

ETHICS GUIDANCE ON MEMBERS' PUBLIC INTEREST DUTIES, CONFLICTS OF INTEREST AND FEES

BACKGROUND AND FEEDBACK ON CONSULTATION

1. The Financial Reporting Council's disciplinary case in respect of corporate finance engagements with the MG Rover company involved alleged failure to consider the public interest, and failure to safeguard against threats to ethical behaviour resulting from conflicts of interest and the fees charged. The appeal process, completed in early 2015, resulted in many of the charges being overturned, but the FRC tribunal reports raised questions about the clarity of some aspects of what is now the ICAEW Code of Ethics (the Code). In late 2015 ICAEW issued three draft guidance notes for members for [comment](#) (the consultation guidance), covering each of the issues raised in the case, noted above. These did not propose changes to the Code itself, but discussed the requirements of the Code in the three areas referred to.
2. Guidance on the Code has been issued on numerous occasions over the years. Such guidance seeks to assist members and others in interpreting provisions of the Code, though does not add to or change the Code itself. Accordingly breach of guidance is not in itself a disciplinary offence.
3. The key matters that the consultation guidance emphasised were:
 - that the principal public interest duty of the profession rests at the level of the profession itself, and that individual members discharge that duty by following the Code;
 - the key requirements in the Code in relation to conflicts of interest, which can arise even within what might appear to be one client; and
 - the need to be vigilant in ensuring that in contingent fees (and in particular contingent fees) the member is not biased towards one outcome in order to generate higher fees
4. The consultation attracted twelve written and five oral responses. It has also been discussed with the FRC and the other Consultative Committee of Accountancy Bodies' members.
5. The ICAEW Ethics Standards Committee (the ESC) considered the feedback on a point-by-point basis and discussed its conclusions with the ICAEW Technical Strategy Board. The key points made in the feedback from respondents to the consultation, and our response to that in the final guidance issued (the guidance), are summarised below.

Overall

6. There was general agreement with the key messages behind the consultation guidance (discussed under each area below). Most respondents also agreed that the guidance should focus on interpreting the current Code as it is, rather than changing the Code itself. Indeed one respondent highlighted the importance of feeding any potential changes through the International Ethics Standards Board for Accountants (IESBA) to ensure international compatibility.
7. A number of drafting suggestions were made by respondents in order to clarify points made in the consultation guidance. The more significant points are referred to below under each area of guidance but there were a number of common points that each of the guidance papers has sought to address where relevant:
 - Increased stress on the need to apply the spirit as well as the letter of the Code;
 - The importance of reasonable and informed perception;
 - Increased discussion on what members should do, as well as what they do not need to do;

- Encouragement to document considerations in the member's own interests – though this does not change what the Code does and does not require in this area;
- Clarifying that hindsight is not a relevant judgment, but that considerations do need to be made on an ongoing basis throughout an engagement or task.

Public interest responsibility of accountants

8. There have been brief references to the profession's and individual accountants' public interest responsibilities in the opening sections of the ICAEW and IESBA Codes for many years, but they are rather vague. The guidance seeks to clarify that, in essence, the accountancy profession as a whole has a responsibility to act in the public interest, as professions do. This is manifested in, among other things, setting a code of ethics that takes the public interest into account in its requirements. The public interest responsibility of individual members therefore is to apply the fundamental principles and related requirements of the Code, in spirit as well as letter, in all of their professional and business activities. There is no separate public interest duty. However the guidance does highlight and discuss the Code's fairly general requirements not to be associated with misleading information, or otherwise act in a way that discredits the profession.
9. There was broad support for the key messages of the consultation guidance and these have not been changed. A few respondents did think that a public interest perspective might be a useful consideration for individual members, though one thought that the public interest action was generally fairly clear. There were different ideas as to how this might be manifested. The guidance adds a reference to those rare situations when, having considered the Code, the ethical course of action might be unclear and suggests a few key questions that members might wish to ask themselves. These are based on a framework that one of the respondents suggested, which itself is in line with the framework ICAEW put forward in a wider context in its *Acting in the Public Interest* thought leadership [publication](#) in 2012.
10. Respondents' proposed areas for additional discussion and detailed drafting suggestions taken up included, among others:
 - referring to the new Professional Conduct in Relation to Taxation (which was issued in final form on 1 November 2016);
 - stressing the relevance of this guidance to members in business;
 - clarification that the public interest is not the same as what the public is interested in;
 - suggestions of additional actions that could be taken by members; and
 - further discussion on the interaction of the misleading-information requirement and promotional advertising material.
11. A number of examples of situations which might potentially be breaches of the misleading-information and discredit requirements were included in the consultation guidance. Respondents supported such examples. Suggestions varied as to what additional examples might be included, and whether there should be absolute outcomes. The ESC concluded that although re-drafting was merited on a number of matters, additional examples should not be included, nor should examples be concluded on as an absolute set of detailed actions, in order to ensure that the examples are not seen to be a set of new Code requirements. Following respondents' suggestions, the introduction to the guidance has been revised to highlight the need to comply with specific legal requirements, which prevail in some areas, and a revised insolvency example is included discussing pre-packs.

Identifying and managing conflicts

12. The main 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. We believe that the conflicts of interest requirements in the Code are well established and understood. However, in view of the circumstances of the case, the consultation guidance, as well as including a reminder of the basic requirements on

conflicts, did highlight the important point that potential conflicts can arise within what might generally be considered to be one client (or employer, though the particular issues raised in this guidance relate primarily to members in practice).

13. Again, there was broad support for the key messages of the consultation guidance and these have not been changed. However, in response to requests from respondents, additional discussion has been included on the nature of a conflict of interest (compared to a competing interest) and the interaction of the Code with the UK legal requirements in the *Prince Jefri* case for informed consent to act in certain conflict situations.
14. Additional proposed areas for additional discussion and detailed drafting suggestions from respondents that were taken up included, among others:
 - enhanced discussion around 'who is the client', and action that the member should or might take;
 - how the informed consent requirements referred to above, interact with the common practice of including general consent clauses in engagement letters.
15. Again, respondents supported the inclusion of examples of potential conflict situations and matters that members might consider. In line with the public interest guidance, the insolvency example has been revised discussing pre-packs. Suggestions from some respondents to include a probate example have been taken up as this is a relatively new regulated area for some members. However, as with the public interest guidance, further additional examples have not been included, nor have examples been concluded on as an absolute set of detailed actions, in order to ensure that the examples are not seen as a set of new Code requirements.

Determining the basis of charging fees

16. While the fees guidance in the Code is well established and generally regarded as well understood, some aspects clearly merited highlighting following the comments in the case, where there was a failure to safeguard against objectivity threats posed by the particular fee structure set.
17. The consultation guidance was largely a reminder that the basis of charging fees, in particular contingency fees, needs to be made clear and set to ensure there is not a threat to objectivity. Again, following comments by the initial tribunal, later corrected by the appeal tribunal, the consultation guidance confirms, for the avoidance of doubt, that the Code does not require the amount of a fee to be justified: this is a commercial matter.
18. Respondents agreed with the key messages, though views differed about whether there should be more to defend the practice of contingent fees or stress caution over them. The guidance retains a broadly neutral approach on their desirability or otherwise.
19. Some drafting changes were suggested and taken up, including among others:
 - enhancing discussions on perception;
 - emphasising the need for clarity on the service offered;
 - enhancing the discussion on potential threats posed by inappropriate contingent fee arrangements, particularly in high risk assignments; and
 - noting that current insolvency regulation can be understood to require professional bodies to investigate the quantum of fees complaints, unlike in other areas.