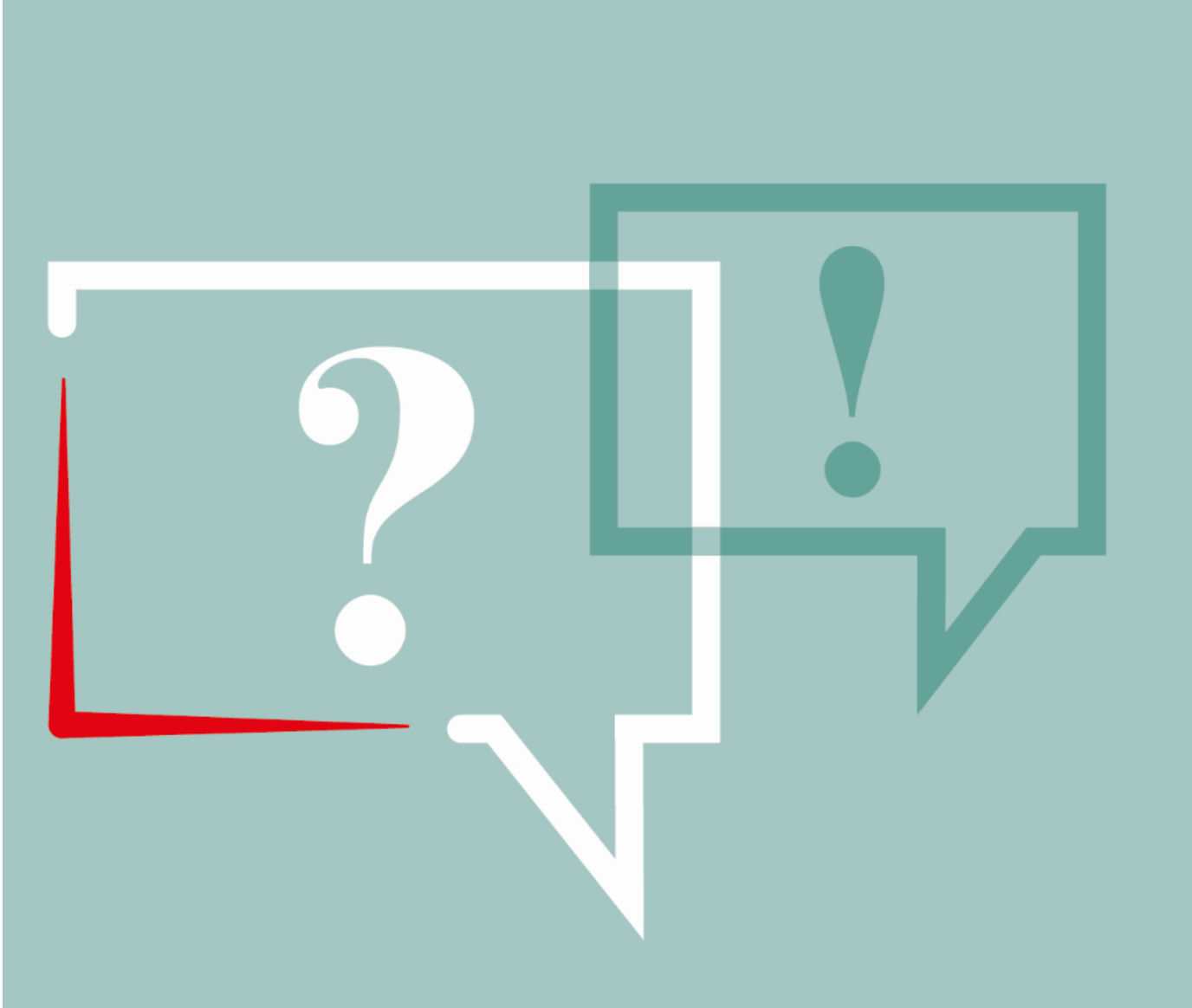
- RPBs and the Insolvency Service finalise the drafting and agree the implementation date.
- The RPBs and the Insolvency Service release the revised code and announce the effective date
- IPs need to ensure that they, and their staff, understand the requirements of the code and how to implement it



## *Next steps*



# *Questions*





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